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Calcutta Weekly Notes

REPORTS OF IMPORTANT DECISIONS

OF THE

CALCUTTA HIGH COURT

AND OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON

Appeal from India.

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JUDGES OF THE HIGH COURT

Chief Justice:

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Puisne Judges:

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THE

The Calcutta Weekly Notes.

Vol. XVI.] MONDAY, NOVEMBER 20, 1911. [No. 1

Contents.

NOTES.

IT IS WITH DEEP SORROW THAT WE HAVE TO record the death of Mr. H. N. Morison of the Calcutta Bar, which sad event took place during the Poojah Vacation, on the 15th of October last, at Kurseong. He got called to the Bar in November 1887 and in February 1889 he was admitted as an Advocate of the Calcutta High Court. He was a man of very wide sympathies and culture and was a true gentleman in every sense of the term. Naturally he was universally popular and had made a large circle of friends. He was a man of literary and artistic tastes and at one time he was a frequent contributor to this journal. "Hints to Advocacy" was his chief contribution to the literature of law. Latterly his health showed signs of breaking down and his unexpected death from hæmorrhage confirmed the suspicion of some of his friends that he had fallen a victim to the most insidious of human diseases. He leaves a widow and three children all of whom are in England and we convey our sincerest condolence to the bereaved family.

WE ALSO DEEPLY REGRET TO RECORD THE DEATH of Babu Gnanendra Narayan Dutta, B. L., Attorney-at-Law, senior member of the firm of Messrs. G. N. Dutta & Co., which melancholy event took place at his Calcutta residence on the 1st of October last. He came from the very well-known zemindar family of Mozilpore. He was very quiet and retiring in his disposition and enjoyed the reputation of being a very honest, conscientious and a generous man. He was an attorney of 18 years' standing and had a fairly large conveyancing business. By his death the profession has lost a very valuable member. We deeply deplore his premature death.

IN THE COURSE OF THE LAST YEAR WE HAVE given the legal profession glimpses into the law and polity of ancient India as they prevailed in the *Aryavarta* many centuries before the Christian era. We propose to continue our researches in the distant past and as a prelude thereto we have reproduced in this issue a trial scene from one of the earliest Sanskrit dramas. To a lawyer it will give a fair idea of the Court house, of the Judges and their conception of duty, of the constitution of the Court and the duties of its officers and other functionaries, as also of the procedure followed at the trials, which all point to the advanced state of civilization that India had attained in those days. The artistic sensibilities of the cultured and even of the commercial classes of this distant period would also be quite a revelation to the modern artistic world. Charudatta's defence in the murder trial was that when he could not touch even a blooming creeper lest it should get hurt, was it possible for him to lay a violent hand on a beautiful woman? But above art and poetry what is most remarkable in this drama of the actual human life of the day is that law was even then no respecter of persons. The most respected, popular and benevolent citizen in the Kingdom, and a Brahmin too, whom all the sacred texts had placed above capital sentence, was found guilty by the judges on the strength of circumstantial evidence and the King condemned him to death. The popular regard for the law and justice quite fits in with the natural sequel of this charming episode. The high-caste but tyrannical Monarch is deposed and a plebeian is acclaimed King by the populace and then the curtain of this exquisite drama drops leaving us to muse and meditate if life even in ancient India was in reality at all times as Manu and the other sacred law-givers wished it to be.

BENSON AND SUNDARA AIYAR, JJ., OF THE Madras High Court have recently delivered an important decision (*Acha Ranganaikammal* v. *Acha Ramanuja Aiyangar*, 21 M. L. J. 600) on the

right of a Hindu widow who has given in marriage her daughter against the wishes of her husband's father to recover expenses properly incurred by her from the latter. The claim could not evidently be supported upon the language of sec. 69 of the Contract Act. But their Lordships very rightly held that *quasi*-contractual liability may arise independently of the existence of a pecuniary interest in the Plaintiff in such circumstances. *Bradshaw* v. *Beard*, 12 Com. Bench Rep. N. S., p. 344, where the brother of a lady who had separated from her husband on account of a quarrel having performed her burial without communicating with the husband was held entitled to recover the costs, is an English case which shows that the principle of liability as laid down in sec. 69 of the Contract Act is not exhaustive. The question therefore was reduced to this:—whether the widow had a right to recover the expenses of the marriage from her husband's co-parceners under Hindu law.

There are Sanskrit texts too well known to require repetition here giving the father of the husband a preferential right over the widow to give the daughter in marriage. But the text refers to the act of *danam* (दानम्) and we have no doubt whatever that the learned Judges were right in holding that the text refers only to the performance of the ceremonial part of the marriage and does not confer the preferential right of guardianship in the matter of disposing of the girl. In *Maharanee Rambansi Kanwari* v. *Maharanee Subha Kunwari*, 7 W. R. 321, there is no doubt an *obiter dictum* of a bench of Judges of the Calcutta High Court to the effect that the text confers a right to dispose of a girl in marriage. But the decision of the Madras High Court seems to us to lay down the sounder view and one that will be generally accepted. It is only necessary to add that in the present instance the finding was that the co-parceners did not improperly or wrongfully refuse to perform the marriage. But this, if the law laid down is correct, would be of no consequence.

THE TRIAL OF CHARUDATTA.

The *Mrichchakatika* or the *Earthen Car* is known to be one of the oldest Sanskrit dramas. It has an interest for the student of the history of Hindu law in that it describes the trial of Charudatta for the alleged murder of a courtesan, named Vasantasena, which gives a glimpse of the actual administration of justice at that distant date. There are other aspects of the drama, which also cannot escape the attention of the historical student of law, *e. g.*, the recognition given to gambling, the execution of gambling debts by a sort of *manus injectio*, and above all the validation of marriage by royal decree which to the student of the Smritis would seem impossible. We translate below the substantial portion of the trial scene.

The Story.

The story leading up to the trial scene is briefly as follows: Vasantasena, an opulent courtesan, had contracted a virtuous passion for a young and nobleminded Brahman merchant Charudatta, who had spent out his large fortune in charity and acts of kindness. She first came to know Charudatta when on a dark night, chased by Sakara, the king's licentious and foolish brother-in-law, she slipped into his house by an open door. Afterwards she left the house for her own, leaving her ornaments with Charudatta for fear of being molested on the way for them. A young man, named Sarbilaka, being in love with Madanika, a slave girl of Vasantasena, and anxious to purchase her liberty broke into Charudatta's house and stole these same ornaments. On his carrying the ornaments to Madanika she recognised them as her mistress's and scolded her lover for his misdeed. Vasantasena who had overheard their conversation, being charmed by their mutual attraction, gave Madanika to Sarbilaka for wife and took the ornaments.

In the meantime Charudatta having come to know of his loss sent his friend Maitreya with a costly jewel necklace to give to Vasantasena in exchange for her ornaments which he pretended he had lost in gambling. Vasantasena inwardly chuckled at the invention and took the necklace. In the evening she went to Charudatta's house and twitted him on his having turned a gambler. Ultimately she showed her the ornaments and related the story to him. She passed the night in Charudatta's house. Next morning Charudatta went to a lonely garden in the outskirts of the city and left instructions to his cartman to take Vasantasena there at night. While Vasantasena was preparing to go Charudatta's maidservant brought there his weeping son Rohasena. On enquiry Vasantasena learnt that he was crying for a golden toy cart and would not have the earthen cart which the maid gave him and which was all he could now afford. Thereupon Vasantasena gave her ornaments to Charudatta's son to have a gold cart made with them and left to prepare for going.

In the meantime there was a commotion in the city. One Aryyaka, a cowherd's son, had been imprisoned by the king and put in chains as it was predicted that he would depose the king and usurp the crown. He had however made his escape in a woman's clothes and when he reached near Charudatta's house, dressed as a female, there was a hot pursuit which obliged him to go indoors;

While he was staying there Charudatta's cartman (charioteer) arrived with the conveyance for Vasantasena. When the cartman called for Vasantasena Aryyaka got into the cart; and the cartman, feeling the cart heavy and judging that the lady was in drove off.

When Vasantasena came out there was another cart at the door which had been stopped there owing to the crowd in the street. Vasantasena, without any enquiry and considering the cart to be intended for her got up. The cartman did not know anything of it and drove off. It was Sakara's cart and was going to the garden house to fetch him from there.

By this mistake Vasantasena soon found herself in the presence of the man whom she hated most. Sakara first tried to persuade her to accept his suit, but ultimately after sending away the cartman as well as his companion he throttled her. When he thought her to be dead he covered her body with dry leaves and left.

He had in the meantime heard from Vasantasena that she had intended to go to another part of the same gardens to meet Charudatta. He therefore conceived the idea of charging Charudatta with the murder and went to the *Adhikarana* or Court to lay the complaint. This is the point where the trial scene commences.

THE TRIAL.

Scene IX.

Enter SODHANAKA.

SODHANAKA.—I have been told by the Judges, (अधिकरण भोजकाः) to go to the Hall of the Court to arrange the seats there. Now therefore I go to the Court *Mandap*. (*Walks and looking about says*) This is the Hall of the Court. Let me enter it. (*Enters, sweeps and places seats*) I have swept clean the Court Hall, placed the seats. Now I shall go and inform the Judges (अधिकरणिका).

(*Looking up*).—Now why does this King's brother-in-law, this wicked and stupid man, come here. I shall avoid his eye in going.

(*Enter* SAKARA *in a brilliant dress*).

SAKARA.— . . . Now, on whom shall I throw the burden of this evil deed. Oh! I bethink me now. I shall throw this evil deed on proverty-stricken Charudatta. And, he is poor and everything would be deemed possible of him. So be it. I shall now go to the Court Hall and have a case written (व्यवहारं लेखयिष्यामि) that Vasantasena has been strangled to death by Charudatta. So now I shall go to the Court Hall. (*Walks and looks up*) This is the Court Hall, let me enter it now. (*Enters and looks around*). How now, the seats have been placed already; so the Judges must be coming now. I shall sit on this grass plot for a moment and wait. (*So waits*).

SODHANAKA.—(*Walking in another part and looking ahead*) Here come the Judges; Let me now get away. (*Exit*).

[*Enter the* JUDGE *surrounded by* SRESTHI (*1*) (*merchant*), KAYESTHA (*clerk*) *and others*].

JUDGE.—I say, you Sresthi and Kayastha!

SRESTHI & KAYESTHA.—What is your Honour's pleasure?

JUDGE.—O, how difficult is the work of Judges in knowing the minds of people which have to be ascertained for the purpose of determining suits. People, lost to a sense of right, come and state here matters covered with untruths and they do not speak of their own faults, so much filled are they with selfish passions. The king is affected by the sin which gains in strength by the struggle of the parties; and, as for the judge, abuse for even a slight cause comes quickly enough for him, but an appreciation of his merits comes very late indeed. For a Judge has to be well versed in law, expert in following the tracks of cunning and deceit and a good speaker; he must not have a bad temper and must be impartial to friends and stangers alike; he should give his decree only upon a consideration of the matters brought before him and not otherwise; he should be the protector of the weak, the chastiser of the wicked; and very anxious to do whatever is just. His heart should be set on ascertaining the affairs of others and he should find the means of assuaging the wrath of the king.

SRESTHI & KAYESTHA.—If anybody speaks of a fault in your Honour's virtues, he may as well speak of moonlight as dark.

JUDGE.—Good Sodhanaka show us the way to the Court Hall.

SODHANAKA.—Be pleased to come O Judge. (*They walk*).

SODHANAKA.—This is the Court Hall; please to enter, ye Judges.

JUDGE.—Good Sodhanaka, go out and ascertain who are here as suitors.

SODHANAKA.—As your honour pleases. (*Goes out and says*) The Judges ask who are here as suitors.

SAKARA.—(*Smiles*). The Judges have come! (*Walking up*) I, the great man, the royal brother-in-law, the king's brother-in-law, am a suitor.

SODHANAKA.—(*Respectfully*) The king's brother-in-law the very first suitor! So be it, your honour; wait a moment please while I inform the Judges. (*Going to the Judge*) your honour, here is the king's brother-in-law a suitor with his suit.

JUDGE.—How now, the king's brother-in-law the very first suitor! It is like the eclipse of the

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(1) The appointment of a few merchants for the Court has been enjoined by Katyayana.

कुलशील वयोवृत्तवित्तवद्भिरमत्सरैः ।
वणिग्भिः स्यात् कतिपयैः कुलभूतैरधिष्ठितं ॥

sun in the morning which, they say, betokens the death of a great man. Sodhanaka, the day's work would be spoiled to-day, go out and say that we shall not look into his suit to-day.

SODHANAKA.—As your honour orders. (*Going out and approaching Sakara*) Sir, the Judges say, go to-day, your suit will not be heard.

SAKARA.—(*Angrily*) What, they will not hear my suit. If they don't then I shall speak to the King my brother-in-law, to my sister and my mother and remove this Judge and appoint another in his place.

SODHANAKA.—Sir, the King's brother-in-law, please wait one moment while I inform the Judges. (*Going to the Judges*) The King's brother-in-law angrily says (*repeats what Sakara had said*).

JUDGE.—Everything is possible for that fool. Good man, go and tell him to come, we shall look into his suit.

SODHANAKA.—(*Going to Sakara*) Sir, the Judge asks you to come in.

SAKARA.—(*Aside*) first they say they won't hear and presently again that they will. So surely the Judges are afraid of me and whatever I shall say I'll make them believe. Be it so, let me enter. (*Entering and approaching the Judges*). Happiness to me, to you also I bid or not bid happiness just as I choose.

JUDGE.—(*Aside*) O, the level-mindedness of the suitor. (*Aloud*) Pray be seated.

SAKARA.—Ha! this land is as my own, so wherever it pleases me I shall sit. (*Coming to the Sresthi*) I shall sit here. (*Going to Sodhanaka*). No I shall sit here. (*Placing his hand on the head of the Judge*) I shall sit here. (*Sits on the ground*).

JUDGE.—You are a suitor.

SAKARA.—So I am.

JUDGE.—Then tell us your business.

SAKARA.—I shall speak in your ear. I am born of a great family. The King's father-in-law is my father; the King is my father's son-in-law; I am the King's brother-in-law; the King is my sister's husband.

JUDGE.—I know all this. But what is in a good descent; it is one's own nature that counts. Even in a good field thorny weeds grow up healthy enough. So tell us your business.

SAKARA.—So I will, even if I have done anything wrong no one can do me any harm. Now my brother-in-law, being pleased with me, has given me the lonely garden with flower beds which is the best of gardens. There I go every day to see, to dry, to improve, to nourish and to cut [plants as necessary]. As luck would have it I see, or do not see, a woman's body lying there.

JUDGE.—Now, do you know who is the unfortunate woman?

SAKARA.—Judge, do I not know that ornament of the town decked with a hundred golden ornaments? Some wretched mother's son has strangled Vasantasena by the force of his arms after entering the lonely garden for lucre, not I—[*Having said this much stops with this half-finished speech and covers his face*].

JUDGE.—Alas, for the negligence of the city police! Now, Sresthi and Kayestha, write down the cause of action, the first step in an action, with the expression "not I"—

KAYESTHA.—As your honour pleases. (*Does so*) I have written.

SAKARA.—(*Aside*). In my haste I have killed myself. However let me see. (*Aloud*). How now, officers of the Court, I was going to say 'I have seen all this.' What are you making a fuss about. [*Wipes away the writing with his foot*].

JUDGE.—But how could you know that she had been strangled by the hand for the sake of wealth.

SAKARA.—I guessed that from the swollen condition of the neck which was destitute of the usual ornament.

SRESTHI AND KAYESTHA.—That seems likely.

SAKARA.—(*Aside*). Good luck has saved me.

SRESTHI AND KAYESTHA.—Whom does this suit pertain to? (2).

JUDGE.—There are two kinds of suits.

SRESTHI AND KAYESTHA.—What are they?

JUDGE.—According to the words and according to the sense. The suit which follows the words of the complaint can only proceed with a complainant and a Defendant. That which follows the sense (3) (Equitable reliefs?) have to be decided by the judgment of the Judge himself.

SRESTHI AND KAYESTHA.—So this suit really pertains to Vasantasena's mother.

JUDGE.—So it does. Good Sodhanaka, go and fetch Vasantasena's mother without delay.

SODHANAKA.—So will I. (*Goes out and re-enters with Vasantasena's mother*) Come in, come in Madam.

OLD WOMAN.—My daughter is gone to a friend's house on a mission of love. This man—may he live long—says, 'Come the Judge calls you.' So I feel myself as under a spell. My heart trembles. Show me please the way to the Court Hall.

SODHANAKA.—This is the Court Hall, enter here madam.

OLD WOMAN.—(*Approaching*). Happiness to you, learned Sirs.

JUDGE.—Welcome, good woman, be seated, please.

OLD WOMAN.—As you please. (*Sits down*).

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(2) The usual rule was that suits must be instituted at the instance of an interested party. Hence the enquiry as to who should be the complainant.

(3) The distinction is not clear. But this shows that in some cases the Judges did proceed to trial without a complaint. This would be against the words of Manu and Yajnavalkya. It would be seen however that these Smriti texts were not meant to be exhaustive.

Sakara.—Have you come old procuress, have you come indeed ?

Judge.—Are you Vasantasena's mother ?

Old Woman.—Yes.

Judge.—Well, where is Vasantasena gone now ?

Old Woman.—To a friend's house.

Judge.—What is the name of that friend ?

Old Woman.—(*Aside*) Alas ! what a shame ! (*Aloud*). This may be asked by a man in the street, it is not a fit question for a judge.

Judge.—Put aside modesty, it is the law that asks you.

Sresthi and Kayestha.—The law asks, there is no harm, tell us.

Old Woman.—How does law come in ? If it does, then hear you, learned Sirs ; it is Charudatta of well-borne name, the son of the Sagardatta and grandson of the merchant Vinayadatta. He lives in the Merchant's Square (श्रेष्ठोचत्वर) My daughter is gone there on an errand of love.

Sakara.—Your honour has heard ? Please take down these words. My suit is against Charudatta.

Old Woman.—Charudatta is a friend. There's no harm in that !

Judge.—The suit then pertains to Charudatta.

Sresthi and Kayestha.—So it does.

Judge.—Dhanadatta, write down the first step of the suit as follows : "Vasantasena went to the honoured Charudatta's house." So has it come to this, that we have to summon even the honoured Charudatta ! Or what's the harm, it is law that calls him. Good Sodhanaka, go and fetch Charudatta, at his ease and without causing him the least anxiety or trouble. Tell him that the Judge wants to see him.

Sodhanaka.—As your honour pleases. (*Exit*) (*Re-entering with Charudatta*) Be pleased to come Sir.

Charu.—(*Thinks*). The King knows me by my ancestry as well as by my character. This summons therefore makes me fear that the facts are known. (*Arguing by himself*). Is it known that I have removed with my cart the prisoner who broke loose and got into the streets ? The King must have been told this by his spies and that is why I am going now like an accused person. But why speculate ? Let me go into the Court Hall. Good Sodhanaka, show me the way to the Court.

Sodhanaka.—Come in please Sir, (*They walk*).

* * * * * * * * *

Charudatta—(*entering*).—Ah ! the Court hall is magnificent in its beauty. It looks like a sea ; the thoughtful ministers (of justice) are like the water ; the bailiffs (दूताः) are like its waves, and the conchshells like those thrown on the breach by the waves (4). The cells for prisoners round it are like the crocodiles and alligators ; the horses and elephants are the other preying sea animals (5) ; the men around making various sounds are like the *kanka* (6) bird ; the *kayesthas* (with their crooked ways) are like the snakes (of the sea) ; Justice (with its uneven course) is comparable to the coast broken in by the breakers.

. . . .

Judge.—This is Charudatta who has a noble face with the nose well raised and eyes well reaching to the sides. This is not a worthy object of causeless complaints. For amongst snakes, cows, horses and men good looks never part company with a corresponding character.

Charu.—Blessings to the Judge ! Oh King's Judge are you quite well ?

Judge—(*Respectfully*).—Welcome to you noble Sir, good Sodhanaka, place a seat for the gentleman.

Sodhanaka (*Bringing a seat*).—Here is the seat, sit on it please, Sir.

Charu.—(*Sits down*).

Sakara—(*Angrily*).—Have you come, you murderer of a woman ? Have you come ? Aha ! the law is just indeed, quite according to the Right, in that it gives a seat to the woman-killer. So be it ; very well, give him one !

Judge.—Honoured Charudatta, is there any love, attachment or affection between you and this lady's daughter ?

Charu.—Whose ?

Judge.—This lady's (*Shows Vasantasena's mother*).

Charu.—(*Rising*).—Madam, I greet you.

Old Woman.—My child, long may you live. (*Aside*). This is Charudatta ! Well placed are my daughter's affections !

Judge.—Sir, is the prostitute your friend.

Charu.—(*Looks ashamed*).

Sakara.—Ah ! Try to falsely conceal your true character for shame or fear. Having killed her yourself for money, you now want to cover your deed by false bearing. But the King won't keep it so.

Sresthi and Kayestha.—Sir, Charudatta, speak ; put aside modesty ; it is law (that asks).

Charu—(*With shame*).—Well, Judge. How can I tell you that a prostitute is my friend ? Or the fault is of my youth and not of my nature.

Judge.—The suit involves severe punishment. So put aside modesty and shame that is in your heart. Reticence will not do and any concealment is useless here. There's no need for shame, the law asks you.

(4) The *Dutas* evidently carried conchshells with them which they blew on occasions like the heralds in English Courts.

(5) The horses and elephants were intended for the use of officers in serving processes and also for the execution of criminals and hence their comparison with preying animals

(6) *Kanka* is another name for the crow. But here it must mean some sea-bird.

CHARU.—Judge, against whom am I joined in this suit?

SAKARA—(*With vehemence*).—Sirrah, thy suit is with me.

CHARU.—My suit with you!

SAKARA.—O You woman-killer! having killed Vasantasena decked with a hundred jewels, you are now attempting to conceal it with false pretences.

CHARU.—You are mad.

JUDGE.—Enough of this. Sir, Charudatta, tell us the truth; is the woman your friend?

CHARU.—Yes.

JUDGE.—Sir, where is Vasantsena?

CHARU.—Gone home.

SRESTHI AND KAYESTHA.—Why did she go? When did she go? Going, by whom was she accompanied?

CHARU—(*Aside*).—Shall I say she went away in secret?

SRESTHI AND KAYESTHA.—Speak sir.

CHARU.—Gone home, what else shall I say?

SAKARA.—You entered my lonely garden and strangled her for her ornaments. Now you say she went home—really?

CHARU.—Ah! irrelevant raver, your face turns pale like the lotus of autumn; that shows that you are lying.

JUDGE—(*Aside*).—To accuse Charudatta is as absurd as to weigh the Himalayas or to drive the sea or catch the wind. (*Aloud*). Why should the honoured Charudatta do such a misdeed?

SAKARA.—What! is the suit to be decided with partiality?

JUDGE.—Get away you fool! Being a low man you utter the Vedas, does not your tongue drop out? You look at the midday sun, is not your sight destroyed at once? You throw your hands into the fire, are they not scalded yet? You defame Charudatta's character, does not the earth remove your carcass? Why should Charudatta do the misdeed? He has given away riches unstintedly till like the sea despoiled of its endless riches he is reduced to mere high waves. Why should that great and noble man, honoured even by his enemies, do a misdeed for lucre.

SAKARA.—What, is the suit to be decided with partiality?

OLD WOMAN.—Wonder of wonders! He who gives away a necklace made of jewels which are the choicest that could be got in the four seas together because some deposited golden ornaments were stolen by a thief, would he do this misdeed for filthy lucre? Oh my girl! Oh my daughter!

JUDGE.—Sir, did she go walking or on a car?

CHARU.—The fact is that she did not go in my presence, so I do not know whether she went on foot or on a car.

(*Enter* VEERAKA *in sulks*).

VEERAKA.—I have been kicked, insulted, overpowered in the duel; thinking of these things my night has passed very indifferently (7). Now here I see the Court-Hall. Let me go in. (*Entering*). Happiness to you all, learned Sirs.

JUDGE.—Hallo, this is Veeraka, the city constable. Veeraka, what is your object in coming here.

VEERAKA.—Well, I was searching for Aryyaka after he had broken loose from his captivity. I guessed that he should be going by some covered vehicle. While searching one of these I said to Chandanaka, 'Well you have seen, I also want to have a look.' At this he kicked me. So I have come to you, learned Sirs.

JUDGE.—My good man, do you know whose that car was.

VEERAKA.—The cartman said, 'This is Charudatta's car conveying Vasantasena to the lonely garden for a pleasure trip.'

SAKARA.—Have you heard again Sirs?

JUDGE.—So the pure moonlight is covered by Rahu and the clear water is made turbid by the breaking bank! Veeraka, we shall look into your case hereafter. Now take the horse that is there at the gate, ride on it to the garden and see whether there is any woman in a poor plight or not.

VEERAKA.—As your honour pleases (*Exit*) (*Re-entering*). I went there and saw the body of a woman being eaten by beasts of prey.

SRESTHI AND KAYESTHA.—How could you know that it was a woman's body?

VEERAKA.—By the hair, the arms, hands and legs that were yet left.

JUDGE.—Alas! Woe unto the inequities of human laws. The more I anxiously deliberate the more I find difficulties. Alas, the requirements of law are well satisfied.

CHARU—(*Aside*). Like the bees that come swarming to drink the honey when a flower first opens, misfortunes come in swarms when once a man has got into trouble.

JUDGE.—Sir, Charudatta, tell us the truth.

CHARU.—When a wicked man, jealous of another's good name and anxious to destroy another's life under the influence of a blinding passion, when such a man tells a lie, as by his nature he must, is that to be accepted? Nay, it is not worthy of consideration even. And again, I never even pull out a blooming creeper to take the flower that is on it, is it likely that I could kill a beautiful woman by pulling at her smooth dark long hair, she weeping at the time?

(7) This man was one of a party of soldiers out in search of Aryyaka when he had fled. This party had stopped Charudatta's car which carried Aryyaka. One of his companions Chandanaka looked into the car but was induced by Aryyaka's entreaties to let him go. He came out and said that it was a woman. Veeraka was suspicious and wanted to have a look himself. His companion resented and provoked a quarrel which was followed by a fight in which Veeraka came off worse. During the scuffle the car escaped with Aryyaka.

SAKARA.—Look here Judge, are you going to try the suit with partiality, that you are even now allowing the man Charudatta to sit on a chair.

JUDGE.—Good Sodhanaka, do so (*i.e.*, remove his chair).

(*Sodhanaka does so*).

CHARUDATTA.—Yes, Judges, judge me, judge me. (*Leaves the chair and sits down on the ground*).

SAKARA—(*Aside*). Ha! Ha! Thus have I thrown my crime on him. Now let me go and sit where Charudatta sat. (*Does so*). Look Charudatta, look at me and say that you have killed her.

CHARU.—Say Judges if the word of such a wicked man is to be accepted. It is not worthy of consideration. (*Aside*). Oh Maitreya, what a plight is mine to-day, Oh my wife, born of a faultless Brahmin family! Oh Rohasena, thou seest not my misfortune, vainly dost thou play and enjoy thyself, for misery is henceforth to be thy lot. I have sent Maitreya to Vasantasena to get news of her and to return to her the ornaments that she gave to Rohasena for his cart. Why does he delay.

(*Enter* VIDUSAKA *with the ornaments*).

VIDUSAKA.—I was sent by Charudatta to Vasantasena. He said, "Friend Maitreya! Vesantsena sent my son Rohasena to his mother, decked in her own ornaments. Her ornaments have to be returned and not taken. So go and return them to her. So I am going to Vasantasena's place. (*Looking ahead*). How now, learned Rebhila, O learned Rebhila, why do you look anxious? (*Hearing him*). What do you say? Friend Charudatta summoned to the Court? It must be no small matter. (*Thinks*). I'll go to Vasantasena later on, let me first go to the Court. (*Walks and looking up says*). This is the Court-Hall, let me enter it now. (*Etering*). Happiness to the Judges. Where is my dear friend?

JUDGE.—Why, he is there.

VIDU.—All pleasant with you?

CHARU.—Yes, it will be soon.

VIDU.—All well with you?

CHARU.—That too will be soon.

VIDU.—How now, friend, why do you look so anxious? And why have you been summoned?

CHARU.—Friend, by me, cruel and ignorant of the Hereafter, a woman who might as well be Rati herself—the rest this gentleman will say.

VIDU.—What? What?

CHARU.—(*Whispers in his ears*).

VIDU.—Who says so?

CHARU.—(*Pointing to Sakara*). That holy ascetic over there, officiating for my death, so complains.

VIDU.—(*To Charudatta*). Why did you not say that she had gone home.

CHARU.—I have said so, but from adverse circumstances that is not believed.

VIDU.—Oh you noble Sirs, do you believe that this man who has adorned the city of Ujjayini with buildings, monasteries, gardens, temples, lakes and wells, that he has done such a misdeed for the sake of petty lucre. (*Angrily*). O, you bastard! The King's brother-in-law! licentious, wicked gold-covered monkey, say, say before me if you dare, how my friend who would not pull a flowering Madhabi creeper for fear lest it might be snapped, say how he could have done this misdeed so injurious to life both here and hereafter. Stay you procuress's son, stay till I break your head into a hundred parts with this wooden stick, crooked as it is like thy heart.

SAKARA.—Hear him, learned Sirs. My suit or quarrel is with Charudatta; why does this wretched fellow want to break my head into a hundred parts. Don't do so you son of a slave-girl, you wicked fellow.

VIDU.—(*Abuses as before with the stick raised*).

[*Sakara angrily rushes at him; Vidusaka returns the attack; they beat each other; in the course of the struggle the ornaments fall down from Vidushaka's armpit*].

SAKARA.—(*Taking up the ornaments*). Look, look, masters! These are the ornaments from her body. (*Pointing to Charudatta*). For this that man has beaten and killed her.

(*The officers of the Court all hang their heads*).

CHARU.—(*Aside*). At such a time do these ornaments come to view! Fallen now as my ill luck would have it, it will fell me.

VIDU.—Friend, why don't you tell them exactly what happened.

CHARU.—Friend, what's the use. The King's sight is weak, he can't see the truth through these things. If I say anything it would only add to my humiliation and make death dishonourable.

JUDGE—How unhappy the lot! Mangala is against him and Vrihaspati is weak in him. Here again arises against him another evil star in these ornaments like a veritable comet.

SRESTHI AND KAYESTHA.—(*After looking at the ornaments and addressing Vasantasena's mother*). Attend, Madam; are these ornaments yours or not?

OLD WOMAN.—(*Looking*). These are like them but not the identical ones.

SAKARA.—Oh you old procuress! You know by the sight and deny by your mouth.

OLD WOMAN.—Fool, get away!

SRESTHI AND KAYESTHA.—Speak with deliberation; are these the same ornaments or not?

OLD WOMAN.—Sir, the art of the maker deceives the eye, but these are not the same ornaments.

JUDGE.—Good woman, do you know these ornaments?

OLD WOMAN.—I tell you, these do not seem altogether unknown but they have been deceptively made by the artist.

JUDGE.—Sresthi, examine them. It often hap-

pens that imitations are made, alike in substance and look, of things. Looking at the work of one man, another artist imitates him and so produces another thing exac ly alike.

SRESTHI AND KAYESTHA.—These are honoured Charudatta's.

CHARU.—No, no.

SRESTHI AND KAYESTHA.—Whose are they then?

CHARU.—They belong to this lady's daughter.

SRESTHI AND KAYESTHA.—How did she part with them?

CHARU.—(*Relating the circumstances*). Thus they have come to me.

SRESTHI AND KAYSKTHA.—Sir, Charudatta, here you should speak the truth. Tru h gives happiness; one who tells the truth never becomes a sinner. Truth is simple. Don't cover it with falsehood.

CHARU.—I don't know what these ornaments are. I know they have been brought from my house.

SAKARA.—You first enter the garden and kill her; now you want to conceal the truth by false dealing.

JUDGE.—Sir, Charudatta, tell us the truth. Presently our rude whips would fall on your soft body and it will grieve us greatly.

CHARU.—I am born of a sinless family; there is no sin in me. Is it possible that a sinless man like me should commit this crime? (*Aside*). I don't care to live without Vasantasena. (*Aloud*). There is no need for further talk. By myself, cruel and ignorant of the Hereafter, a woman who for her beauty might as well be Rati herself—the rest will be said by this gentleman.

SAKARA.—Has been killed. Ay, say yourself "I have killed."

CHARU.—You yourself have said so.

SAKARA.—Listen, listen gentleman. He has killed (her). All doubt has been removed by this. I pray that corporal punishment be awarded to him.

JUDGE.—Sodhanaka, do as the King's relation has said. Officers, take hold of Charudatta.

OLD WOMAN.—Be pleased to hear, learned Sirs. This man who sent a necklace of jewels which were the choicest that could be had in the four seas together in the place of stolen gold ornaments, is it possible that he should have killed my daughter for her jewels? If he has killed, he has killed. Long may my son live. Now, a suit is between a Complainant and a Defendant. I am the complainant in this case. So release him, I say.

SAKARA.—Get away, born slave, get away. What have you got to do with all this.

JUDGE.—Madam go away. Officers take him away.

OLD WOMAN.—O my child, O my son—(*Exit weeping*).

SAKARA.—(*Aside*). I have done just what I should like. Now let me go. (*Exit*).

JUDGE.—Sir, Charudatta, we are authorised only to decide. For the rest it is with the King. Sodhanaka, inform King Palaka. Tell him that this Brahman offender is not to be sentenced to death but should be banished the realm with his wealth undiminished. So Manu has laid down.

SODHANAKA.—As your honour pleases (*Exit*). (*Re-entering*) Sirs, I had been there. King Palaka says that the ornaments for which Vasantasena was killed should be tied round the criminal's neck and he should be taken with the beat of drums to the southern execution ground and there made to die on a spike, so that whoever else may do such things may be warned by this punishment.

CHARU.—Oh the wrong-headed King Palaka! Thrown into the fire of this kind of law by ministers, Kings soon attain a miserable condition. These white crows (8) of ministers by polluting King's justice kill thousands of innocent men and are killed themselves.

Friend Maitreya, take my word to my wife and give her my last greetings. Bring up my son Rohasena.

VIDU.—When the root is severed how can a tree be nursed.

CHARU.—Say not so. The son is the image of a deceased person. The love that you bear to me, do please bestow on Rohasena.

VIDU.—Friend, I am your dear friend, do you suppose I should live without you.

CHARU.—Show your love to Rohasena.

VIDU.—That is well said.

JUDGE.—Good Sodhanaka, remove these men. (*Sodhanaka does so*) Is there anybody here? Give orders to the Chandalas.

(*Charudatta is being removed by officers*).

SODHANAKA.—Sir, please come this way.

CHARU.—Maitreya, friend, what is this my plight to-day. O my wife! begotten of a spotless ancestry! O Rohasena, vain are thy pleasures and enjoyments, for ever afterwards misery will be thy lot. O king! you could have tried the case against me by the scales, poison, water, fire &c., (ordeal) (9) but without thus fairly ascertaining my guilt you lay your hand on my body. You are going to kill, at my enemy's word, me a Brahmin: you shall fall into Hell with all your children and grandchildren. Here, I come. (*Exit*).

THE CONCLUSION.

In the next and the concluding scene of the drama Charudatta is carried to the execution-

(8) These are regarded as of evil omen.

(9) The last expressions show an evident reference to Yajnavalkya II, 95.

तुलाग्न्यापो विषं कोशो दिव्यानीह विशुद्धये।
महाभियोगेष्वेतानि शीर्षकस्थेऽभियोक्तरि॥

The subsequent verses of Yajnavalkya give details of the trial by ordeal as practised under Hindu law.

ground by the Chandalas through the streets. There are five places fixed for making announcements ; as he is brought to each of these places his attendants beat the drum and repeat in a set form of words the offence of Charudatta and the punishment destined for him. On the way sympathising crowds bless him and ladies drop their tears from the windows above.

In the course of an affecting interview with his son who is brought to him by Maitreya, Charudatta was brought to one of the places of announcement. Just above that place was imprisoned Sthavaraka, the cartman who had unknowingly taken Vasantasena to Sakara's garden. Sakara's companion who also knew the circumstances of Vasantasena's death, having left the city to join Aryyaka, this was the only witness to Sakara's crime. Sakara had therefore confined him in a room. Sthavaraka on hearing the announcement guessed everything and by a supreme effort released himself by throwing himself from the window and related the true facts to all present. Sakara arrived at this juncture and succeeded in discrediting this man by slipping in a golden trinket into his hand and then saying that for stealing that he had confined the slave and that he was accusing him out of spite on that account.

This man having thus been disposed of, Charudatta was carried to the execution ground. At the last proclamation place, Vasantasena met the crowd.

She had not been killed by Sakara's violence but had only fallen senseless. She had been revived by a Buddhist Bhikshu who was once a gambler and had on one occasion been saved from his creditors by Vasantasena's generosity. This man was taking her to Charudatta's place at her bidding when on the way they saw the crowd accompanying Charudatta to the execution. Just then the last proclamation was being made. The Bhikshu heard and explained it to Vasantasena. They both hurried forward making their way as best they could through the crowd. And just when the sword raised by one of the Chandalas accidentally slipped away from his hand, she arrived there and discovered herself. On seeing her Sakara fled, pursued by the Chandalas.

While Vasantasena and Charudatta were talking of what had occurred since they parted, great things had occurred in the city. Aryyaka had by a secret move taken King Palaka unawares, killed him and possessed the city. Sarbilaka his friend and chief officer was immediately sent to look for Charudatta. He arrived at this juncture and broke to Charudatta the news of Aryyaka's success. Just then Sakara was brought a prisoner. He threw himself at Charudatta's feet and as Sarbilaka said he would leave the punishment to Charudatta, the latter asked him to be immediately released.

Meanwhile Dhuta, Charudatta's wife had decided to immolate herself on a pyre and, unwilling to hear of Charudatta's death before she died, she was making all haste. Informed of this Charudatta rushed to the spot and was just in time to save the situation. He was here reunited to his son and Maitreya. Sarbilaka announced King Aryyaka's pleasure that Vasantasena should henceforth be regarded as the lawful wife of Charudatta.

Reviews.

LEADING CASES AND STATUTES ON THE LAW OF EVIDENCE. With notes, explanatory and connective. *By Ernest Cockle. Second Edition, London. Sweet and Maxwell, Ld., 3 Chancery Lane, W. C. 1911.*

The study of leading cases in extenso has of late formed an important item of the curriculum of legal study for the University students here. We have long been of opinion that the study of cases from the Law Reports often prove more confusing than helpful to students and we are glad to be confirmed in our view by the author of the work under review. We are quite at one with him that "nothing confuses students more than striking but immaterial facts." The author of the present compilation has presented the material portions of the judgments only, so that the point may be easily appreciated and assismilated by the students. The author has not been content with merely clipping the judgments to suit students, he has arranged them after the manner of a text-book furnishing introductory notes at the beginning of each group of cases and further notes by way of connecting links between them. The book is thus a happy compromise between a text-book and a collection of leading casess and as such we cordially recommend it to the students of law in this country It is, however, by no means students only who profit by such books. Practitioners have also shown their appreciation of the work and the author has had to amplify the scope of the work in the present edition to suit their requirements.

THE LEADING CASES ON HINDU LAW. Part I. Adoption—Capacity. *By S. Srinivasa Aiyar, Vakil, High Court, Madras : G. C. Loganadham Bros. The Guardian Press, Mount Road. 1911.*

Mr. Aiyar is following in regard to Hindu Law almost the same plan as that adopted in the work just noticed. There are introductory notes, brief statements of facts followed by material portions of the judgment—the whole annotated by reference to texts and cases in which the principles of the cases have been followed. The notes are perhaps a little elaborate, showing that the interests of the practitioner have been kept more in view than the students'. There is no doubt,

however, that a careful study of the book whether by a student or legal practitioner will be wholly beneficial.

THE LAW OF SERVICE TENURE IN BENGAL. *By Ranajit Sinha, B. A., B. L., Pleader, Bhagulpur. The Law Printing House, Mount Road, Madras.*

The author deserves all praise for bringing together the law on this important subject scattered as it is in different reports and statutory enactments. We have no doubt that it will be prized by practitioners for the saving it will effect in their labour in their search for authorities.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL.—*Rex* v. *Savidge.* Before JUSTICES DARLING, COLERIDGE AND HAMILTON. 23rd October 1911.

Misdirection of jury, confused and conflicting account—Burden is upon the prosecution to show that if a misdirection of fact had not been made the jury would have arrived at the same verdict.

This was an appeal from a conviction and sentence for manslaughter on a trial before AVORY, J. The story for the prosecution was that the Appellant was in a public house with the deceased, that the Appellant dealt a blow, unprovoked and unlawful, which caused the death. The defence was that the blow was given under provocation and under such circumstances as to justify the deed. Both sides produced evidence of the affray. The learned Judge in the course of his summing up to the jury said :—

"Now, shortly, I will remind you of the way in which the case stands on the part of the prosecution and on the part of the defence, making this observation while I remember it, that, with the exception of the prisoner himself, who did give evidence before the Coroner, none of the witnesses for the defence who have been called before you to-day ever gave evidence before the Magistrate in this case. They have given their evidence for the first time, and there has been, therefore, no opportunity of testing the truthfulness by any inquiry of what they said."

"*Mr. Carter*, who appeared for the Crown, then said :—'My Lord, if I might interpose, some of these witnesses did give evidence before the Coroner.'"

"The learned Judge replied.—'I said "before the Magistrate." Did I not say that with the exception that the prisoner did give evidence before the Coroner, none of these witnesses for the defence have given evidence before to-day ?

"*Mr. Carter* then said :—'I beg your Lordship's pardon ; I misunderstood your Lordship.'"

"MR. JUSTICE AVORY then said.—'That is what I meant to say. The prisoner did give evidence before the Coroner ; the prisoner did not give evidence before the Magistrate, who had to decide whether this case should be sent for trial, and none of the other witnesses for the defence who have appeared here to-day appeared before the Magistrate and gave any evidence. My observation was that there therefore could be no opportunity of testing by inquiry the truthfulness of their statements.'"

The Appellant contended that the trial Judge had misdirected the jury. The Court allowed the appeal and quashed the conviction. In the course of the judgment Mr. Justice Coleridge said :—

The substance of this was the conveying to the jury that, although the Appellant himself had been called before the Coroner, none of the witnesses he had put forward at the trial had been called, before, either at the Police Court or before the Coroner, and that, therefore, there had been no opportunity for testing the statements that they had now made at the trial for the first time on oath. Now some of these witnesses had given evidence before the Coroner, and there had therefore been an opportunity to test their story. It must be remembered that the jury had to judge from confused and conflicting accounts of what had taken place, and that it appeared that the Appellant had received considerable provocation as appeared from the rider the jury appended to their verdict that they recommended the prisoner to mercy on account of the large amount of provocation he apparently received.

It is clear that there was a very nice question for the jury as to which account of what happened was to be believed, and it was on this question as to which side the jury should incline their minds that the learned Judge made the observations I have read.

We cannot dive into the minds of the jury as to what guided them in the decision at which they arrived. Having regard to the mistake which occurred in these circumstances, it rests upon the prosecution to show that if this unfortunate statement had not been made the jury would have arrived at the same verdict. As the Lord Chief Justice said in *Stoddart's case* (1909, 73 J. P., 379), the question is whether, if the jury had been properly directed, they would have returned the same verdict. We are not satisfied that the jury would have returned the same verdict if this statement had not been made by the learned Judge. In every other way the learned Judge summed up the case most fairly. Unfortunately he was led by human error, to which we are all subject, to make these observations.

Mr. Lynch for the Appellant.

Mr. Carter for the Crown.

B. D. *Appeal allowed.*

HOUSE OF LORDS.—*The Moss Steamship Co., "Ld" v. Whinney.* Before THE LORD CHANCELLOR, THE EARL OF HALSBURY, AND LORDS ASHBOURNE, ATKINSON, SHAW AND MERSEY. 26th June 1911.

Receiver trustee or agent—His liability, whether personal.

This was an appeal from a decision of the Court of Appeal. The facts were as follows :—

Messrs. Ind, Coope, & Co. had for some time shipped beer on the vessels of the Moss Steamship Company, and taken bills of lading which provided that the shipowner shall have a lien on the goods not only for the stipulated freight, but also for any unsatisfied freight due on other shipments either from shipper or consignee to the shipowner. On January 5th an order was made in a debenture-holder's action that Mr. Whinney should be
ver and manager of Ind, Coope, & Co. I
was that the company still remained a livi
son, but was disabled from conducting its b
of which the entire conduct passed into the
of Mr. Whinney. Mr. Whinney did no
down the business, but continued it, and,
other things, he resolved to send some
Coope, & Co.'s beer to Malta to the co
representatives there.

Accordingly on January 3rd he sent an o
the Moss Steamship Company directing tl
ship the beer to Ind, Coope, & Co., care o
bull, jun. and Somerville of Malta, and he
as follows :—" Ind, Coope, & Co., Limi
Arthur F. Whinney, Receiver and ma
Upon this Messrs. James Moss & Co., as
shipped the beer and made out the bill of lading in the terms theretofore in use, which, gave to the shippers a contractual lien, not merely for the freight of £56 payable for this particular beer, but also for any unsatisfied freight due, either from shipper or consignee. There was at that time due from Ind, Coope, & Co. to the shipowner the sum of £171 for unsatisfied freight.

The question for decison now was :—

Can Mr. Whinney claim delivery of this beer on payment of the stipulated freight of £56 or must he also pay the additional £171 unsatisfied freight due upon earlier contracts from Ind, Coope, & Co., in accordance with the lien clause in the bill of lading?

Mr. Justice Hamilton decreed the full claim but his judgment was set aside by Lord Justices Vaughan Williams and Buckley, Lord Justice Moulton dissenting. The Court now dismissed the appeal, Lords Shaw and Mersey dissenting. In the course of his judgment the Lord Chancellor said :—

My Lords, questions have been raised as to the power of a Receiver and manager to hypothecate assets of the company for payment of unsecured creditors. It is said that such a proceeding would be *ultra vires*, or at all events an excess of authority, of which a trader who knew the position could not avail himself. I do not think such a question arises in the present case for the reason stated by Mr. Bailhache. This is an action between the shipowners on the one side and Mr. Whinney on the other. If Mr. Whinney has contracted so to hypothecate these goods, I say if he has done so, he cannot himself compel the shipowners to deliver them without first satisfying the charge which he has created. As between the litigating parties there is a charge. It may be that Mr. Whinney had no power to create it, but if so, then it is for the company to claim the goods and to raise the question of his authority. Of course, a decision upon the ground so taken by Mr. Bailhache would really settle nothing as to the true rights of the shipowners.

opinion there is another ground upon
case ought to be decided in favour of
ndent. The shipowners can claim a lien
n of £171 unsatisfied freight only if this
freight was due by the shippers or
of this particular shipment of beer.
e the shippers and consignees respec-
e must look at the order of January
he bill of lading together. The order
Ind, Coope, & Co. by Mr. Whinney,
nd manager. Unless qualified by other
ces absent here, this means that Mr.
ordered the shipment and contracts for
personal credit, looking, of course, for
to the assets of the company, of which
ver and manager. He is the shipper in
it is true, of Ind, Coope, & Co. The shipowners know, from the terms of the order, or ought to know, that Ind, Coope, & Co. no longer are conducting the business, but Mr. Whinney is conducting it and making contracts for it. So again, when in the bill of lading Ind, Coope, & Co. are named as consignees, the shipowners know that they are so only in name, the real consignee being the same as the real shipper, namely, Mr. Whinney, the Receiver and manager.

I agree with Lord Justice Moulton that the company was still alive and its business was being still carried on by Mr. Whinney, but he was not carrying on as the company's agent. He superseded the company, and the transactions upon which he entered in carrying on the old business were his transactions, upon which he was personally liable. He was really a trustee, and the shipowners dealt with the trustee. No doubt there may be cases in which a Receiver and manager is in all senses the agent of the company, and a question may then arise as to the extent of his authority. But here he was not such agent, and this was sufficiently conveyed to the shipowners by the notice that he was Receiver and manager.

Messrs. Bailhache, K. C., and Dunlop for the Appellants.

Sir A. Cripps, K. C., and Leck for the Respondent.

B. D.

COURT OF APPEAL.—*Central London Railway* v. *Commissioners of Land Tax for the City of London.* Before THE MASTER OF THE ROLLS AND LORDS JUSTICES FARWELL AND KENNEDY. 24th July 1911.

Ownership, presumption of, a centro usque ad cælum—*Ownership of half the street presumed in abutting owner—Liability of the tube railways to pay the land tax.*

This was an appeal from a decision of SWINFEN EADY, J.

The case raised two questions of importance as to the Plaintiff company's liability for land tax—*first,* where their line lay under highways and the tax had been redeemed on lands abutting on those highways, and, *secondly,* where it lay under any lands the surface of which had been exonerated from the tax by redemption.

The Court below held that where the land tax had been redeemed on lands or houses abutting on a public thoroughfare the exoneration did not extend to the middle line of such thoroughfare, and that for that portion the tube railway was liable to pay the land tax.

Hence this appeal which was allowed by a majority, Lord Justice Farwell dissenting.

In the course of his Judgment the MASTER OF THE ROLLS said—

It is important to observe that there is no suggestion of any separate assessment of a moiety of Cheapside. And further that in 1804 Cheapside was, and that in the present year the streets in the City of London are, like country roads in this sense, that the "streets" are not vested in any local authority. The entire ownership *a centro usque ad cælum* is vested in the owners of the adjoining houses. In the absence of evidence to rebut the presumption, the owner of each house is owner of the street *usque ad medium filum.* It is often called a presumption of law, and I do not stop to consider whether it is more properly called a presumption of fact.

His Lordship, after observing that various theories had been started as to the origin of this presumption, referred to the authorities on the point. . . . .

Whatever be the origin of the presumption, said his Lordship, its existence cannot be disputed. It is not a mere conveyancing presumption. It is a rule of construction that a messuage includes a moiety of the street or road in which it is situate. The messuage and the moiety of the street or road are one tenement. Some evidence must be forthcoming to establish a severance or the existence of two tenements. This applies to a contract to sell the house, to a grant of the house, and to a lease of the house. A remarkable instance in the case of lease was where the landlord was allowed to distrain on a cart standing on the moiety of the road, as being on the demised premises—*Hodges* v. *Lawrence* (18 J. P., p. 347).

It applies also to a devise of the house. I cannot suggest any legal instrument to which the presumption would not apply. An inclosure award is not really an exception. For the roads set out under the award owe their existence to the Inclosure Act; and it depends upon the language of the Act and the award whether the lord of the manor has or has not been deprived of the soil for the benefit of the adjacent owners. It is conceded that the presumption may be rebutted, and the terms of the Act and award may suffice to rebut it: .

. . . .

Is there any reason for holding that the assessment of the house and the certificate of the contract for redemption are documents to which the presumption does not apply and that they did not, as matter of construction, include a moiety of the street? I can discover none. It is plain that the moiety of the street or road might be included without being expressly named. For example, "the manor of X," "all the estate of John Smith in the parish of Y." And I feel no doubt that the "Priory Firm" would include the soil of any roads running through the farm. A limited owner who redeems the land tax on the house gets a charge upon the property. It is not reasonable to suppose that his charge extends only to the outside wall of the house and not to the middle of the street. I do not feel pressed by the argument that a separate assessment of a street or road is seldom to be found.

The fact that the moiety of the road was of little or no value, having regard to the public rights over it, seems to tend in favour of its inclusion in the assessment. But it is a fallacy to assert that there can be no beneficial occupation of the street. The owner of the adjacent house has not only legal possession which enables him to restrain trespassers, but he has also rights which are or may be of value. For example, the right to wells, vaults or cellars under the street, or to grant licences for carrying wires over the street. I am not aware of any authority adverse to the view which I have expressed. Much reliance was placed upon a sentence in Lord Watson's judgment in *Metropolitan Railway Company* v. *Fowler* (1893, A. C., 487), but I do not think it right to attribute to the dictum of that great Judge the weight of a deliberate judgment upon a point not distinctly raised before him.

Messrs. Macmorran, K. C., and Konstam for the Appellants.

Messrs. Danckwerts, K. C., and Bremner for the Respondents.

B. D. *Appeal allowed.*

THE CALCULTTA WEEKLY NOTES.

REPORTS.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN. LORD SHAW. LORD MERSEY. MR. AMEER ALI. 1911, Heard, 19, June. Judgment, 27, July.	THAKUR RANG LAL SINGH and another, Appellants, *v.* MAHARAJA SIR RAVANESHWAR PERSHAD SINGH BAHADUR and ors., Respondents.

Civil Procedure Code (Act XIV of 1882), secs. 287, 311—Execution sale—Postponement of sale—Proclamation fixing date of monthly sale as the day of sale—Monthly sale delayed—Sale in course of monthly sale on a later date—Irregularity—Substantial injury.

Where an execution sale which was to take place on the 16th May 1903 was on that date postponed and fresh proclamation of sale was issued directing that the sale would be held "at the monthly sale commencing at 6 o'clock in the morning of the 13th July 1903," but the monthly sale, owing to the absence from station of the presiding officer, did not take place till the 20th July on which date the property was sold in the course of the monthly sales :

Held—*That the sale was not in contravention of secs. 287 and 291 of Act XIV of 1882.*

That even if there was any irregularity in the sale, it could not be set aside in the absence of substantial injury.

This was an appeal from a judgment and decree of the High Court at Calcutta dated the 24th of September 1905 which affirmed a decree of the Subordinate Judge of Monghyr dated the 11th of May 1904 who rejected an application by the Appellants as judgment-debtors to set aside a judicial sale.

The application was made by a petition dated the 13th of August 1903 under sec. 311 of the Code of Civil Procedure (Act XIV of 1882) on the ground of material irregularities in publishing and conducting the sale of the property of the judgment-debtors which it was alleged was followed by substantial injury. It was further contended that the property in dispute was a ghatwali tenure and was therefore not liable to sale under the law.

In reply to the petition of the judgment-debtors the auction-purchaser at the sale (the present Respondent) put in a petition of objection dated the 11th of April 1904 in which he asserted that there was no irregularity in publishing or conducting the sale ; that an adequate price was obtained for the property at the sale and that the contention that it was not transferable by reason of its being a ghatwali tenure of a particular class was entirely wrong.

With reference to the allegations of the parties the Subordinate Judge framed the following issues for trial :—

(1) Whether the property in dispute is transferable ?

(2) Whether there was a material irregularity in publishing and conducting the sale ?

(3) Whether the property in dispute was sold at an inadequate price?

Oral and documentary evidence was adduced on behalf of both parties. On

that evidence the Subordinate Judge found that the property in dispute was a ghatwali tenure. But the Subordinate Judge found as a fact that in the particular ghatwali tenure before him there was not only no custom restricting its alienation, but it was satisfactorily established by the evidence of the judgment-debtor himself and by the instances of transfers produced in the case that it had been all along the subject of divisions and transfer. He therefore decided the first issue against the judgment-debtors and his finding on it was apparently not disputed in the High Court. Dealing with the second issue the Subordinate Judge recorded that the irregularities complained of were as follows :—

(*a*) Non-publication of the sale-proclamation.

(*b*) Non-publication of a fresh proclamation under sec. 291, Civil Procedure Code, the sale not having taken place within seven days from the date fixed for the sale.

(*c*) That the Government Revenue payable being more than Rs. 500 the sale should have been published in the *Calcutta Gazette.*

(*d*) That when the property in dispute was purchased in the name of Balmakund Sahay, Dewan of the Maharaja of Gidhour, the latter cannot be declared to be the purchaser of the property.

With regard to (*a*) the Subordinate Judge found that it was established by the evidence that the sale-proclamation was published in all the villages of the disputed taluk and was otherwise duly made known. As to the other matters complained of he held that they did not constitute irregularities in conducting the sale.

On the third and last issue he found that every possible care was taken to sell the property at a fair price and that the sum of Rs. 38,000 realised by the sale was "a very adequate value."

He therefore ordered that the application of the judgment-debtors should be rejected and that the sale should be confirmed.

The judgment-debtors appealed to the High Court at Calcutta from the order of the Subordinate Judge. The appeal was heard by two learned Judges (Harington and Pargiter, JJ.) of the Court who, on the 24th of September 1905, delivered their judgment, the material portion of which is as follows :—

"The point taken on behalf of the Appellants is that the sale should have taken place on the 13th July 1903 but that the Judge being away on casual leave the sale did not take place until the 18th July, that there was no warrant for holding the sale on the 18th and that therefore the whole proceeding was illegal and void.

"It is further contended that the notices required to be served were only served in one out of the 13 mouzahs. Even if it be assumed that these matters were established there was in our opinion only an irregularity. The onus therefore rests upon the Appellants to show that they have suffered substantial loss in consequence of these irregularities supposing in fact irregularities took place.

"Now the property was sold and it fetched Rs. 38,000. The Judge finds that the net collection from the property amounted to Rs. 2,054-odd. If that finding is correct then so far from the judgment-debtors having suffered any injury they succeeded in selling their property at a good price at 19 years' purchase which is more than the average price of property in that district. But the Appellants con-

tend that the collections amounted to Rs. 5,200 or 5,300. Oral evidence was given to this effect and the Appellants state that the jumma-bundi showing these figures is in possession of their manager. It is a very remarkable fact that they did not produce the jumma-bundis which they say are in their manager's possession. From the Road-cess returns which were filed by the judgment-debtors we see that the collections amounted to something over Rs. 2,000. That being so we think the Judge was quite right in his conclusion and the Appellants have entirely failed to show that the property has been sold at an inadequate price. Even if there was an irregularity in the proceedings the Appellants have sustained no damage, consequently they are not entitled to have the sale set aside."

The appeal was therefore dismissed with costs and hence this appeal.

Sir E. Richards, *K. C.*, and *Mr. Dunne* for the Appellants :

There were material irregularities in the conduct of the sale and the Appellants suffered substantial loss thereby. The sale was held more than seven days after the advertised date. It was in violation of sec. 291, C. P. C. A fresh proclamation was essential. It was a condition precedent to the sale, its absence is an illegality and it is no sale within the meaning of the Code. Cited *Basharutulla* v. *Uma Churn* (1) ; Ameer Ali and Woodroffe's Code of Civil Procedure, p. 949. If not an illegality, it is an irregularity and the price obtained was inadequate.

Mr. L. DeGruyther, *K. C.*, and *Mr. Ross* for the Respondents were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This is an appeal from a judgment and decree of the High Court of Bengal which affirmed the order of the Subordinate Judge of Monghyr dismissing the application of the judgment-debtors, Appellants, under sec. 311 of the Civil Procedure Code (Act XIV of 1882) to set aside a sale of certain landed property in execution of a mortgage decree.

The grounds on which the sale was impugned in the first Court were two-fold, (1) that the property sold was a *ghatwali* tenure and therefore inalienable ; and (2) that there was material irregularity in publishing and conducting the sale which resulted in substantial injury to the Appellants.

The first ground appears to have been abandoned in the High Court and is not pressed before this Board. The Appellants now rest their case mainly on the provisions of secs. 287 and 291 of the Code. They urge that on the 16th of May 1903 the sale was postponed to the 13th of July following and a sale-proclamation was directed to issue fixing that date for sale ; that it was not sold on the 13th, but on a later date, without a fresh proclamation as required by law, and that consequently the sale is null and void, and ought to be set aside. An examination, however, of the proceedings culminating in the sale, shows that there is no substance in the Appellants' contention. It is clear from the order-sheet that sale-proclamations had issued, at the instance of the Appellants, not less than six times. On the 30th of March 1903 the sale was stayed on their application and a sale-proclamation had issued fixing the 11th of May. On this day the Appellants asked for three days' grace, which was granted, the property being " kept under hammer." It was not, however, put up to sale until

(1) I. L. R. 16 Cal. 794 (1889).

the 16th of May, when it was found that there were not sufficient bidders present, and a fresh proclamation was therefore ordered to issue fixing the 13th of July for the sale. In the proclamation it was notified that "in the absence of any order of postponement the sale would be held at the monthly sale, commencing at 6 o'clock in the morning of the 13th of July 1903, at Monghyr."

The presiding officer was, however, absent from Monghyr from the 13th to the 16th of July. On the 17th an application was made to him for a postponement, which was rejected. The property, however, was not sold until the 20th. It is evident that on the 16th of May the sale was postponed to the 13th of July, the day on which the monthly sales were to commence; those sales did not actually begin until the 17th, owing to the absence from the station of the presiding officer, and the sale was held on the 20th in the course of the monthly sales. On the facts appearing on the record their Lordships think the Subordinate Judge did not act in contravention of the provisions of the Civil Procedure Code in holding the sale on the 20th of July.

Both the Courts in India have found against the Appellants on the question of substantial injury. The evidence regarding the value of the property is meagre and unsatisfactory, and their Lordships are not satisfied that, assuming even there was any irregularity in publishing the sale, any substantial injury has been caused thereby to the Appellants.

On the whole their Lordships are of opinion that the order of the High Court is right, and that this appeal should be dismissed with costs. And they will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Downer and Johnson* for the Respondents.

B. D. *Appeal dismissed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 1134 OF 1910.

STEPHEN, J.
1911,
16, January.

JUMNA DASS, Plaintiff,
v.
HARCHARN DASS, Defendant.

Jurisdiction of the High Court—Restraint of suit outside the jurisdiction—Persons not residing within jurisdiction—Injunction.

The High Court has power only to restrain a person who happens to be within its jurisdiction from prosecuting a suit without its jurisdiction. On the principle of "equity acting in personam*" the mere fact that he possesses property, moveable or immoveable, within the jurisdiction but does not reside within it, does not give the High Court jurisdiction over him, since in the event of an injunction being granted against him and that being disobeyed he could not be subjected to the process of contempt.*

VULCAN IRON WORKS *v.* BISSHUMBHER PERSAD (1) *followed.*

THE CARRON IRON CO. *v.* MACLAREN (2), MAUGLE CHAND *v.* GOPAL RAM (3) *relied on.*

This was a Rule obtained by the Plaintiff calling on the Defendant to show cause why he should not be restrained from proceeding with his suit against the Plaintiff in Ludhiana in the Punjab pending the hearing of this suit, both suits being so nearly connected with the same subject-

(1) 13 C. W. N. 346 : s. c. I. L. R. 36 Cal. 233 ; 1 Ind. Cas. 927 (1908).
(2) 5 H. L. C. 416 : s. c. 24 L. J. Ch. 620 (1855).
(3) I. L. R. 34 Cal. 101 (1906).

JUMNA DASS *v.* HARCHARN DASS.

matter, that were the Ludhiana suit brought in a Court subordinate to this Court, it would be stayed.

Mr. S. P. Sinha (with him *Mr. N. Sircar*) in support of the Rule contended that the two suits are so nearly connected with each other as to be upon the same subject-matter and that if the Ludhiana suit were brought in any Court subordinate to this Court it would no doubt be stayed and that the fact that the Defendant has property within the jurisdiction of this Court, namely, a deposit of Rs. 600 gives this Court jurisdiction over him so as to be restrained from proceeding with the suit in Ludhiana.

Mr. B. C. Mitter for the Defendant showed cause.—That this Court has no jurisdiction to issue injunction on the Defendant as he is not a resident within it on the principle that a Court of Equity can only restrain a person from proceeding with a suit in a foreign Court if he is a resident within the jurisdiction of the Court.

The JUDGMENT OF THE COURT was as follows :—

STEPHEN, J.—The Petitioner in this matter is a commission agent who brought certain goods on behalf of the Defendant. His case is that the Defendant refused to reimburse him for the expenses he had incurred, and that events occurred which justified him in re-selling the goods on behalf of the Defendant at a less price than he had paid for them. Before the re-sale the Defendant paid him Rs. 600 as a deposit in respect of the expenses he had incurred on behalf of the Defendant. He now sues the Defendant for the loss incurred on the re-sale of the goods allowing for the Rs. 600 he has received. The Defendant brought a suit at Ludhiana for the return of Rs. 600 before the institution of the present suit. The Plaintiff has obtained a Rule on the Defendant calling on him to show cause why he should not be restrained from proceeding with his suit in Ludhiana, and the two suits are so far concerned with the same subject-matter, that were the Ludhiana suit brought in a Court subordinate to this Court, it would certainly be stayed. The Defendant, however, shows cause by contending that this Court has no jurisdiction to issue an injunction on him, as he is not resident in Bengal. To this the Plaintiff replies that the Defendant has property within the jurisdiction, namely, the Rs. 600 deposit, and that this gives this Court jurisdiction, over him. I can not, however, consider that this argument is well-founded in point of law. In *Vulcan Iron Works* v. *Bisshumbher Persad* (1), Fletcher, J., after referring to *The Carron Iron Co.* v. *Maclaren* (2), comes to the conclusion that a Court of Equity can only restrain a person from proceeding with a suit in a foreign Court, if he is within the jurisdiction of the Court. It has been sought to show that this conclusion was not properly deduced from the authority referred to on the ground that that case was decided on the merits of the case, and that if the Court that is asked to issue an injunction can make any order that would affect the person whom it is sought to enjoin, if, as is said, the Court can reach him by attaching or sequestering his property, it has jurisdiction to issue an injunction. I do not consider that this is so. The Court in the case of *The Carron Iron Co.* v. *Maclaren* (2) proceeded not on the particular merits of the

(1) 13 C. W. N. 346 ; s. c. I. L. R. 36 Cal. 233 ; 1 Ind. Cas. 927 (1908).

(2) 5 H. L. C. 416 : s. c. 24 L. J. Ch. 620 (1855).

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case but on the general rule that a person living entirely under a foreign jurisdiction must be left to obtain such relief as his own Courts may afford, and that being so, the case is an authority for the proposition put forward by Fletcher, J. Lord Brougham's judgment seems to be quite inconsistent with any other view. I agree with Fletcher, J., in the view he takes of the decision of this Court in *Mungle Chand* v. *Gopal Ram* (3).

The petition, therefore, fails on a point of law and I need not determine the question whether the Defendant has any property within the jurisdiction, as the question does not arise. But I may say that the term property would have to be extended to very wide limits to embrace the Rs. 600 that the Plaintiff has received and has applied to his own purposes.

The Rule is, therefore, discharged with costs.

Babu C. C. Bose, Attorney for the Plaintiff.

Messrs. Manuel & Agarwalla, Attorneys for the Defendant.

A. K. G. *Rule discharged.*

[FULL BENCH REFERENCE.]

IN

APPEALS FROM APPELLATE DECREES

Nos. 1499 & 329 OF 1909.

JENKINS, C. J.
WOODROFFE, J.
MOOKERJEE, J.
CARNDUFF, J.
CHATTERJEE, J.
1911,
Heard,
18, August.
Judgment,
5, September.

RAJ KUMARI DEBI, Plaintiff, Appellant,
v.
BARKATULLAH MONDAL and ors., Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 49 (b) —Under-raiyati *lease—Lease for indefinite term—Lease "from generation to generation"—Ejectment—Notice—"Written lease," meaning of.*

The words "written lease" in cl. (b) of sec. 49 of the Bengal Tenancy Act, mean a written lease of the same kind as that mentioned in cl. (a), i.e., *a written lease for a term.*

The case of an under-raiyat *holding under a* pottah *executed before the passing of the Bengal Tenancy Act, and not expressly providing for the period of its duration, comes within cl. (b) of sec. 49 and such* under-raiyat *may be ejected upon notice to quit as provided thereunder.*

When an under-raiyati *lease provides that the* under-raiyat *is to hold from generation to generation, the period of duration is provided for by the contract, within the meaning of cl. (a) of sec. 49.*

This was an appeal preferred on the 23rd of July 1909, against a decree of S. N. Huda, Esq., District Judge of Pabna and Bogra, dated the 16th of April 1909, affirming that of Babu Sasi Kumar Ghosh, Munsif at Bogra, dated the 30th of November 1908.

The case came up for hearing on the 21st of June 1911, before a Division Bench (Chitty and N. Chatterjea, JJ.), which referred the same to the Full Bench on 29th of June 1911.

The facts of the case material to this report will appear from the order of reference.

The ORDER OF REFERENCE was as follows:—

CHITTY, J.—This second appeal arises out of a suit brought by the Plaintiffs to eject the Defendants from certain land. The facts are that the Plaintiff is an occupancy *raiyat* of the said land. On 18th Sraban 1288, (1st August 1881), the

(3) I. L. R. 34 Cal. 101 (1906).

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predecessor of the Defendants executed in favour of the Plaintiff a *kabuliyat* as *korfa* or *under-raiyat*. The *kabuliyat* was for no fixed period or term. The Defendants were holding the land under that *kabuliyat* and were served by the Plaintiff with a notice to quit, in accordance with the terms of sec. 49 (*b*) of the Bengal Tenancy Act. The Courts below following the case of *Madan Chandra Kapali* v. *Jaki Karikar* (1) have dismissed the Plaintiff's suit. The Plaintiffs have appealed.

The Courts below have referred to the cases of *Komaruddi* v. *Sreenath Chowdhury* (2), *Mohendra Nath Sepai* v. *Parbutty Charan Dass* (3) and *Idugazi Doctor* v. *Chandra Kali Sundrani* (4). They distinguish them by saying that in those cases the *kabuliyats* were after the passing of the Bengal Tenancy Act. As a matter of fact in the first of the three cases, the date of the *kabuliyat* or *pottah* does not appear. In the second, the *kabuliyat* was no doubt after the passing of the Act, *i.e.*, in 1893. But in the third, the *pottah* was dated 13th Baisak 1290, (26th April 1883). The actual date of the lease does not, in my opinion, make much difference. The question turns upon the construction to be put upon sec. 49 of the Bengal Tenancy Act. If the words "written lease" are to be given their ordinary meaning then it is clear that in enacting sec. 49 the Legislature omitted to provide for a case where an *under-raiyat* holds under a written lease for an indefinite period. This was the view taken in the case of *Madan Chandra Kapali* v. *Jaki Karikar* (1), where the learned Judges said—"But if he holds under a written lease for an indefinite time, his *raiyat* lessor cannot eject him arbitrarily. He can only do so for non-payment of the rent." In the case of *Komaruddi* v. *Sreenath Chowdhury* (2), decided by the late C. J., and Mitra, J., it was held that "written lease in sub-sec. (*b*), means such a written lease as is mentioned in sub-sec. (*a*), that is, a written lease defining the term of the tenancy." The case of *Madan Chandra Kapali* v. *Jaki Karikar* (1) was not referred to on that occasion. In the other two cases, in *Mohendra Nath Sepai* v. *Parbutty Charan Dass* (3) and *Idugazi Doctor* v. *Chandra Kali Sundrani* (4), decided by Mitra, J., very shortly after the first, that case was referred to but the learned Judge adhered to the view which was taken by the late C. J., and himself. With all respect to those learned Judges, I would point out that it is only by implication from the preceding words that the words "written lease" in sub-sec. (*a*) can be taken to denote only a written lease for a definite term. To fix them with that meaning some other words must be read into the section whether in sub-sec. (*a*) or (*b*). However as the cases in 6 and 8 *Calcutta Weekly Notes* stand, that in the former volume is in direct conflict with those in the later volume. The question is one of considerable importance to *raiyats* and *under-raiyats*, and I would, therefore, refer it to the Full Bench. The question will be:—Whether in the case of an *under-raiyat* holding land from a *raiyat* under a written lease executed before the passing of the Bengal Tenancy Act, the lease not being expressed to be for any definite term, the *under-raiyat* is liable to ejectment and, if

(1) 6 C. W. N. 377 (1902).
(2) 8 C. W. N. 136 (1903).
(3) 8 C. W. N. 136 (1903).
(4) 8 C. W. N. 139 (1903).

(1) 6 C. W. N. 377 (1902).
(2) 8 C. W. N. 136 (1903).
(3) 8 C. W. N. 136 (1903).
(4) 8 C. W. N. 139 (1903).

RAJ KUMARI DEBI *v.* BARKATULLAH MONDAL.

so, after what notice. Certain other cases were cited which turn on the construction to be put upon sec. 85 of the Act. These have, in my opinion, no direct bearing upon the present question.

The facts in second appeal No. 329 of 1909 are in all respects similar to those above stated. That appeal is accordingly also included in this reference.

CHATTERJEE, J.—I agree in making this reference to the Full Bench.

In S. A. No. 1499 of 1909.

Babu Surendra Chandra Sen (with *Babu Rishendra Nath Sircar*) for the Appellant.

In this case the Defendant is the son of the original *under-raiyat. Under-raiyati* tenure not being heritable he is merely a tenant on sufferance and the notice he has got is undoubtedly "reasonable notice." The notice moreover was good notice within sec. 49 (*b*) of the Bengal Tenancy Act. The notices were served on the 24th Chaitra 1311, B. S., and the suit was instituted on 10th Magh 1313, B. S. The only question is whether the lease which is a written lease but does not fix a term comes within cl. (*b*) of sec. 49.

[CHIEF JUSTICE.—Can there be a lease for an uncertain term at all ?]

Submitted it was very doubtful.

[CHATTERJEE, J.—There are in the document the words সন সন খাজানা দিবে (will pay rent every year).]

Which means "for so long as he holds," and that would perhaps bring it within the definition of "lease" in the Transfer of Property Act.

Assuming it to be a "lease" he submitted that by the operation of sec. 85 (3), the term of the tenancy became fixed by operation of law so that sec. 49 (*a*) would apply. But in any case it would come under cl. (*b*).

Secs. 10, 18, 25, 44 and 49 all show that the modes provided in the Act for ejectment of tenants are exhaustive and by sec. 178 (1), cl. (*c*), the parties cannot provide for themselves a different mode. It is hardly likely that the Legislature should have left out any description of *under-raiyati* leases unprovided for, nor that it should have intended to confer higher rights on tenants holding under indefinite terms. *Mohendra Nath Sepai* v. *Parbutty Charan Dass* (3) is in my favour, as also *Idugazi Doctor* v. *Chandra Kali Sundrani* (4).

Babu Hari Charan Ganguli for the Respondent.

It was never questioned in the lower Courts that I was not a tenant or that I did not hold under a lease.

Leases in the form of the present lease are very common.

"Lease" as defined in the old Rent Act would cover a mere undertaking to cultivate and though that term is not defined in the present Act that is probably due to the fact that the word had acquired a definite meaning and did not require definition.

See also sec. 3, Registration Act III of 1877.

[MOOKERJEE, J.—Why should the Legislature be supposed to have left leases which according to you are very common unprovided for in sec. 49 ?]

The Legislature as sec. 85 shows did not intend to interfere with the contractual rights and obligations of the *raiyat* and *under-raiyat* as between themselves. It sought to protect the rights of the superior landlord only.

[MOOKERJEE, J.—Do you suggest that such a lease would operate as a permanent lease ?]

(3) 8 C. W. N. 137 (1903).
(4) 8 C. W. N. 139 (1903).

RAJ KUMARI DEBI *v.* BARKATULLAH MONDAL.

As against the *raiyat* only—not against the whole world.

To bring the present lease within sec. 49 (*b*) it will be necessary to read into the section the words "for a term" after the words "written lease."

In S. A. No. 329 of 1909.

Moulvie Mustapha Khan for the Appellant referred to *Abdool* v. *Kalee* (5) and *Haran Chunder* v. *Mookta Soonduree* (6).

Babu Kumar Sankar Roy for the Respondent referred to sec. 66, Bengal Tenancy Act.

The JUDGMENT OF THE COURT was as follows:—

No. 1499.

The decision of the question referred in this case depends upon the proper construction of sec. 49 of the Bengal Tenancy Act. Chap. VII of the Act which deals with *under-raiyats* consists of two sections. Sec. 48 speaking of the limit of rent recoverable from *under-raiyats* divides rent into two classes, rent payable under a registered lease or agreement and rent payable in any other case, thus comprising all classes of *under-raiyats*. Sec. 49 dealing with the ejectment of *under-raiyats* divides them into two classes: cl. (*a*) speaks of those who hold under a written lease and cl. (*b*) speaks of those who hold otherwise than under a written lease. The term "written lease" in cl. (*a*) is necessarily restricted, by the word "term" used before, to written leases which are for a term or period of duration mentioned in the lease. The word "term" is not repeated in cl. (*b*), and it is therefore contended on the authority of the case of *Madan Chandra Kapali* v. *Jaki Karikar* (1), that the case of an *under-raiyat* who holds under a *pottah* which does not provide for any period of duration is omitted from the purview of the section and that he cannot therefore be ejected except under sec. 66 for non-payment of rent. The Court is of opinion that there is no sufficient reason for holding that the Legislature made any such omission either by intention or by mistake. As regards intention there is no reason why a tenant of this class should attract any particular favour from the Legislature. As regards mistake it must be remembered that this class of *pottahs* called *mela pottahs* or *bemiadi pottahs* are very common in Bengal and could not have escaped notice. Looking at the whole scheme of the Act and the manner in which the different classes of tenants are dealt with in its different provisions the Court holds that the proper construction to be placed on the word "written lease" in cl. (*b*) is to read them as indicating a written lease of the same kind as that mentioned in cl. (*a*).

The answer to the reference therefore is that the case of an *under-raiyat* holding under a *pottah* executed before the passing of the Bengal Tenancy Act, and not expressly providing for the period of its duration, comes within cl. (*b*) of sec. 49 and the notice must be as provided thereunder.

In this view of the case the appeal must be decreed with costs.

No. 329.

The *pottah* in this case was one from generation to generation: its period of duration therefore is provided for by the contract and the question referred does not arise. The case must go back to the Division Bench for disposal in due course.

(5) 7 W. R. 81 (1867).
(6) 10 W. R. 113 (1868).

(1) 6 C. W. N. 377 (1902).

[FULL BENCH REFERENCE.]

CR. REV. NO. 1433 OF 1909.

JENKINS, C. J. WOODROFFE, J. MOOKERJEE, J. CARNDUFF, J. CHATTERJEE, J. 1911, Heard, 16, August. Judgment, 5, September.	MEHI SINGH, Complainant, Petitioner, *v.* MANGAL KHANDU, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 250, 423 (d)—*"Consequential or incidental order"—Order to pay compensation on reversal of conviction—Power of Appellate Court.*

Held, *by the majority of the Full Bench—That an Appellate Court in setting aside an order convicting an accused person cannot make an order directing the complainant to pay compensation to the accused under sec. 250 of the Criminal Procedure Code.*

Sec. 423 of the Code in authorising the Appellate Court to "make any amendment or any other consequential or incidental order that may be just or proper" does not extend to it the special power given by sec. 250 to an original magisterial Court alone. The clause does not amplify the powers of the Appellate Court: but what it does is to modify the exhaustive character which without it sec. 423 (1) would apparently have.

This was a Rule against an order of the Appellate Court (S. W. Goode, Esq., Sub-Divisional Magistrate of Beguserai) passed under sec. 250, Cr. P. C., on the 5th of October 1909, (while setting aside the conviction of the accused) directing the Petitioner, complainant, to pay a compensation of Rs. 25 to each of the accused. The original Court (Mr. O. G. Robinson, Magistrate, 2nd class, of Beguserai) had convicted the accused under secs. 379 and $\frac{379}{114}$ of the Penal Code and sentenced each to undergo rigorous imprisonment for 6 weeks.

The material facts are set out in the ORDER OF REFERENCE which was as follows:—

STEPHEN and CARNDUFF, JJ.—The Petitioner before us lodged a complaint under secs. 379 and $\frac{379}{114}$ of the Indian Penal Code against three persons, who were convicted before a Deputy Magistrate. On appeal to a Joint-Magistrate the convictions were set aside, and the Appellate Court found the case entirely false and called on the Petitioner to show cause why he should not pay Rs. 25 compensation to each of the Appellants under sec. 250 of the Criminal Procedure Code. No cause being shown, the order to pay compensation was made absolute. A motion to set aside this order was rejected by the District Magistrate. We have issued a rule to show cause why the order for compensation should not be set aside on the ground that the Court had no jurisdiction to make an order on appeal granting compensation.

The question we wish to refer is, has an Appellate Court power to order compensation under sec. 250 of the Criminal Procedure Code ?

The question turns on the construction of secs. 250 and 423 of the Code. The former, as far as it is relevant, runs as follows:—"If in any case instituted by complaint or upon information given to a police-officer or to a Magistrate a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused and is satisfied that the accusation against him was frivolous or vexatious, the Magistrate may in his discretion direct the complainant to pay compensation to the accused." But, be-

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fore making such direction, "the Magistrate is to (*a*) record and consider any objection which the complainant may urge;" (*b*) and if he directs compensation "state in writing, in his order of discharge or acquittal, his reasons for awarding compensation;" and by sub-sec. (3) a complainant who has been ordered by a Magistrate of the second or third class to pay compensation, may appeal from that order as if he had been convicted on a trial held by such Magistrate. On the terms of this section there can be no doubt that the only person who has power to award compensation under it is the Magistrate by whom the case is heard. But it is contended that this power is conferred on the Appellate Court by sec. 423 (1) (*a*) of the Code. This section enables an Appellate Court to take certain steps in cases of (*a*) acquittals, (*b*) convictions, and (*c*) other orders, and (*d*) to "make any amendment or any other consequential or incidental order that may be just or proper." The question is whether the order of the Appellate Court in this case is "consequential" as it is not suggested that it is "incidental," a term which seems to exclude any final order. It has been held by the High Court of Allahabad that it is not consequential, see *Balli Pande* v. *Chittan* (2): and by this Court in the recently reported case of *Kari Singh* v. *Jutani Dhanuk* (3), that it is. The difference of opinion depends largely on first impression, as the only authority referred to by either Court is a passage in Sir Henry Prinsep's edition of the Criminal Procedure Code in a note to sec. 250, at p. 250 of the 13th Edition, which seems to us, as we gather that it did to Stanley, C. J., to be carefully framed so as to raise the question but not to express any opinion as to its proper answer. Under these circumstances and looking at secs. 250 and 423 only, we agree rather with the Allahabad decision than with that of this Court. Primarily we should suppose a consequential order to be an order that is the necessary consequence of the Court's decision, as an order that an Appellant whose conviction is set aside should be discharged from his bail bond, or that any part of a fine imposed on him should be repaid: and we incline to suppose that an order which depends on the consideration of a question that has not been previously considered is not within the terms of sec. 423. We are the more inclined to take this view on consideration of sec. 106 (3), which is referred to by the Judges in this Court in the case above cited as an example of the policy of the present Code of enlarging the powers of the Appellate Court. That enactment expressly enables the Appellate Court to bind a person down under sec. 106. This seems to show that an order to this effect is not a consequential order under sec. 423; and a power to bind down seems to be very much on the same footing as a power to award compensation to an accused person.

It has been argued before us that if the Appellate Court has power to award compensation under sec. 250, the person against whom such order is made loses some of the safeguards provided by that section. In the first place, it is said that the provisions of sec. 250 (1) (a) would not apply to the Appellate Court, so that that Court could not be obliged to record or consider objections which the complainant might have been in a position to urge against the making of the order. In the second place, if payment of compensation is directed by a second or third-class Magis-

(2) I. L. R. 28 All. 625 (1906).
(3) 14 C. W. N. 212 (1909).

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trate, the complainant cannot, if he cares to appeal, be made to pay compensation unless there are two decisions against him ; whereas, if compensation is directed in the first instance by an Appellate Court, there is only one. Neither of these arguments seems to us to carry any weight. On the other hand, in the present case it is no doubt "inconvenient," to borrow a phrase from Stanley, C. J., that, where one tribunal has found a charge to be proved beyond all reasonable doubt, another should find it to be not only false, but frivolous and vexatious.

We regard the matter, however, as one of the first impression, subject to the views expressed in the two decisions we have mentioned, and the indication given in sec. 106 (3) of the meaning to be attached to the word "consequential" in sec. 423.

We, therefore, refer the above-mentioned question to a Full Bench of this Court. If the answer is Yes, the rule in this case will be discharged. If it is No, the rule will be made absolute, the order set aside, and any money paid under the order and in the hands of lower Court must be refunded.

Babu Karunamoy Bose for the Petitioner.—Reads secs. 250, 423.

[THE CHIEF JUSTICE.—On general principles, has not the Court of appeal all the powers of the first Court ?]

In view of the specific provisions of the Criminal Procedure Code, the powers of the Appellate Court are not co-extensive with that of the original Court.

An order under sec. 250 is not a "consequential or incidental order" as the making of it would involve a fresh judicial proceeding and a fresh exercise of judicial mind and the consideration of fresh evidence given.

[CHATTERJEE, J.—Besides in an appeal from a conviction the complainant is no party and a fresh proceeding upon notice to the complainant would be necessary.]

The power under sec. 250 is specifically given to the trying Magistrate. If the Criminal Court of appeal had all the powers of the original Court where was the necessity for the elaborate provisions of sec. 423 defining its powers ?

The Appellate Court's powers are to remedy or rectify errors. On appeal from a conviction, it is concerned with the question whether the accused is guilty or not and not whether the complaint is in addition frivolous and vexatious. Compare sec. 106 (3). An order under this section would be consequential on the main order and yet the Legislature which enacted this provision at the same time as sec. 423 (*d*) was careful to specifically give the power to make an order under sec. 106 to the Appellate Court. Sec. 522 also seems to contemplate an order which would be consequential on the main order in the case. Moreover that section gives powers to the "Court" a term comprehensive enough to include an appeal Court. See also secs. 545, 562, 553.

Decisions passed anterior to the enactment of sec. 423, cl. (*d*), are all in my favour and I submit sec. 423 (*d*) has not amplified the powers of the Appellate Court in this respect. The difficulty was created by a note in Sir H. Prinsep's Commentary, 12th Edition, omitted in the present edition.

[THE CHIEF JUSTICE.—Suppose an order of acquittal is set aside on appeal and the accused convicted, will not the Appellate Court have power to set aside the order under sec. 250 ?]

Yes ; because the order in that case

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would be incidental to the order of conviction.

The powers of the Appellate Court under the Code are not so wide as that conferred by 57 and 58 Vict., Ch. 16, sec. 2 (2).

Besides, where a conviction has been had in the original Court, the case for an order under sec. 250 is so obviously weakened that the Legislature might very well have considered it inexpedient to give the Appellate Court power to make an order under sec. 250 when setting aside the order of conviction.

THE JUDGMENT OF THE COURT was as follows :—

The question referred to the Full Bench is whether an Appellate Court can order compensation such as is contemplated by sec. 250 of the Code of Criminal Procedure, 1898.

Sec. 250, being confined by its terms to the Courts of Magistrates trying cases in the first instance, does not confer the requisite power. But it is suggested that cl. (*d*) of sec. 423 (1) does.

Sec. 423 (1), which defines the powers of an Appellate Court in disposing of an appeal, begins by setting forth those powers in precise terms, and concludes with cl. (*d*), which enables it to "make any consequential or incidental order that may be just or proper."

Now, in a Criminal Court, this phrase cannot be construed so liberally as to embrace any and every ancillary order which is capable of being described as "consequential or incidental." Otherwise an Appellate Court affirming, for instance, a conviction of kidnapping a woman, might add, and enforce, a direction that the offender should pay her, by way of maintenance, a monthly allowance. This can hardly be.

It would seem, therefore, that "consequential or incidental" orders, within the purview of the provision, must fall under one or other of two heads.

First, there are orders which follow as a matter of course, being the necessary complements to the main orders passed without which the latter would be incomplete or ineffective. Such are directions as to the refund of fines realised from acquitted Appellants, or, on the reversal of acquittals, as to the restoration of compensation paid under sec. 250; and for these no separate authority is needed.

Secondly, there are orders which, though ancillary in character, require more than the support of a Criminal Court's inherent jurisdiction, and could not be passed without express authority.

An order mulcting a complainant to compensate an accused for having been frivolously or vexatiously charged seems to fall under the second head. It does not necessarily follow or arise out of an order of discharge or acquittal, and it is not, *per se*, an order "consequential or incidental" thereto. For the issue primarily before the Court is whether the accused has been proved to be guilty or not, and the question whether the complaint against him was merely frivolous or vexatious, is another matter importing fresh considerations. The making of an award for compensation would, consequently, seem to need express authority, and an order therefor is not "consequential or incidental" to an order of discharge or acquittal, unless the discharging or acquitting Court has, *aliunde*, power to make it. In an original Court it is, by virtue of sec. 250, "consequential or incidental" to an order of discharge or acquittal made there; but it is not *quoad* a like order passed on appeal.

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If this be so, then the clause can be relied upon only if it be sufficient to extend to an Appellate Court, to be exercised by it, *mutatis mutandis*, the special power given to an original magisterial Court alone by sec. 250. But it falls short of this, and, so far as appears, it never occurred to the learned Judges who decided *Hari Chand* v. *Fakir Sadruddin* (1) that it could be appealed to in this connection. It does not, like sec. 2 of the Supreme Court of Judicature (Jurisdiction) Act, 1894 (57 and 58 Vict., c. 16) or Or. XLI, r. 33 of the Code of Civil Procedure, 1908, invest an Appellate Court with authority to "make any order which ought to have been given or made" by the Court below; nor does it, like sec. 107 of the latter, confer upon Appellate Courts "the same powers" as Courts of Original Jurisdiction. It does not amplify the powers of Appellate Courts: but what it does is to modify the exhaustive character, which without it, sec. 423 (1) would apparently have, and so to prevent any conflict between its special provisions and the general provisions of, *e.g.*, sec. 517 or sec. 522.

And, as the exercise of the power in questions by an Appellate Court would involve such an extreme measure of contempt for the judgment of the inferior Court concerned that it could but seldom be used with propriety, it can readily be understood why the Legislature should not have thought it worth while—if, indeed, it did not think it actually inexpedient—to extend it to such a Court.

For these reasons the majority of the Full Bench are of opinion that the answers to the question referred should be in the negative.

(1) 8 Bom. L. R. 841 (1901)

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER No. 412 OF 1910.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard, 2, June.
Judgment, 28, June.

RAJA PADMANAND SINGH, Appellant,
v.
RAMAPROSAD MALVI and another, Respondents.

Civil Procedure Code (Act V of 1908), Or. 21, rr. 46 and 52—Annuity, instalments not accrued due if attachable—Right to annuity if may be attached—"Debt," meaning of.

A executed a conveyance of all his properties in favour of his son for the payment of his debts it being provided therein that the purchaser would pay the vendor a monthly sum of Rs. 4,000, the first payment to be made on the 1st October 1905 and the payment for every succeeding month on the first day of the month following between the hours of 1 A.M., *and 6* A.M., *the deed further providing that the vendor would not by mortgage or otherwise sell or charge or alienate the allowance payable to him and that on no account and in no circumstances was it to become payable to any person other than the vendor or his duly constituted attorney. The allowance was further declared to be a first charge upon a specified share of the estate so far as the subsisting mortgages executed by the vendor would allow:*

Held—*That the allowance payable as annuity could not be regarded as a debt or even as a portion of the consideration for the conveyance, payment of which was deferred, and no instalment of such allowance could be attached under r. 46 of Or. 21 of the Civil Procedure Code until it should have actually fallen due.*

A sum payable upon a contingency is

not a debt and does not become one until the contingency has happened.

Whether a claim is a debt or not is in no respect determined by a reference to the time of payment.

Held, further—*That the allowance could not also be attached under r. 52 of Or. 21 of the Code, as that rule does not allow of an anticipatory attachment of money expected to reach the hands of a public officer and is restricted only to money actually in his hands.*

Quære—*Whether notwithstanding the restrictions upon alienation embodied in the conveyance the right to receive the annuity is attachable in execution.*

This was an appeal against a decision of Babu Kishori Mohan Sikdar, Subordinate Judge, Bhagulpur, dated the 5th of July 1910.

The facts of the case will fully appear from the judgment.

Dr. Rash Behari Ghose and *Babus Bepin Behari Ghose* and *Debendra Nath Bagchi* for the Appellant.

Babu Noresh Chandra Sinha for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This appeal is directed against an order by which the Court below has overruled an objection of the judgment-debtor now Appellant before us to the attachment of a sum of Rs. 4,000 payable monthly as allowance to him by the representative in interest of his son. It appears that, on the 25th September 1905, the Appellant conveyed all his properties in favour of his son for the payment of his debts. The conveyance provided that the purchaser would pay the vendor a monthly sum of Rs. 4,000 the first payment to be made on the 1st October 1905 and the payment for every succeeding month, on the first day of the month following, between the hours of 1 A.M., and 6 A.M. The deed further provided that the vendor would not, by mortgage or otherwise, seek to charge or alienate the allowance payable to him and that, on no account and under no circumstances was the allowance to become payable to, or demandable by, any person other than the vendor or his duly constituted attorney. There was also a provision that so far as was consistent with the then subsisting mortgages executed by the vendor himself the allowance payable was to be a first charge upon a specified share of the estate. The purchaser died some time after this transaction whereupon the properties vested in his widow, Rani Sashirama Kumari, and are now under the management of the Court of Wards on her behalf. On the 4th April 1910, the Respondents before us, who held a decree for a large sum of money obtained against the Appellant, Raja Padmananda Singh, on the 13th November 1908, applied for execution thereof. They prayed for recovery of the judgment-debt by attachment of the allowance of Rs. 4,000 from April 1910 up to the date of realisation, and also for rateable distribution of a sum of money, which had been already deposited in Court and apparently represented a portion of the allowance due to the Appellant from November 1909 to January 1910. They further asked that the allowance for the months of February and March 1910, which had already accrued due and was still in the hands of the Manager under the Court of Wards, might be attached and made available for the satisfaction of their dues. Notice was in due course issued upon the judgment-debtor who

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objected that the allowance could not be attached before it became due; that it was not attachable at all because it was in the nature of a maintenance grant; and finally, that in no case could the entire amount of the maintenance be treated as attachable. The Subordinate Judge has overruled these objections and has issued a prohibitory order upon the Manager under the Court of Wards, by which the latter is directed to withhold payment of the monthly allowance to the judgment-debtor from the month of April 1910 till the whole of the amount claimed by the decree-holders is satisfied. The judgment-debtor has now appealed to this Court, and, on his behalf, it has been argued that no attachment could be effected of the allowance before it had accrued due: in other words, that an annuity, not yet due is not garnishable under the provisions of the law. In our opinion, this contention is clearly well-founded and must prevail.

The applications of the decree-holder falls, it is stated on their behalf, within the scope of rr. 46 and 52 of Or. 21 of the Civil Procedure Code of 1908. R. 46 in so far as it may be supposed to be applicable to the circumstances of the present case, provides that, in the case of a debt not secured by a negotiable instrument, the attachment shall be made by a written order prohibiting the creditor from recovering the debt, and the debtor from making payment thereof until the further order of the Court. A copy of the order is required to be affixed on some conspicuous part of the Court house and another copy sent to the debtor. Sub-r. (3) of r. 46 provides that a debtor thus prohibited may pay the amount of his debt into Court, and such payment discharges him as effectually as payment to the party entitled to receive the sum. R. 52 provides for the attachment of property in the custody of a public officer. In a case of this description, the attachment is made by a notice to the officer requesting that the property sought to be attached and any interest or dividend becoming payable thereon may be held subject to the further orders of the Court from which the notice is issued. It will be observed that the expression "debt" is not defined in r. 46, and that although in r. 52 the term used namely, "property," is wider in scope, an attachment can be affected only of property in the custody of a public officer.

In so far as r. 46 is concerned there is no room for controversy that the term "debt" is intended to be used in its legal sense of a debt either due or accruing due. As was explained by Sir Lawrence Jenkins, C. J., in the case of *Banchharam Majumder* v. *Adyanath Bhattacherji* (1), a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation. That is the definition given by Lindley, L. J., in *Webb* v. *Stenton* (2). It was further pointed out in the case mentioned that the principle applicable to cases of this description may be concisely stated in the words of the learned Judges who decided the case of *People* v. *Arguello* (3):—"Standing alone the word debt is as applicable to a sum of money which has been promised at a future date as to a sum now due and payable. If we wish to distinguish between the two we say of the former that it is a debt owing and of the latter that it is a debt due. In other words debts are of two kinds *solvendum*

(1) 13 C. W. N. 966.: s. c. I. L. R. 36 Cal. 936 (1909).
(2) 11 Q. B. D. 518 (1883).
(3) 37 California 524 (1869).

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in praesenti and *solvendum in futuro.* Whether a claim or demand is a debt or not is in no respect determined by a reference to the time of payment. A sum of money which is certainly and in all events payable is a debt without regards to the fact whether it is payable now or at a future time. A sum payable upon a contingency however is not a debt and does not become a debt until the contingency has happened." On this principle it was ruled by this Court in the case of *Haridas Acharjya* v. *Binoda Kishore Acharjya* (4) that when A is bound under deed to pay to B a monthly allowance during the lifetime of the latter, there cannot be a valid attachment of any portion of the allowance by a prohibitory order issued to A of a date anterior to the time when the same falls due to B. The learned Judges relied upon the observation of their Lordships of the Judicial Committee in *Tufuzool Hossain* v. *Raghoonath Purshad* (5) and it may be observed that the same view had been indicated many years earlier by Mr. Justice Colvile in *Boistub Churn Bysack* v. *Battye* (6). The same principle has been adopted by the Allahabad High Court in *Sher Singh* v. *Sri Ram* (7) and *Devi Prasad* v. *Lewis* (8) and also by Madras High Court in *Ayyavayyar* v. *Virasami* (9). It has been ingeniously argued however by the learned Vakil for the Respondents decree-holders on the authority of the decision in *Harshankar Prosad* v. *Baijnath Das* (10) that the sum payable as annuity was in substance a portion of the consideration for the conveyance paid to the vendor in successive instalments, and consequently constituted a debt the payment whereof was deferred. But there is clearly no foundation for this contention. The aggregate amount of the consideration of which part was immediately payable and the balance payable in instalments was never fixed by agreement of parties. The annuity, it cannot be contested, would terminate immediately upon the death of the grantee and cannot be treated as a debt the payment whereof was deferred. The case of *Dumbar Koeri* v. *Sham Kissen* (11) is distinguishable, because there the annuity apparently accrued due from day to day, and consequently on the date the prohibitory order was issued, there was an actually existing debt though the sum was payable at a future date. The cases of *Sree Nath Roy* v. *Brojendra Bhusan* (12) and *Gopal Lal Seal* v. *Marsden* (13) cannot be treated as binding authorities upon this matter, because those decisions were based on the distinction between an annuity given by a Will and right to future maintenance, and the question was not decided whether a contingent right could be made the subject of a prohibitory order. In view of the principles already explained, the position cannot thus be seriously maintained that a prohibitory order may be validily issued in respect of sums which may never fall due and become payable to the judgment-debtor.

It is worthy of note that the view just indicated has been adopted as well-founded on principle both in the English and the American Courts. It is settled law in

(4) I. L. R. 27 Cal. 38 (1899).
(5) 14 M. I. A. 40 at p. 50; 7 B. L. R. 186 (1871).
(6) 1 Taylor & Bell 307 (1850).
(7) I. L. R. 30 All 246 (1908).
(8) I. L. R. 31 All. 304 (1909).
(9) I. L. R. 21 Mad. 393 (1897).
(10) I. L. R. 23 All. 164 (1901).

(11) 9 C. W. N 703 (1905).
(12) 10 C. W. N. 1102n (1892).
(13) 10 C W N. 1102 (1906).

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England that, to make a debt attachable it is essential that the relation of creditor and debtor should exist between the judgment-debtor and the garnishee. Two practical tests have been applied in relation to this matter, namely, *first*, could the judgment debtor sue the garnishee for the amount and recover it? *Secondly*, would the debt vest in the judgment-debtor's trustee in the case of bankruptcy? Hence a garnishee order can be made where the debt is payable by instalments, for payment of the accruing instalments as they become payable from time to time, *Tapp* v. *Jones* (14). Consequently though annuities payable by trustees are attachable, *Nash* v. *Pease* (15), the money must have reached their hands and be also payable, *Webb* v. *Stenton* (2). These decisions recognise the distinction between a case where there is an existing debt payment whereof is deferred and a case where both the debt and its payment rest in the future: in the former case, there is an attachable debt, in the latter case there is not. See also *Hall* v. *Pritchett* (16), *Both* v. *Trail* (17) and *Fellows* v. *Thornton* (18). The distiction mentioned has also been recognised in the Irish Courts, *Sparks* v. *Younge* (19) and *Payne* v. *French* (20). It has similarly been ruled that an annuity payable under a trust-deed is attachable only in respect of sums that have accrued due, *Nokes* v. *Manders* (21) and *Bascombe* v. *Onge* (22). In America the principle is recognised as firmly settled that in case of annuities payable on fixed dates during the life of the annuitant without provision for an apportionment, as the claim of the annuitant is liable to be defeated on his death before the time of payment arrives, the claim is before such time contingent and not the subject of garnishment. It is hence stated in Rood on Garnishment, sec. 120, that on a promise to pay a certain sum on a certain date in each year as long as the annuitant shall live and at the same rate for any part of the year, the promisor can be charged as garnishee of the annuitant only for the amount which had accrued before the garnishment was served, for it is uncertain that she will live longer, *Salim* v. *Cooper* (23), *Easterly* v. *Keny* (24), *Sayward* v. *Drew* (25), *Dickinson* v. *Dickinson* (26), *Cony v. Day* (27), and *Briggs* v. *Beach* (28); compare *Damber Koeri* v. *Sham Kissen* (11). A similar exposition is given by Chief Justice Drake in his classical Treatise on Attachments, 7 Ed, sec. 555. The only solitary cases in which the contrary view has been maintained are those of *Red* v. *Power* (29) and *Kaiser* v. *Shaw* (30). In these two decisions, however, no explanation is suggested upon which it may be held that a debt though it is uncertain and contingent and may never become due and payable, may yet be subject to garnishment. The preponderance of authority is undoubtedly in favour of the view that it is only indebtedness which is in its nature absolute

(2) 11 Q. B. D. 518 (1883).
(14) L. R. 10 Q. B. 591 (1875).
(15) 47 L. J Q B. 766 (1878).
(16) 3 Q. B. D. 215 (1877).
(17) 12 Q. B. D. 8 (1883).
(18) 14 Q. B. D. 335 (1884).
(19) I. R. 8 Ch. 251.
(20) 10 Ir. Jur. N. S. 52.
(21) 15 I. L. T. R. 18.
(22) 15 I. L. T. R. 47.
(11) 9 C. W. N. 703 (1905).
(23) 15 Gray. 532.
(24) 36 Com. 18.
(25) 6 Maine 263.
(26) 59 Vermont 678; 10 Atlantic 521.
(27) 2 Miles. (Pa.) 412.
(28) 18 Vermont 115.
(29) 69 Miss. 242; 13 South 586.
(30) 104 Kentucky 119; 84 Am. St. Rep. 450 (1898).

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and payable at some time without contingency, that can be reached by garnishment process, *Smith* v. *Gilberts* (31). We are unable therefore to accept the contention of the Respondents that a fixed sum payable to the debtor monthly or only for life is subject to garnishment, although the aggregate amount which will be payable is uncertain and contingent. It is thus incontestable that the Respondents decree-holders were not entitled to the issue of a prohibitory order in respect of sums which had not accrued due, on the basis of their application: and that r. 46 of Or. 21 of the Code of 1908 is of no assistance to them.

In so far as r. 52 of Or. 21 is concerned, the case is equally clear. As already stated, that rule applies only where the property to be attached is in the custody of a public officer. It does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, and is restricted only to money actually in his hands [*Tulaji* v. *Balabhai* (32)]. The prohibitory order issued by the Court upon the application of the decree-holders cannot consequently be sustained.

It has finally been argued by the learned Vakil for the decree-holders that it is open to them to apply for attachment and sale of the right of the judgment-debtor to receive the allowance from the representatives of the purchaser. It has in substance been contended that, notwithstanding the restrictions upon alienation formulated in the conveyance, the right may be attached and sold in execution of a decree against the vendor. The question sought to be raised is by no means free from difficulty, and it is sufficient to state that when it arises, it must be answered in the light of the principles explained in the cases of *Asadali Molla* v. *Hyder Ali* (33), *Annapurni* v. *Swaminatha* (34) and *Tarasundari Debi* v. *Saroda Charan Banerji* (35), where the earlier authorities on the question of the assignability of a right to receive maintenance or allowance will be found reviewed. It has also been suggested by the learned Vakil for the Respondents that the restraint upon alienation of this right was invalid, and that in fact the entire settlement was fraudulent and inoperative in law. This also is a question of considerable nicety, and, if we treat it as one of first principles untrammelled by precedents, it does not follow by any means that the answer must necessarily be against the judgment-debtor [see also Erskine, Principles of the Law of Scotland, Book III, Sch. VI, sec. 4 ; On Arrestment of Alimentary Debts, 17th Ed., p. 444. Erskine, Institute of the Law of Scotland, Book III, Tit. VI, sec. 4; Bell, Commentaries on Law of Scotland, Book II, part II, Ch. 7, Ed. 1870, Vol. I, p. 124; Bell, Principles, sec. 2276, 8th Ed., Vol. II, p. 557. *Irvine* v. *McLaren* (36), *Harvey* v. *Calder* (37), *Bell* v. *Innes* (38). Green, Encyclopaedia of Scots Law, Vol. I, article on Alimentary Interest. Gloag and Irvine on Securities, p. 444. *Hewahs* v. *Roberton* (39), *Hughes* v. *Edwards* (40)]. It is sufficient for our present purpose to state that the applica-

(31) 71 Com. 149 ; 71 Am. St. Rep. 163.
(32) I. L. R. 22 Bom. 39 (1896).

(33) 14 C. W. N. 918 : s. c. 12 C. L. J. 918 ; I. L. R. 38 Cal. 13 (1910).
(34) I. L. R. 34 Mad. 7 (1910).
(35) 12 C. L. J. 146 (1910).
(36) 7 Shaw 317 (1829).
(37) 2 Dunlop 1095 (1840).
(38) 17 Dunlop 778 (1855).
(39) 9 Rettie. 175; 19 Scots L. R. 149 (1881).
(40) 19 Rettie 33 ; 29 Scots L. R. 911 (1892).

tion of the decree-holders by which the proceedings now before us were initiated, did not invite the Court to attach and sell the right of the judgment-debtor to receive the allowance. The interesting question suggested therefore cannot be discussed in this appeal.

The result is that this appeal is allowed, the order of the Subordinate Judge reversed, and the application for execution in so far as it seeks relief in respect of allowance from April 1910 onwards, dismissed with costs in all the Courts. We assess the hearing fee in this Court at five gold mohurs.

CARNDUFF, J.—I agree.

Appeal allowed.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE No. 2780 OF 1908.

WOODROFFE, J. TEUNON, J. 1911, 24, August.	MATABBAR MOLLAH, Plaintiff, Appellant, v. SASI BHUSAN GHATAK, Defendant and others, Respondents.

Registration Act (III of 1877), sec. 77—Suit for order directing registration of document—Limitation Act (XV of 1877), secs. 5, 6—30 days expiring during a Court holiday—Suit instituted on re-opening day if barred.

The provisions of sec. 5 of the Limitation Act apply to suits under sec. 77 of the Registration Act (III of 1877).

When therefore the period of limitation provided in that section for a suit for an order directing the registration of a document expired during the X'mas holidays:

Held—***That the suit if instituted on the day the Court re-opened would not be barred by limitation.***

NIJABUTOOLLA v. WAZIR ALI (2) ***followed.***

This was an appeal preferred on the 9th of December 1908, against the decree of Babu Atul Chandra Batabyal, Subordinate Judge of Zillah Burdwan, dated the 5th of September 1908, confirming that of Babu Ambika Charan Majumdar, Munsif of Burdwan, dated the 12th of June 1907.

The appeal arose out a suit for directing the registration of a document alleged to have been executed in favour of the Plaintiff-Appellant by the Defendant-Respondent.

The Defendant after presentation of the document for registration denied execution before the Sub-Registrar. The Plaintiff got an order from the District Registrar directing the registration of the document, but the Sub-Registrar refused to register the document on the ground that the document was presented before him more than 30 days after the order of the Registrar. This decision of the Sub-Registrar having been upheld on appeal by the Registrar, the Plaintiff instituted the present suit under sec. 77 of the Registration Act (III of 1877). The plaint was however not presented within 30 days of the last order of the Registrar as the 30th day fell within the X'mas vacation but it was presented on the day the Courts re-opened.

The Munsif held that the suit was not maintainable in that the document had not been presented before the Sub-Registrar within 30 days of the order of the Registrar directing the Sub-Registrar to register it. He further held that the suit was barred by limitation.

The Subordinate Judge on appeal held that the suit was maintainable, but that it was barred by limitation, relying on *Appa Rau* v. *Krishna Murthi* (5).

(2) I. L. R. 8 Cal. 910 (1882).

(5) I. L. R. 20 Mad. 249 (1896).

MATABBAR MOLLAH v. SASI BHUSAN GHATAK.

The Plaintiff preferred this second appeal.

Babu Hemendra Nath Sen for the Appellant.

Babu Bepin Behary Ghosh (Jr.) for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—This is a suit for an order directing the registration of a document.

The Munsif held, for the reasons stated in his judgment, that the suit was not maintainable, and that, if it was maintainable, it was barred by limitation, in that the suit was not brought within 30 days from the date of the dismissal of the Plaintiff's appeal by the Registrar.

The learned Subordinate Judge, on appeal, disagreed with the Munsif, in holding that the suit was maintainable, but held that the suit was barred, in that sec. 5 of the Limitation Act, which contains a proviso in the case where the Court is closed when (as here) the period of limitation expires, had no application to suits under the Registration Act. It is, no doubt, the general rule that a general enactment is not ordinarily presumed to be intended to interfere with a special Act ; and sec. 6 of the Limitation Act provides that "when, by any special or local law now or hereafter in force in British India, a period of limitation is specially prescribed for any suit, appeal or application, nothing herein contained shall affect or alter the period so prescribed." We are not here concerned with the wider question, whether sec. 6 is limited in its operation only to prevent the time within which a suit should be brought from being affected and whether it excludes the application of other provisions of the Limitation Act, such as those relating to the computation of the period of limitation. Nor are we concerned with other Acts of the Legislature, nor with other sections of the Limitation Act. The actual question before us (which is the only one which calls for decision) is whether sec. 6 of the Limitation Act excludes the application of sec. 5 of the same Act to suits brought under sec. 77 of the Registration Act (III of 1877). It has been held to be the general rule that where the parties are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity. See *Peary Mohun* v. *Anunda Churn* (1). And parties will not be called upon to do that which is impossible. The Legislature under the Registration Act has given a period of 30 days in which to bring a suit ; and it is not reasonable to suppose that that period is to be cut down to 29 days. There is, moreover, direct authority of this Court in favour of the Appellant's contention, to be found in the case of *Nijabutoolla* v. *Wazir Ali* (2), where it was held that the provisions of sec. 5 of the Limitation Act apply to suits under sec. 77 of the Registration Act. It was there held that sec. 5 had a general application to all suits, notwithstanding anything contained in sec. 6. This decision is not affected by the other decisions to which we have been referred relating to other Acts or other sections of the Limitation Act : for as pointed out in the case of *Girija Nath* v. *Patani Bibee* (3), sec. 6 is not in conflict with sec. 5. There the High Court pointed out that so far as sec. 5 is

(1) I. L. R. 18 Cal. 631 (1891).
(2) I. L. R. 8 Cal 910 (1882).
(3) I. L. R. 17 Cal. 266 (1889).

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concerned, the decisions then cited before it did not conflict with sec. 6, because those decisions did not extend the period of limitation. All that they did was to prevent the period of limitation from being curtailed by the closing of the Court; and the days on which the Court was closed must be considered as non-existent (*dies non*) and therefore they are not counted when the *dies non* happen to be days on which the period of limitation expires. There is no decision in this Court which holds that sec. 5 is not applicable to suits under the Registration Act; and we must therefore hold that the suit is not barred by limitation.

It was then argued that, even if that were so, the question is not to be regarded as one relating to a rule of limitation, but as one affecting the right itself, and that as the right to bring a suit is a statutory right, which depends on the terms of sec. 77 of the Registration Act, no right, in fact, accrues upon which a suit may be instituted, if in fact more than 30 days have expired, as stated in sec. 77. The first answer to this is, I think, the decision to which I have referred in *Nijabutoolla* v. *Wazir Ali* (2), where the matter was dealt with as a question of limitation. But, apart from this, I think that on a consideration of sec. 77 itself such contention fails. The object of the Legislature was that a person should have 30 days. Thirty days were given him for the purpose of doing something; and that something was the institution of the suit. But the intention was that he should be in a position to institute the suit on any one of these 30 days, there being nothing to oblige him to bring the suit at any time before the actual expiration of the period of 30 days. The objection on this ground therefore fails.

An argument has then been addressed to us upon the question of the maintainability of the suit. The learned pleader on behalf of the Respondent has sought to support the judgment on the ground which has been decided against him in the lower Appellate Court. It is true that that Court has held that the suit was maintainable; but in holding this it appears to have proceeded on the ground that the 30 days after the making of the order are to be 30 days from the date of the communication of the order, and that therefore the Plaintiff had a right to sue under sec. 77 of the Registration Act. The authority relied upon is that in the case of *Abdul Ali* v. *Mirja Khan* (4). It is not necessary to go into the question of law upon this point. But, assuming that the law is correctly stated in the judgment under appeal, the learned Subordinate Judge has assumed, without any evidence, that the suit was brought within 30 days of the communication of the order, and that the order was not known to the Plaintiff on the date upon which it was made. Now, there is no evidence at all upon this point, as no evidence was, having regard to the findings of the lower Court, taken at all. In fact, it has been urged by the Respondent, that that question was not one which properly arose in the suit, having regard to the pleadings: for, as the Munsif points out in his judgment, want of knowledge of the order of dismissal had not been pleaded, which alone, in his opinion, could save limitation on the authority of the ruling in *Abdul Ali* v. *Mirja Khan* (4). Although the Appellant has relied on the statements made in para. 4 of the plaint, it is very

(2) I. L. R. 8 Cal. 910 (1882).

(4) I. L. R. 28 Bom. 8 (1903).

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doubtful whether such a contention can be taken to be implied or can be extracted from any statement therein appearing. The point, however, appears to have been taken before the Munsif, and it was one of the grounds of appeal to the Subordinate Judge. And, as the question is a technical one, and, at the most, the Plaintiff was one day out of time, I think that we should in this case give the Plaintiff the benefit of the doubt we have upon this matter, and enable him to give evidence upon this point, so that if he establishes it, the merits of the case may be enquired into.

There is one point which, in this connection, should be cleared up. In para. 4 of the plaint the Plaintiff says that he started for Katwa on the 15th, which was the last day of the period of limitation, but that when he reached the Sub Registrar's office at that place, he found that the Sub-Registrar had left his office after finishing the registration work of the day. He does not state (and he should state) at what hour he reached the Registry office. An enquiry must be made as to what the office hours of the Sub-Registrar are.

On these grounds I would set aside the decree under appeal and would remand the case to the lower Appellate Court in order that the question as to when the order of the Sub-Registrar was communicated to the Plaintiff may be determined, and when, therefore, the last day of the period of 30 days expired.

If it is found that the Plaintiff presented himself at the Registry office, or presented the document within the prescribed 30 days, having regard to the decision in *Abdul Ali* v. *Mirja Khan* (4) and to the provisions of sec. 26 of the Registration Act, the Court will proceed to decide the suit on the merits. If the period of 30 days has been exceeded, then the suit is to be dismissed. The costs of this appeal will abide the result.

(4) I. L. R. 28 Bom. 8 (1903).

TEUNON, J.—I agree.

Case remanded.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 797 OF 1911.

HOLMWOOD, J.
N. CHATTERJEA, J.
1911,
3. August.

TRIPUNDESHUR MITTER, Petitioner,
v.
THE CORPORATION OF CALCUTTA, Opposite Party.

Calcutta Municipal Act (III of 1899, B. C.), secs. 3 (39) (a), 351 —"Re-erection," meaning of—Building line, infringement of—"Building," tin shed if.

The offence of infringing on a building line is the erection or re-erection of the wall of a building within that line. The replacing of the roof on four posts already in existence does not constitute the offence.

The repairing or renewing of the roof of a shed consisting of four posts and a tin roof was not re-erection within the meaning of the Calcutta Municipal Act.

Quære—*Whether such a shed is a "building."*

This was a Rule granted on the 7th of July 1911, against an order of Mr. N. C. Ghuttak, Municipal Magistrate of Calcutta, passed on the 9th of June 1911, under sec. 449 (*ii*) of Act III (B. C.) 1899.

The Petitioner *inter alia* stated that he had got a timber yard at No. 61, Russa Road, North, in Bhowanipur, in the Suburb of Calcutta, and there had been in existence on that yard for over 10 years an ordinary shed used as a working place for carpenters. In January 1911, the Peti-

tioner made certain necessary repairs of the thatches in the roof of the said shed without any change in the dimension or height or without any alteration in any other part of the same. The Petitioner subsequently came to learn that proceedings were going to be taken against him by the Corporation of Calcutta on account of the said repairs on the ground that the shed in question fell within the prescribed road line of Russa Road, North, in contravention of sec. 551 of Act III (B C.) of 1899. The Petitioner thereupon having approached the Building Surveyor of District No. IV on the subject, the latter told the Petitioner that if he gave an undertaking to set back the shed when required at his own cost and without claiming any compensation therefor, no action would be taken against him for the repair done, and accordingly on the 13th of January 1911, the Petitioner gave a written undertaking to the effect as desired by the Building Surveyor.

Notwithstanding such undertaking given by the Petitioner, proceeding was subsequently taken against him before the Municipal Magistrate of Calcutta on the charge that he had re-erected a tiled hut without sanction and that the hut fell on the prescribed road line of Russa Road, North, in contravention of sec. 351 of Act III (B. C.) of 1899.

The Magistrate convicted the Petitioner on the 9th June 1911 and directed, under sec 449 (*ii*) of the Act, that so much of the hut re-erected be demolished as would remove the hut from the prescribed road line and leave six feet open space from the masonry building on the north. Against this order the Petitioner moved the High Court and obtained this Rule.

Babus Provash Chandra Mitter and *Susil Madhub Mullik* for the Petitioner.

Babu Debendra Chandra Mullik for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This conviction is for re-erecting a building within the building line of a certain road. It appears that before the building line was laid down the shed consisting of four posts and a tin roof stood on identically the same spot as it does now. After the building line was laid down the owner had occasion to take the roof off and the Municipal authorities happened to see this place when there was no roof on the shed. Whether the owner repaired the same bits of tin or whether he put in new bits of tin or what he did in renewing or repairing his roof there is nothing to show. But he eventually put up a roof either made of new tin or repaired, it does not matter which, in identically the same place as the old roof.

Now this is certainly not a re-erection. It is admitted that sec. 3 (39) (*a*) is the only definition which can apply in this case, and this is reconstruction of the building if more than one half of the cubical contents has been taken down. Now the removal of this roof for the purpose of repairing did not alter the cubical contents of this shed in the least except a small area which the lean-to-roof may have contained. That certainly cannot have been anything like one-half or even a quarter of the whole cubical content. The expression re-erected does not apply.

Now comes the question whether sec. 351 has been infringed. No portion of any building or wall abutting on any street shall be constructed within the line. We cannot find any definition of the word building, and we are not at all clear that this roof with four posts is a building:

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Contents.

NOTES.

The constitution of Benches and the distribution of business amongst them since the reopening of the High Court has been as follows :—

PRIVY COUNCIL DEPARTMENT AND PRESIDENCY GROUP.—The Hon'ble the Chief Justice and the Hon'ble Mr. Justice N. R. Chatterjea.

RAJSHAHI GROUP.—The Hon'ble Mr. Justice Caspersz and the Hon'ble Mr. Justice D. Chatterjee.

PATNA GROUP.—The Hon'ble Mr. Justice Mookerjee and the Hon'ble Mr. Justice Carnduff.

BURDWAN GROUP.—The Hon'ble Mr. Justice Stephen and the Hon'ble Mr. Justice Coxe.

THE CRIMINAL BUSINESS.—The defended criminal admitted appeals and capital sentence cases—The Hon'ble Mr. Justice Harington and the Hon'ble Mr. Justice Brett.

The Criminal Business other than the defended admitted appeals and capital sentence cases and undefended cases—The Hon'ble Mr. Justice Holmwood and the Hon'ble Mr. Justice Sharfuddin.

ORIGINAL SIDE.—The Hon'ble Mr. Justice Woodroffe, the Hon'ble Mr. Justice Fletcher and the Hon'ble Mr. Justice Chitty sitting singly.

THE SIXTH CRIMINAL SESSION OF THE YEAR WILL commence its sittings from Wednesday the 29th instant, Mr. Justice Woodroffe presiding.

WE ARE GLAD TO OBSERVE THAT REFERENCES ON the Original Side are now heard right through from day to day during the ordinary Court hours. We are sure that the observance of a similar practice with regard to the examination of witnesses on commission would greatly expedite cases and afford great relief to suitors in respect of the expenses of litigation. Reforms in the machinaries of the administration of justice along such lines will also be greatly appreciated by junior members of the Bar as their services are bound to be in larger requisition consequent on such changes. We would also draw the attention of the District and Presidency Small Cause Court Judges for the introduction of similar reforms in their Courts as well. The present practice of proceeding with the commissions after Court time proves very expensive to the parties. Judges may therefore well lay it down in their orders that the commissioners should proceed with their work during ordinary Court hours.

A QUESTION OF SOME NOVELTY RECENTLY CAME up for decision before a Bench of the Bombay High Court in *Emperor* v. *Nour Mahomed Soleman* reported in I. L. R. 35 Bom. 368. During the last Dewali festival, the accused who owned a toy shop abutting on a public road in the town of Bombay exhibited in the windows of the shop overlooking the road certain clockwork toys, with a view, no doubt, to attract purchasers. The toys, it is reported, consisted of effigies of a lion, a tiger and a cock, and there was, it is added, an electric bell which rang causing a spark of electricity. These, according to the findings of the Magistrate, proved irresistible to the simple folk of Shekh Menon Street, with the result that "thousands of people collected on the road, there were dangerous rushes, people were knocked down and great obstruction and danger was caused to those using the road." The Police, we are informed, called upon the accused to stop the exhibition but he refused and thereupon the accused and his servant were charged with committing an offence under secs. 283 and 114 of the Penal Code, and they were convicted and sentenced by the Magistrate to pay a fine of Rs. 25 each.

THE LEARNED JUDGES, CHANDAVARKAR AND Heaton, JJ, hold with perfect justice that there was on the findings a public nuisance and that the act of the accused was the "efficient cause" of it. But this being a criminal trial the question was whether the accused intended to cause the results which in fact followed. Their Lordships say "their object was to attract a crowd, and they knew that a crowd would be, and as a matter of fact was attracted by what they did and they must be regarded as having intended that consequence." The language here used by their Lordships if literally interpreted may, however, convey an erroneous idea as to the reasoning which really under-

lies their decision. Looking at the facts of the case it would, to our mind, be unreasonable to hold, and the Judges could hardly have intended to hold, that the accused actually anticipated all the mischief caused by the crowd or that they desired or even expected that such a crowd would collect before their shop. They no doubt wanted to attract a crowd but the result may be assumed to have exceeded their expectations. When, however, they did see the mischief caused by their act, innocent as it might have been in the beginning, they should, in the interest of the public, have stopped the show which was attracting a large number of idlers, and they were certainly unreasonable in not accepting the suggestions to that effect made by the Police. The user of their property by the accused, as held by the Judges, ceased to be reasonable the moment the crowd collected in sufficient numbers to cause obstruction and danger.

THE LIABILITY OF COMMON CARRIERS IN INDIA.

The Common Law liability of carriers was a remnant of the old Common Law rule relating to all bailees based, as Holmes points out, on the fact that while the bailee had an action against anybody who deprived him against his will of anything in his possession, the bailor had none. Thus all bailees in Common Law were absolutely liable for loss of bail simply upon proof of delivery. This Common Law doctrine continued to be held long after the reason for it had disappeared and it was laid down even so late as when the *Southcote's* case, 4 Co. 83 b (1601), was decided. *Southcote's* case continued as authority till it was ultimately displaced by the judgment of Holt, C. J., in *Coggs* v. *Bernard*, 2 Ld. Raym 909. So long as this absolute liability continued there was no occasion to distinguish between carriers and other bailees. But even before *Southcote's* case the absolute liability of bailees was breaking down and a distinction was made between carriers for hire and factors and servants, two years before *Southcote's* case, in *Woodlife's* case, Owen 57. That was probably the first case in the reports which recognised a special liability in carriers as distinguished from other bailees.

The decisive turn was given to the law of bailments by the supercession of detinue for bailments by an action on the case and the introduction of the theory of *quid pro quo* borrowed from the action of debt. Detinue afforded no relief for damage to the thing caused by the negligence of the bailee provided that there was no active wrong and the thing in suit was produced. This helped the supercession of detinue by an action on the case which furnished the further advantage that in it the Defendant could not wage his law as in detinue. But in the state of the law at that time a Defendant could not be held liable for a mere non-feasance; it was necessary to allege mal-feasance. It was thus that it became necessary to allege an undertaking by the Defendant to do the act upon which alone his negligence in doing it would amount to a mal-feasance. Hence the allegation of *super se assumpsit* in this form of the action on the case.

There was another branch of law which contributed to the development of the law of common carriers and that was the law relating to common farriers. The law required persons following a public occupation to ply their trade in the interest of the public, so that they would be liable not only for negligent performance of a duty undertaken by them as such common farrier but also for failure to do their work at the request of any member of the public.

By the fusion of these two different liabilities, of bailees by reason of their supposed or real undertaking to take care of the thing and of common farriers by reason of the public nature of their calling, the law of bailment, now that both the forms of action became fused in one, took a new course of development. Henceforth for an action for damage done to a bail and *a fortiori* for loss of bail, it was necessary either to allege an undertaking (*super se assumpsit*) in the bailee or his common calling which gradually came to be understood as implying an undertaking. The result of this process was that from being an action for a wrong as it originally was the action on a bailment now began to sound in contract.

In *Bernard* v. *Coggs* in which Holt, C. J., first gave a definite form to the English law of bailment, it was assumed to have been derived from the Roman law and Holt, C. J., proceeded to expound the liability of different kinds of bailees by reference to Roman law. It cannot be doubted that the subsequent history of bailment in English law has thus been largely moulded by ideas borrowed from Roman law through Bracton from whom Holt, C. J., drew his Roman learning. But in its origin it was English.

The development of a law of common carriers also was peculiarly English though it may have been moulded later on, on the model of the Roman law of *quasi*-contract based on the occupation of *nautae* while that of *caupones* and *stabulari* undoubtedly formed the basis of the Common law liability of inn-keepers. But so far as carriers were concerned, Roman law only attached the liability to ship-owners. The English law of common carriers however took its particular concrete shape by reference to the English law relating to common farriers.

When Lord Holt delivered his judgment in *Coggs* v. *Bernard* "common" carriers had not yet come to have the comprehensive significance that it now has for he speaks of common carriers along

with common bargemen, lightermen, &c., as being under the same kind of liability. But the nature of their liability was finally settled by him as it now is except in so far as it is modified by statute. "The law," he says, "charges this person thus intrusted to carry goods against all events except acts of God and King's enemies."

"King's enemies" do not include robbers or rebels as was established in the *Marshall's* case, S. B. 33, Henry VI, 1 pl 13, where a prisoner was released from the debtor's prison of Marshalsea by rebels and the defence was that the debtor was released by the King's enemies. The result of that case would seem to be to confine this exception to a carrier's liability to the acts of alien enemies of the King.

"Act of God" was described by Lord Mansfield in *Forward* v. *Pittard*, 1 T. R. 27, as such act as could not happen by the intervention of man, like storms, lightening and tempest. In this view he held that where the loss was due to a fire in adjoining premises it was not an act of God, though of course it would undoubtedly be a *casus fortuitus* under the Civil law. The law on the subject was further specified by Cockburn, C. J., in the leading case of *Nugent* v. *Smith*, 1 C. P. D. 423. While acts originating in human agents were undoubtedly not acts of God, it was there pointed out that it was not every act done by elemental forces that would be a ground of exemption from liability. The carrier is liable though the loss was due to elemental forces if it was to any extent caused by his negligence, as for instance by negligent exposure to danger. The carrier, it was laid down, is bound to do his utmost to protect the goods. If he is wanting in this amount of care he is liable though the loss be caused by an "act of God." But at the same time the standard to be applied is that of a man of ordinary prudence unless, it would seem, he had some special knowledge or capacity. He is bound to do what a man of ordinary prudence would do, but it is not necessary that "the *vis major* should be such as no amount of human care or skill could have resisted or the injury such as no amount of human skill could have prevented." In this case the judges held that a carrier by sea was not liable for the death of a man by reason of the fright into which she got owing to the ship being tossed by a tempest where no negligence was found. In an old case it was also held that jettison was a good defence as it was due to an act of God.

Lord Mansfield gave expression to the true position of a common carrier when he said that they were in the nature of insurers against all risks but those due to an act of God or the King's enemies.

In India the Common law relating to carriers was long applied before the Carriers' Act of 1865 empowered carriers by land or by inland navigation to limit their liability by contract. But by sec. 8 of the Act it is laid down that even in case of a limitation of liability by contract or otherwise a common carrier would be liable for the negligence of its servants. While following the common law sec. 9 places the onus of proving want of negligence on the carriers themselves.

After the passing of the Indian Contract Act the question arose whether the liability of common carriers like that of all other bailees was not governed by the provisions of the Contract Act. In *Kuverji* v. *G. I. P. Railway*, I. L. R. 3 Bom. 109, the Bombay High Court held with reference to the definition of bailment in sec. 148 that bailee under that Act included common carriers and that therefore the common law rule of carriers' liability was abrogated by the Contract Act. The Calcutta High Court in *Mothura Kant* v. *I. G. S. W. Co*, I. L. R. 10 Cal 160, on the other hand held that the provisions of the Contract Act did not abrogate the common law rule as limited by the Carriers' Act. The view of the Calcutta High Court was adopted by the Privy Council in the *Irrawaddy Flotilla Co.* v. *Bhagwan Das*, L. R. 18 I. A. 166. Common Carriers in India therefore are now as before liable as by the common law in England subject to limitations imposed by the Carriers' Act, which in its turn follows generally the plan of the English Act.

A question arose in two different Courts in India as to the meaning of "common carriers" with reference to the status of the *Campagnie des Messageries Maritimes* regarding carriage contracts entered into in India. The Calcutta High Court held that being a French Company they were not common carriers by common law, that their position was therefore governed by the Indian Contract Act. (*Mckillan* v. *Campagnie des Messageries Maritimes*, I. L. R. 6 Cal. 227). The Madras High Court, on the other hand, in a case where the contract was entered into in Calcutta, held that the *lex loci contractus* would apply and the *Campagnie* should be held to be Common Carriers. *Haji Ismail Sait* v. *The Company of the Messageries Maritimes*, I. L. R. 28 Mad. 400. It would seem that the Calcutta High Court too applied the *lex loci contractus* in that it made the provisions of the Indian Contract Act applicable, and it is difficult to see on what principle the English Common Law which was a part of the *lex loci* could be excluded. No doubt everything depended on the meaning of the words "common carrier." The definition in the Carriers' Act is not applicable to this case as that Act applies to carriers by land or inland navigation. But common carrier is not so much of a technical term in English law that it cannot apply to a foreigner if he plies the trade of a common carrier within the jurisdiction of the Common Law.

The liability of Railway Companies as carriers is limited by legislation (Indian Railways Act, 1890,

sec. 12) to that of a bailee under secs. 151, 152 and 161 of the Indian Contract Act subject to further limitation by a contract signed by the bailor. But sec. 76 provides, like sec. 9 of the Carriers' Act that the burden of proving want of negligence lies on the Railway Company. It has been held that the effect of this is to establish that loss or damage of goods is *primâ facie* evidence of negligence, (I. L. R. 24 Cal. 786 ; I. L. R. 22 All. 361).

The liability of a carrier for passengers is on a different footing from that for goods. In *Collett* v. *L. N. W. Ry.* (16 Q. B. 985), Lord Campbell, following a long judicial usage, had observed that the Railway Company was bound to carry the Plaintiff *safely*. Taken literally this would make Railway Companies insurers for the safety of passengers in the same manner as common carriers were insurers for the safety of goods. But Lord Halsbury in delivering the judgment of the Judicial Committee in *E. I. Ry. Co.* v. *Kalidas*, 5 C. W. N. 449, pointed out that in the circumstances of that case Lord Campbell only meant to imply that though there was no contract between the Plaintiff and the Railway Company if the Company was bound to carry him they were bound to exercise the same care and diligence with respect to him as with respect to any other passenger with whom there was a contract. In this case the Judicial Committee laid down on a consideration of the English case law that the Railway Company was not bound to carry a passenger 'safely' but only with reasonable care and diligence and that they were not therefore liable for the death of a passenger in the absence of negligence.

It would seem that this is the law not with reference to Railways only but also with regard to all other carriers. Thus for instance Lord Chelmsford in *Henderson* v. *Stevenson*, L. R. 2 H. L. Sc. 470, which was a case of a steam-packet company held that the steam packet company was under a liability to carry and convey passengers with reasonable care and diligence which implies absence on the part of the company of negligence. Apart from this however the decision in the case of the Railway company is not based on any ground peculiar to Railway companies but on those common to them with all carriers of passengers.

Reviews.

THE LAW REPORTS OF BRITISH INDIA. *By M. Subramániam, B. A., B. L., and M. V. Krishnaswamy, B. A., B. L., Vakils, High Court, Madras. Vol. I, Allahabad: The Law Reports Office, Madras, South India. 1911.*

The compilers of this volume had collaborated with Mr. Sanjiva Row in bringing out the now well-known "Indian Reports" which supplied the profession with excellent annotated reprints of the Privy Council decisions contained in Moore's Indian Appeals. The death of Mr. Row having brought the arrangement to an end, the present compilers have, after securing the permission of the Government, commenced reprinting in a cheap and handy form the decisions which appeared in Government Law Reports up to 1876. In this volume appear the Agra Full Bench Rulings and the cases repoted in the North West Provinces High Court Reports, Vols. I to III, covering the periods from 1866 to 1867 and 1869 to 1871. The volume is very neatly got up and will prove useful.

THE CODE OF CRIMINAL PROCEDURE, Act V of 1895, with Notes and Notifications. *By Babu Bijoy Krishna Bose, B. L., of the Alipur Bar and Vakil High Court. Lila Printing Works, Bowbazar, and to be had of the author at 28, Hazra Lane, Kalighat, Calcutta. Price Rs. 6.*

We are glad to welcome this moderately priced and moderately annotated edition of the Criminal Procedure Code. The annotated editions of the Code have gone on increasing in such numbers, size and price in recent years that it is sometimes distressing to decide which of them to consult for one's ordinary daily use either at home or in the Courts. The want therefore of a handy edition of the Code which would not prove confusing to the profession at times of hurry and furnish useful information from the more recent and important decisions, was greatly felt and the work under review, we are glad to find, answers that requirement. The early experience acquired by the author in rendering frequent assistance to the Public Prosecutor at Alipur, and later on in conducting the defence in the great Alipur Conspiracy Case has enabled him to deal with the sections of the Code relating to Police investigation, magisterial enquiry and other matters connected with the progress of trial in the Courts in a thoroughly practical manner. For instance under sec. 162 and other sections he points out that a number of rulings are not of much practical importance having regard to the changes in the law. This method of annotation, we regard as the chief merit of the work. The author has, however, taken care to embody all recent rulings up to September last in this work. For instance we find the *Stallman* case, 15 C. W. N. 1053, referred to both in the notes and the addenda. The real point of a case has been printed in bold type in the annotations which makes the work of reference easy. All the same the annotations still leave considerable room for classification and we are also of opinion that the index is somewhat meagre. The size of the book is attractive, the binding neat and printing clear. Altogether practitioners will find it a very handy work of reference.

TRIPUNDESHUR MITTER *v.* THE CORPORATION OF CALCUTTA.

but from the use of the expression "wall abutting on a public street" we presume that the offence intended was one which is indicated in sec. 3 (3) of the Act where the "building line" is defined as meaning "a line (in rear of the street alignment) up to which the main wall of a building abutting on a street may lawfully extend." It is therefore clear that the offence of infringing on a building line is the erection or re-erection of the wall of a building within that line, and we do not think that the replacing of the roof upon the same posts can fall within the purview of the law. Admittedly it is the front posts and not the roof which caused the trouble; and if the Municipality wish to remove the obstruction they must obtain powers obviously to remove the posts, because the roof cannot be removed unless the posts are removed, and the posts appear to have been always in the same position as they are now.

The rule must therefore be made absolute and the order of the lower Court discharged.

Rule made absolute.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

APPLICATION IN THE PRESIDENCY SMALL CAUSE COURT.

SUITS NOS. 19 AND 706 OF 1910.

HARINGTON, J. 1911, 30, January. } JOHAN SMIDT, Plaintiff, *v.* RAM PRASAD, Defendant.

Presidency Small Cause Courts Act (XV of 1882), sec. 38—New trial, power of Court to order—Judgment against weight of evidence.

Sec. 38 of the Presidency Small Cause Courts Act (XV of 1882) places no limitation upon the power of the Court to order new trial in a matter when the judgment is manifestly against the weight of evidence; such power is not restricted to questions of law only.

SASSOON *v.* HARRY DAS BHUKUT (1) *relied on.*

This was a Rule obtained by the Defendant in suits Nos. 19 and 706 of 1910 of the Calcutta Small Cause Court calling upon the Plaintiff to show cause why the order of the Small Cause Court for a new trial in the suit should not be set aside.

These were suits on contracts alleged by the Plaintiff to have existed between the parties. They were originally heard and tried by the learned Second Judge of the Calcutta Small Cause Court. Evidence was gone into and upon the evidence adduced the learned Second Judge held there was no contract between the parties and dismissed the suits. The Plaintiff thereupon applied under sec. 38 of the Presidency Small Cause Courts Act for a new trial on the ground that the learned Second Judge had erred in holding that there was no contract between the parties and that his decision was wholly against the weight of evidence. The application was heard by a Bench composed of the learned Chief Judge and the Second Judge of the Small Cause Court. The latter would dismiss the application but the former granted it and transferred the case to the file of another Judge. The Defendant now obtained this rule on the ground that in the absence of any question of law the Small Cause Court has no power to order a new trial on a pure question of fact.

Mr. A. K. Ghose for the Petitioner argued that the learned Chief Judge in directing the new trial illegally assumed the functions of a Court of Appeal and that the said order was passed without

(1) 1 C. W. N. 44 (1896).

JOHAN SMIDT *v.* RAM PRASAD.

jurisdiction. [*Sadasook Gambir Chund* v. *Kannayya* (2)].

Mr. N. N. Sarcar showed cause that the order of the Bench was perfectly legitimate and that the Small Cause Court can in any suit order a new trial to be held or alter, set aside or reverse the original decree or order upon such terms as it thinks fit. [*Hassanbhoy Visram* v. *The British India Steam Navigation Company* (3)] referred to.

The JUDGMENT OF THE COURT was as follows :—

HARINGTON, J.—This Rule must be discharged. Sec. 38 of the Presidency Small Cause Courts Act gives the Court power, *inter alia*, to order a new trial to be held. It has been argued by learned Counsel in support of the Rule that the Court can only exercise the power under sec. 38, if a question of law arises, but I find no such limitation in sec. 38, and I think that the judgment in the case of *Sassoon* v. *Harry Das Bhukut* (1) shows that a new trial may be ordered when the judgment is manifestly against the weight of evidence.

The Rule must therefore be discharged with costs.

Mr. H. C. Dutt, Attorney for the Petitioner.

Messrs. Fox and Mundal, Attorneys for the Plaintiff.

A. K. G. *Rule discharged.*

(1) 1 C. W. N. 44 (1896).
(2) I. L. R. 19 Mad. 96 (1895).
(3) I. L. R. 12 Bom. 579 (1888).

[FULL BENCH REFERENCE]
IN
APPEAL FROM ORDER
No. 44 OF 1908.

JENKINS, C. J.
WOODROFFE, J.
MOOKERJEE, J.
CARNDUFF, J.
CHATTERJEE, J.
1911,
Heard,
16, August.
Judgment,
5, September.

KARTIK CHANDRA GHOSH and another, Objectors, Appellants,
v.
ASHUTOSH DHARA, Decree-holder, Respondent.

Civil Procedure Code (Act XIV of 1882), secs. 244, 278, 280—Decree for money against judgment-debtor personally—Claim by him as shebait *of Deity—Appeal—Second appeal—Party.*

When A, in execution of a decree for money against B personally, attaches and proceeds to sell properties of which B alleges that he is in possession, not in his own right but as shebait *of a Deity to whom the properties have been dedicated, the question raised falls within the scope of sec. 278 read with sec. 280 of the Civil Procedure Code of 1882 and not within that of sec. 244 of that Act.*

KURIYALI *v.* MAYAN (1) and PUNCHANAN *v.* RABIA BIBI (2) *referred to.*

This was an appeal preferred on the 14th of February 1908, against an order of Mr. F. Roe, District Judge of Zillah Hughly, dated the 4th of October 1907, affirming an order of Babu Sripati Chatterjee, Sub-Judge of that district, dated the 8th of August 1907.

The appeal came on for hearing before MOOKERJEE and VINCENT, JJ., who on the 25th August 1909 referred the case to a Full Bench.

(1) I. L. R. 7 Mad. 255 (1883).
(2) I. L. R. 17 Cal. 711 (1890).

KARTIK CHANDRA GHOSH *v.* ASHUTOSH DHARA.

The ORDER OF REFERENCE was in the following terms :—

MOOKERJEE AND VINCENT, JJ.—On the 20th May 1907, one Ashutosh Dhara, Respondent in this appeal, obtained, in the Court of the Subordinate Judge of Hughly, a decree for money against Kartik Chandra Ghosh and his two brothers, now Appellants before this Court. On the 4th June 1907, Ashutosh applied for execution of his decree. As certain properties had been attached before judgment, the Court directed the issue of sale-proclamation and fixed the 13th August for sale. On the 7th August the judgment-debtors presented a petition of objection under sec. 244 of the Civil Procedure Code of 1882, in which they urged that the properties attached and intended to be sold were in their possession, not on their own account, or as their own properties, but in trust for four idols in whose favour they had been dedicated by their ancestors under a deed of endowment executed on the 31st January 1883. The Sub-Judge held that the question raised fell within the scope of sec. 278 and not sec. 244, and under the proviso to the former section, declined to make the investigation on the ground that the claim had been designedly and unnecessarily delayed. The sale then took place in due course on the 13th August, and the properties were purchased by the decree-holder. The judgment-debtors then appealed to the District Judge on the ground that the objection preferred by them fell within the scope of sec 244, and that it should not have been summarily rejected without investigation. The District Judge, however, held that the judgment-debtors were the representatives, not of a party to the suit but of a Deity who was not a party to the litigation. In this view, he held that the claim must be taken to have been preferred under sec. 278, and so affirmed the order of the Court of first instance. The present appeal is directed against the order of the District Judge. On behalf of the Appellants, reliance has been placed upon the cases of *Begraj* v. *Kundali* (4) and *Jogendra* v. *Gobinda* (5), in support of the view that the objection raised falls within the scope of sec. 244, and reference has also been made to some observations in the case of *Punchanan* v. *Rabia Bibi* (2). On behalf of the Respondent reliance has been placed upon the cases of *Rooplal* v. *Bekani Meah* (6), *Bhajahari* v. *Ramlal* (7), *Ram Krishna* v. *Padma Charan* (8) and *Amar Chand* v. *Nani Gopal* (9), in support of the view that the question raised is covered by sec. 278 and our attention has also been drawn to the case of *Ramanathan* v. *Levvai* (10), where a similar view was taken by a Full Bench of the Madras High Court. There is a clear conflict of judicial opinion upon this subject, and under the Rules of Court, we are bound to refer the matter for decision to a Full Bench. The question which we refer for decision may be formulated as follows.

If A in execution of a decree for money against B personally, attaches and proceeds to sell property of which B alleges that he is in possession, not in his own right but as *shebait* of a Deity to whom the properties have been dedicated, does the question raised fall within the scope of sec. 244 or 278 of the Code of 1882.

(2) I. L. R. 17 Cal. 711 (1890).
(4) 8 C. W. N. 353 (1902).
(5) 12 C. W. N. 310 (1908).
(6) I. L. R. 15 Cal. 437 (1888).
(7) 6 C. W. N. 63 (1901).
(8) 6 C. W. N. 663 (1902).
(9) 12 C. W. N. 308 (1907).
(10) I. L. R. 23 Mad. 155 (1898).

KARTIK CHANDRA GHOSH *v.* ASHUTOSH DHARA.

As the question arises in an appeal from an Appellate order, the whole case must be referred for final decision by the Full Bench.

Babu Hara Kumar Mitter (with him *Babu Satyendra Nath Mukerjee*) for the Appellants.—Refers to secs. 50, 244, 278, 279, 280, 281, 282, 283, 331—"Party" in sec. 244 means the person whose name appears on the records—not the "persona" or capacity.

If a person has two capacities there is no reason why he should not make his objections in both capacities.

The question whether the judgment-debtor has a saleable interest or not is clearly a question under sec. 244. When he raises a *jus tertii* the question still is whether the judgment-debtor has a saleable interest. The executing Court for the purpose of deciding this question may go incidentally into the question of title of the third party. It will not surely bind the third party, but the question will be a question under sec. 244 all the same. Cites *Nga Tah Yah* v. *Burn* (11). *Kuriyali* v. *Mayan* (1) is in point and in my favour. The Privy Council in *Prosunno Kumar* v. *Kalidas* (3) has approved of this decision and it is therefore binding on this Court. The Full Bench decision in *Punchanan* v. *Rabia Bibi* (2) is also in my favour.

[THE CHIEF JUSTICE.—In that case the question came under sec. 234 and so under sec. 244].

The question was one of assets or no assets.

[THE CHIEF JUSTICE.—Assets or no

(1) I. L. R. 7 Mad. 255 (1883).
(2) I. L. R. 17 Cal. 711 at p. 713 (1890).
(3) I. L. R. 19 Cal. 683 (1892).
(11) W. R. F. B. 8: s. c. 2 B. L. R. F. B 91-(1868).

assets in the hands of the representative of the judgment-debtor.]

Babu Baidya Nath Dutt (with him *Babu Tarini Das Banerjee*) for the Respondents was not called upon.

The JUDGMENT OF THE COURT was as follows:—

The question referred for decision to the Full Bench has been formulated in the following terms.

If A in execution of a decree for money against B personally, attaches and proceeds to sell properties of which B alleges that he is in possession, not in his own right, but as *shebait* of a Deity to whom the properties have been dedicated, does the question raised fall within the scope of sec. 244 or 278 of the Code of 1882?

In order that a question may be determined under sec. 244, it must arise between the parties to the suit in which the decree was passed. The question sought to be raised is not of this description, because while B is a party to the suit in his personal capacity the claim is advanced by him in his capacity of *shebait* of a Deity who is not a party to the suit.

In the opinion of the Full Bench, therefore, the question raised does not fall within the scope of sec. 244. On the other hand, it falls within the scope of sec. 278 read with sec. 280.

It has been argued, however, that this view is contrary to two decisions which are binding upon the Full Bench, namely, *Kuriyali* v. *Mayan* (1) and *Punchanan* v. *Rabia Bibi* (2). The first decision, no doubt, involves by implication the view that the question raised falls within the scope of sec. 244, but it is not binding upon this Court: it was approved by the

(1) I. L. R 7 Mad. 255 (1883).
(2) I. L. R. 17 Cal. 711 (1890).

KARTIK CHANDRA GHOSH *v.* ASHUTOSH DHARA.

Judicial Committee in *Prosunno Kumar* v. *Kalidas* (3) upon an entirely different point, namely, that sec. 244 does not cease to be applicable to proceedings in execution merely because the execution purchaser is a stranger to the suit. The decision in *Punchanan* v. *Rabia Bibi* (2) is by a Full Bench of this Court, and is binding till overruled by a Special Bench. It does not, however, decide the question now in controversy, but merely deals with the converse question.

The result is that the appeal to the District Judge as also the appeal to this Court must be deemed incompetent. The appeal is, therefore, dismissed with costs of the hearing before the Division Bench and the Full Bench, the hearing fee for each hearing being fixed at two gold mohurs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

L. P. APPEAL NO. 9 OF 1911.

JENKINS, C. J.
CHATTERJEE, J.
1911,
Heard, 30 and 31, August.
Judgment, 31, August.

DHARMA DAS MANDOL, Plaintiff, Appellant,
v.
GOSTA BEHARY MANDOL and others, Defendants Nos. 1 & 2, Respondents.

Debutter, *private, consensus of co-sharers if may change character—Treatment of property as secular, effect of—Partition of property by* shebaits *if converts property into secular—Legal conversion, proof of.*

Where a private debutter *had been partitioned between members of the family for the better enjoyment thereof and there had been sales and mortgages of portions of the property by some members but there was nothing to show that there was a consensus to give the property a different turn,*

Held—*That the original* debutter *character of the property being established these facts did not operate to destroy its* debutter *character.*

DOORGA NATH *v.* RAM CHANDRA (1) *referred to.*

Per CHATTERJEE, J.—*A partition of* debutter *property for the purpose of convenience of the user for the* sheba *is not a violation of the trust for the* sheba *of the property.*

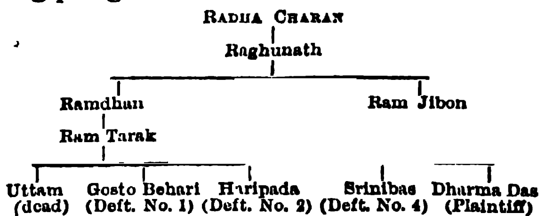
Per JENKINS, C. J.—*Where the original* debutter *character of a property is found in a suit to establish such character against one who claims under an original* shebait, *it lies upon the Defendants to show the subsequent legal conversion of the land to the ordinary user of the property.*

JUGGUT MOHEENEE *v.* RAJENDRO NATH (2) *referred to.*

This was an appeal under sec. 15 of the Letters Patent, filed on the 5th of January 1911, against a decree of Mr. Justice Caspersz, dated the 6th of December 1910, passed in Second Appeal No. 743 of 1908.

The facts of the case so far as they are material for this report were as follows:—

The Plaintiff and the Defendants other than Defendant No. 3 were all descendants of one Radha Charan Mandol who was the founder of the *debutter.* The relation between the Plaintiff and the Defendants Nos. 1 and 2 will appear from the following pedigree:—



(2) I. L. R. 17 Cal. 711 (1890).
(3) I. L. R. 19 Cal. 683 (1892).

(1) I. L. R. 2 Cal. 341 (1876).
(2) 10 B. L. R. 19, 31 (1871).

DHARMA DAS MANDOL *v.* GOSTA BEHARY MANDOL.

It was alleged by the Plaintiff that Radha Charan had dedicated 10 bighas of land and himself remained in possession of it. Subsequently the heirs of Radha Charan partitioned the lands by metes and bounds and held them in those shares, contributing to the *sheba* according to their shares. Defendants Nos. 1 and 2 and their deceased brother Uttam held ⅓rd share of the lands. Sarup Manji the father of Defendant No. 3 in execution of a decree on a mortgage executed by Ram Tarak purchased a portion of the lands of the Defendants and purchased the remaining portion of the same at a private sale. Subsequently on the death of Uttam the Defendants Nos. 1 and 2 refused to pay their share of the *sheba* expenses. Thereupon the Plaintiff brought this suit for a declaration that the properties in question were *debutter* property, that Sarup Manji acquired no title by his purchase and that Defendant No. 3 had no title to the land and other consequential reliefs.

The Defendants Nos. 1, 2 and 3 pleaded, *inter alia*, that the plaint lands were not *debutter* and it transpired that subsequent to the purchase by Sarup Manji the Defendants Nos. 1 and 2 recovered their ⅔rds share in the lands purchased by him and re-purchased some other lands.

It was found in the case that besides the mortgage by Ram Tarak which was subsequently renewed by his son Uttam almost all the co-sharers except the Plaintiff and his predecessors had sold portions of what were claimed as *debutter* lands.

The Munsif who tried the suit in the first instance found that the property was *debutter* and that it had been proved that according to the terms of a *solenama* executed by Ram Tarak amongst others a *shebait* who refused to pay his share of contribution to the *sheba* was liable to forfeit his share. The learned Munsif accordingly decreed the suit, the *debutter* character of the property was declared and possession of the property was decreed to the Plaintiff.

On appeal the Subordinate Judge set aside the decision of the Munsif and dismissed the suit with costs. In the course of his judgment the Subordinate Judge observed as follows :—

"In this case, there is no direct evidence of dedication. It is only proved that out of the income of the lands, the *debsheba* was performed. But this is not sufficient proof that the lands are *debutter* as has been held in *Doorga Nath* v. *Ram Chandra* (1). Then of course a deed of endowment is not absolutely necessary in order to the creation of a valid *debutter* [see *Muddun Lal* v. *Komol Bibee* (3)]. The question is whether there is reliable oral evidence on the point. It appears from several pieces of documentary evidence that the Mandol family had *debutter* property as observed by the learned Munsif and that the only idol that the family worships is Thakur Sridhar Jiu. It may be safely presumed, therefore, I think, that the property was once *debutter*. But if treatment of the property in a particular way is to be regarded as the true test whether the property is *debutter* or secular, as it has been authoritatively laid down in several instances, then I cannot but say that the property has for a long time past been treated as secular property.

"The father of the Defendants Nos. 1 and 2 mortgaged the property long ago for no legal necessity. Uttam, the deceased brother of the Defendants Nos. 1 and 2, again renewed that bond. The claim for

(1) I. L. R. 2 Cal. 341 (1876).
(3) 8 W. R. 43 (1867).

DHARMA DAS MANDOL *v.* GOSTA BEHARY MANDOL.

declaration that the property is *debutter*, after it has been so treated as secular property, is liable to be barred by limitation [vide *Shama Charan Nandi* v. *Abhiram Goswami* (4)]. So the treatment of the property is not a light thing at all.

"It appears in the present case that almost all the co-sharers except the Plaintiff sold portions of what are called *debutter* lands. It will appear from Ex. L that the Plaintiff and his brother Sribash once instituted a suit similar to the present but because Sribash had once sold his portion of the *debutter* land that suit was withdrawn. The learned pleader for the Respondent contends that sale was a mere instance of a breach of trust; so Sribash even could not be disqualified from maintaining that suit [vide *Jugut Mohinee* v. *Sookhimony* (5)]. No doubt this proposition is true. But in this case, the parties partitioned the *debutter* property amongst themselves and treated for a long time past their respective shares as secular property. The learned pleader for the Respondent contends that the parties can partition *debutter* property just as they can divide the *pala* (turn) of worship. Division of *pala* is quite distinct from the division of the *debutter* property itself and the treatment of the several shares as secular property. I hold that the property ceased to be *debutter* and was converted into secular property.

"As regards the second point, there is no evidence to show that the endower imposed any such condition as mentioned therein. It was only two of his descendant's Ram Tarak and Amrita Lal who laid down that condition. So, the Plaintiff, who is not a descendant of either of these two, cannot derive any benefit therefrom.

(4) 10 C. W. N. 738 (1906).
(5) 17 W. R. 41 P. C. (1871).

Besides, a descendant of the endower cannot bind their own descendants even by such a condition if the property is really *debutter*, just as he cannot create a permanent incumbrance affecting the property. So in no case is the Plaintiff, in my opinion, entitled to recover *khas* possession."

On appeal to the High Court the case was heard by the Hon'ble Mr. Justice Caspersz sitting singly. At the time of this hearing a compromise had been effected between the Plaintiff and the representatives of Defendant No. 3. The learned Judge disposed of the case against Defendant No. 3 in terms of the compromise but as against the others he affirmed the decision of the learned Subordinate Judge and dismissed the suit. In the course of his judgment his Lordship observed as follows:—

"In second appeal, it has been urged by the learned Vakil, on behalf of the Plaintiff, *first*, that, on an erroneous view of the Hindu Law, the Subordinate Judge has held the property to be not *debutter*; for that such property cannot change its character by reason of any method of treatment adopted towards it, and, *secondly*, that, at any rate, the suit of the Plaintiff having been compromised with regard to the heirs of the mortgagee Swarup Manji, namely, the widows of Defendant No. 3, the suit may be decreed against Defendants Nos. 1 and 2, who are holding under a collusive conveyance from Defendant No. 3.

"As already mentioned, a petition of compromise was put in, between the Plaintiff and the widows of Defendant No. 3, and to that extent this appeal has been disposed in terms of that compromise. The second contention, therefore, may be entertained, but I think there is no force in

it. It has not been found by the first Court that the conveyance to Defendants Nos. 1 and 2 (of plots 2 and 4) was a collusive transaction, and the Munsif rather thought that it was a real transaction binding the Defendants Nos. 1 and 2 because they had cut themselves off from lawful participation in the performance of the *debsheba*. The Subordinate Judge did not decide the point because it was not raised before him, and on the finding of the first Court the point does not now arise.

"There remains the substantial argument in this case. The judgment of the Subordinate Judge is not, perhaps, quite accurately expressed, but his findings are in accordance with the law on the subject of *debutter* property. He says that there is not sufficient proof of the lands being *debutter*, and it is only proved that out of the income of the lands the *debsheba* was performed. This in original terms, is the principle laid down in *Doorga Nath* v. *Ram Chandra* (1). Their Lordships of the Judicial Committee, however, laid stress on the family understanding as to whether there was any endowment. The decision of the Privy Council was applied in *Gobinda Kumar Roy Chowdhury* v. *Debendra Kumar Roy Chowdhury* (6), where it was reported that, by the conduct of the members of the family properties at one time *debutter* had, by common consent, been converted into secular properties. In another passage of the judgment of the Privy Council (at p. 347) there is an observation, 'where the temple is a public temple the dedication may be such that the family itself could not put an end to it; but in the case of a family idol the consensus of the whole family might give the estate another direction.' Now what has been found by the Subordinate Judge is that there was such a family consensus. It is quite clear in the terms of the *solenama*, dated 7th October 1874, (pp. 27 and 28 of the paper-book) that even before the year 1874, the property had been divided into shares. One share, 3 annas 4 gundas, belonged to Ram Tarak and the then Defendants, Sribash Mondal, Dharmadas Mondal and Srimatya Nabin-Dasi. The same state of affairs is admitted by the Plaintiff in the 7th paragraph of his plaint where it is said that the *shebaits*, for the convenience of enjoyment and possession, got the said property partitioned by metes and bounds and used to perform the *debsheba* from the income of those properties. In the case of *Abhiram Goswami* v. *Shyama Charan Nandi* (7), there was an ancient document, and it was pointed out that the mere fact of the proceeds of any land being used for the support of an idol may not be proof that those lands formed an endowment for the purpose, but it is a fact that may well be taken into consideration, when as in this case the intention of the founder has to be gathered from an ancient document expressed, to say the least in ambiguous language. In the present case there is no ancient document, either ambiguous or unambiguous, and in the circumstances, I do not see how the first Court could have arrived at the conclusion that the lands are strictly *debutter* of the Idol Sridhar Jiu; on the contrary, from the facts underlying the arguments of the learned Subordinate Judge, it is quite evident that the property in suit was never *debutter* in the strict sense of the word; it was rather

(1) I. L. R. 2 Cal. 341 (1876).
(6) 12 C. W. N. 98 (1907).
(7) 14 C. W. N. 1.: s. c. I. L. R. 36 Cal. 1003 (P. C.) (1909).

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appropriated with pious intentions towards the upkeep of a certain family Thakur. The conduct of the parties, from the very beginning, showed that there was no real dedication to pious uses such as would be protected by the law and to which would attach that character of perpetuity which alone attaches to valid endowments."

Against this decision the Plaintiff appealed under sec. 15 of the Letters Patent.

Babus Mohendra Nath Roy and *Krishna Prosad Sarbadhikary* for the Appellant.

Babu Shyama Churn Roy for the Respondents.

The Judgment of the Court was as follows :—

Chatterjee, J.—This appeal arises out of a suit for a declaration that certain properties which had passed from the family of the Plaintiff and Defendants and had been re-purchased by some of the Defendants were *debutter* properties and liable to contribute to the expenses of the *debsheba*. There were also certain other prayers. The *debutter* character of the property was denied.

The learned Subordinate Judge has found that the property was once *debutter* but that by the action of certain members of the family in dealing with this property the character of the property has been changed into that of secular property. As authority for the latter conclusion, he has relied upon certain cases which he does not name. He may have had in his mind the case of *Doorga Nath* v. *Ram Chandra* (1). In that case, there is no doubt, their Lordships said: "but in the case of a family idol, the consensus of the whole family might give the estate another direction." In the first place, that is a mere opinion which was not necessary for the decision of the case: and, in the second place, it does not say that it is competent to the heirs of the donor or other *shebaits* to convert *debutter* property into secular property by the manner of their dealing with the same. In any case, the facts found in this case do not come within the purview of that opinion even, for, in this case, there was not the consensus of the whole family. The Plaintiff and his predecessors were not guilty of any breach of trust in respect of the *debutter* in question. It is argued before us that the mere fact of the several members of the family having partitioned the land was an act of breach of trust and that in that way the whole family may be considered to have joined in giving the property a direction in the way of its being treated as a secular property. The partition, however, must have been for the purpose of convenience of user for the *sheba* for which the property was dedicated: and, if that be so, the partition would not be in violation of any trust for the *sheba* of the deity. Besides that, there is nothing against the Plaintiff or his predecessors. There has not, therefore, been any legal conversion of the *debutter* property and the finding of the learned Subordinate Judge to that effect is wrong.

During the pendency of the appeal, there has been a compromise of the case with Defendant No. 3 and the relation between the parties is governed, so far as the Defendant No. 3 is concerned, by the terms of the compromise entered into in the case. As regards the other Defendants, there will be a decree in this case declaring that the property in suit is *debutter* property and liable to contribute to the *sheba* of the deity Sridhar Jiu.

Jenkins, C. J.—I agree with the con-

(1) I. L. R. 2 Cal. 341 (1876).

clusion at which Mr. Justice Chatterjee has arrived. The case appears to me to be a very simple one. We are only concerned with Defendants Nos. 1 and 2, for with Defendant No. 3 there has been a compromise which removes that Defendant from the sphere of contest. We start with the fact found by the Subordinate Judge that the property in suit was *debutter.* The purpose of the suit is to have its *debutter* character established, at this present day, with consequential relief. It is sought to establish this claim not against a stranger to the dedication, but one who claims under an original *shebait.* It lies upon Defendants Nos. 1 and 2 to show that there has been some subsequent legal conversion of the land to the ordinary user of property. [See *Juggut Moheenee* v. *Rajendro Nath* (2)]. Whatever force may be attributed to what was said by their Lordships of the Privy Council in *Doorga Nath's* case (1) in relation to a family idol, it certainly is not shown upon the facts of this case that there has been a legal conversion of the property which has divested it of its original *debutter* character.

On these grounds, I think that the decree of the Subordinate Judge cannot be supported and his decree as well as the judgment of Mr. Justice Caspersz must be set aside and a decree passed declaring the present *debutter* character of the property and that the Plaintiff and Defendants Nos. 1 and 2 as *shebaits* are under an obligation to apply the income of the *debutter* property towards the purpose to which it was dedicated, that is to say, the worship of the deity Sri Sri Sridhar Jiu. The Plaintiff declares his willingness to apply the income of the property in his possession for the purpose of the endowment, and we decree that the income of the property in the possession of Defendants Nos. 1 and 2 be also applied for the purpose of the endowment.

(1) I. L. R. 2 Cal. 341 (1876).
(2) 10 B. L. R. 19, 31 (1871).

Each party will bear its own costs in all the Courts.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER
No. 308 OF 1910.

CHATTERJEE, J.
1911,
Heard,
17, July.
Judgment,
25, July.

COXE, J.
TEUNON, J.
1911,
Heard,
16, May.
Judgment,
26, June.

NAGENDRA CHANDRA BANERJEE, Decree-holder, Appellant,
v.
HARENDRA NATH MUKHERJEE, Judgment-debtor, Respondent.

Civil Procedure Code (Act XIV of 1882), secs. 210, 257A, 525, 526—Arbitration, reference to, by executing Court—Award modifying decree for money—Instalment decree upon award, if ultra vires—*Waiver of irregularity.*

Upon an application for execution of a decree for money, the judgment-debtors having raised objections, the dispute was referred by the executing Court to an arbitrator before whom the judgment-debtor withdrew his objections and the decree-holder consented to have the decretal amount paid in certain instalments. The arbitrator purported to embody these terms in an award and the Court subsequently passed a modified decree in terms thereof. The decree-holder having applied for execution of this decree more than 12 years after the original

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decree was passed in his favour, the judgment-debtor objected inter alia *that the application was time-barred, that the agreement embodied in the award and the decree based thereon were void under sec. 257A and that this decree was not in compliance with sec. 210 of the Code and was otherwise* ultra vires *of the executing Court.*

Held—*Per* CHATTERJEE, J., *agreeing with* TEUNON, J., (COXE, J., *contra*)—*That assuming that the proceeding referring the matter to arbitration was altogether null and* ultra vires, *the arbitration might be treated as a private arbitration, so that the award would be one under sec. 525 and the decree under sec. 526 which it was not open to the parties to challenge or dispute.*

Per CHATTERJEE, J.—*The executing Court had inherent jurisdiction over the subject-matter of the dispute, and any irregularities in the procedure leading to the decree having been waived, the party waiving such irregularities cannot be allowed to deny its validity.*

This was an appeal preferred on the 28th of June 1910 against the order of H. E. Ransom, Esq., District Judge of Zillah Nadia, dated the 23rd of March 1910, reversing the order of Babu Ram Chandra Mullick, Subordinate Judge of that district, dated the 23rd of August 1909.

The facts of the case will appear from the judgments of Coxe and Teunon, JJ.

Babus Mohendra Nath Roy, Satis Chandra Mukherjee and *Lalit Mohun Ghose* for the Appellant.

Babus Basanta Kumar Bose, Tarak Chandra Chakraverty, Dwarka Nath Mitter and *Satindra Nath Mukherjee* for the Respondent.

The appeal first came on for hearing before Coxe and Teunon, JJ., who differed in opinion.

The dissentient JUDGMENTS were as follows:—

COXE, J.—The facts of the present case are as follows:—The Appellant obtained a decree against the Respondent in the Calcutta Small Cause Court in 1893. This decree was transferred for execution to the Subordinate Judge of Nadia. Apparently for several ensuing years the Appellant endeavoured in vain to enforce it. The last application for execution to which I need refer was filed in 1906. This was objected to by the Respondent. The parties ultimately agreed to refer the matter to arbitration. The arbitrator gave his award on the 18th March 1907 and it ran as follows:—"The judgment-debtor withdraws his objection and the decree-holder agrees to take the decretal amount by instalments as follows: Rs. 400 to be paid within two months from the date and Rs. 400 more to be paid within the course of one year. The remainder of the decretal amount will have to be paid in two years more in half shares. In other words half the remainder must be paid within the year 1315 and the other half within the year 1316, B. S. The costs incurred in the execution of the decree will be borne by the parties themselves. Under the circumstances I consider the arrangement fair and recommend that the Court will be pleased to confirm the same. In the event of non-payment the decree-holder will be at liberty to execute the decree and to realise the money by attachment and sale of the judgment-debtor's property." On receiving the award the learned Subordinate Judge, dealing with case which related to the objection of the judgment-debtor, ordered "That the award is approved by the Court and this case is disposed of in terms thereof. The judgment-debtor

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withdraws from the objection, which is therefore rejected and the case is dismissed." And the same day the Subordinate Judge, dealing with the case which related to the decree-holder's application for execution passed an order to the effect that "The award is approved and accepted by the Court, and in terms thereof the original decree is modified and a decree is to be substituted as set forth in the award and agreed upon by both parties. This execution case is dismissed in terms of the said award." About a year and a half later, on the 25th August 1908, in the case relating to the objection of the judgment-debtor, a formal decree was drawn up to the effect that the case be decreed in terms of the award.

The judgment-debtor seems to have paid the first instalment and on the 31st March 1909 the decree-holder applied for execution of this decree of 1908 with respect to the second instalment. The Courts below have refused this application and the decree-holder appeals.

It is argued on his behalf that the order of the 18th March 1907 extinguished the original decree and amounted to a new decree which can be executed in the ordinary course. The decisions in *Jhabar Mahomed* v. *Modan Sonahar* (2), *Hukum Chand Oswal* v. *Taharunnessa Bibi* (3), *Tukaram* v. *Anant Bhat* (4), *Belchambers* v. *Sarat Chandra Ghose* (5) were cited on behalf of this argument. Now no doubt when the original decree is completely superseded by a subsequent contract, the cases cited are authority that that contract is not rendered void by sec. 257A of the Code of 1882, so as to bar a subsequent suit upon it. There is no case however in which such a contract has been recognised in execution and in *Jhabar Mahomed* v. *Modan Sonahar* (2), it was held that such a contract could only be enforced by a fresh suit. And even where the question is not one of execution but of a subsequent suit the test whether the contract is enforceable or not turns on the point whether the judgment-debt, *qua* judgment-debt is or is not put an end to [*Venkata Subramania Ayyar* v. *Koran Kannan Ahmed* (6), followed in *Gopal Sahu* v. *Brij Kishore Persad* (7) as well as in *Belchambers* v. *Sarat Chandra Ghose* (5)].

Now I do not think that the arbitrator's award in this case extinguished the former decree. The concluding words, "In the event of non-payment the decree-holder will be at liberty to execute the—and to realise the money by attachment and sale" (where the missing word appears to be "decree"), indicate that the arbitrator contemplated the execution of the original decree in the event of non-payment. The decree to which reference is intended can hardly be the decree which the arbitrator expected to be drawn up on the award. I do not think he expected any such decree to be drawn up. The words occurring a little before, "The costs incurred in the execution of the decree," certainly refer to the original decree. It seems to me therefore that the award so far from extinguishing the former decree and substituting a new contract therefor, merely made an alteration in the time of payment and intended that that payment should be enforced

(2) I. L. R. 11 Cal. 671 (1885).
(3) I. L. R. 16 Cal. 504 (1889).
(4) I. L. R. 25 Bom. 252 (1900).
(5) 12 C. W. N. 674 : s. c. I. L. R. 35 Cal. 870 (1908).
(6) I. L. R. 26 Mad. 19 (1902).
(7) I. L. R. 32 Cal. 917 (1905).

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in execution of the original decree. Nor is the matter carried further by the order on the judgment-debtor's objection. The order on the petition for execution however does go further. It provides that the "original decree be modified and a decree be substituted as set forth in the award." But apart from the fact that the modification of the original decree is not necessarily inconsistent with the supposition that the new decree is to be enforced by execution of the old decree, the new decree which was long afterwards drawn up was simply in accordance with the award. If the award therefore did not extinguish the old decree it could not be extinguished by the terms of the order of the 18th March, which found no place in the ultimate decree. It appears to me therefore that the so-called decree of August 1908 merely provided that the sums payable under it were to be realised in execution of the decree of 1895, and if the execution of that decree was barred, the existence of the subsequent decree would not save the execution from the operation of sec. 230, C. P. C.

Nor can the order be regarded as a "subsequent order" within the meaning of sec. 230. Sec. 210 shows how an order of that kind can be made. It can only be made by the Court which passed the decree; and the section lays down in express terms that save as provided in that section and sec. 206, no decree shall be altered at the request of parties. This direct and emphatic provision of the Code cannot in my opinion be evaded. It seems to me that the order now under consideration derives whatever value it may have from the fact that it was passed by consent of parties, and sec. 210 seems to me to deal definitely with this question of consent of parties and to lay down under what circumstances effect may and under what circumstances effect may not be given to such consent.

Next it is argued that the decree of August 1908, whether it be good or bad, cannot be questioned by the executing Court. In the view that I take of that decree this question does not arise, as I hold that that decree, as it stands, does not justify the execution of anything but the original decree. The point, however, has been fully argued and I think that I should refer to it. No doubt an execution Court cannot go behind a real decree, *Moharaja of Bhartpur* v. *Rani Kanno Dei* (8). But I am not prepared to hold that no order which may bear the name of a decree can be questioned in execution. The decree now before us is not a decree in a suit. The number it bears, "56 miscellaneous," is not the number of a suit under sec. 206 of the Code. In place of the "particulars of the claims" required by that section appears the judgment-debtor's objection to the execution and the relief sought is the dismissal of the application for execution. It has been argued that the order may be regarded as analogous to an order under sec. 526 or to one under sec. 258. It may be analogous to an order under sec. 526 but in my opinion it is not such an order and cannot be so treated. And I know of no authority which justifies the execution of an order recording a payment under sec. 258.

It appears to me that this so-called decree is a mere pretence. The Subordinate Judge had no power to sanction an agreement to give time for the satisfaction of a judgment-debt, he had no power to extend the period of limitation and he had no power to alter another Court's

(8) I. L. R. 23 All. 181 (1900).

decree. He could not do these things by calling his order a decree and by forcing it with considerable difficulty into the form of a decree. The judgment-debtor is in my opinion entitled to show that this order is not a decree at all but merely an illegal order, in the garb of a decree, sanctioning an arrangement which could not be enforced in execution.

Thirdly, it has been argued that the judgment-debtor is estopped by his conduct from contesting the present application and from pleading that the order of August 1908 is not a decree. But as this order, if it could have any effect at all, could only obtain that effect by defeating the provisions of sec. 257A and sec. 230 no question of estoppel can arise. And of course if the view that I take of the first point be correct, this third point does not really arise.

I would therefore dismiss the appeal but in the circumstances without cost.

TEUNON, J.—In this case it appears that on the 24th of June 1895 the decree-holder Appellant obtained a decree in the Small Cause Court, Calcutta, against the judgment-debtor, Respondent.

The decree was transferred under the provisions of sec. 223 of the Code of Civil Procedure, 1882, to the Court of the Subordinate Judge of Nadia, and in that Court in 1906 the decree-holder made his 7th application for execution. The judgment-debtor preferred certain objections and in the proceedings arising out of his petition and the decree-holder's application the matters in dispute between the parties were on their application referred by the Court to arbitration. Before the arbitrator the parties came to terms and, on the 18th March 1907, the arbitrator submitted to the Court the following report :—

"Both parties have appeared before me. They are nearly related to one another and at my suggestion they have very properly made an amicable settlement of the (sic? their) disputes. The judgment-debtor withdraws his objection and the decree-holder agrees to take the decretal amount by instalments as follows : Rs. 400 to be paid within 2 months from this date and Rs. 400 more to be paid within the course of one year. The remainder of the decretal amount will have to be paid in two years more in half shares. In other words half the remainder must be paid within the year 1315, and the other half within the year 1316, B. S. The costs incurred in the execution of the decree will be borne by the parties themselves.

"Under the circumstance I consider the arrangement fair and recommend that the Court will be pleased to confirm the same. In the event of non-payment the decree-holder will be at liberty to execute the (?) and to realise the money by attachment and sale of the judgment-debtor's property. The signatures of the decree-holder and judgment-debtor are affixed."

As for statistical purposes the decree-holder's application for execution and the judgment-debtor's petition of objection had been separately numbered, the Subordinate Judge proceeded on the arbitration report to pass two orders. The order recorded on the order-sheet of the case arising out of the judgment-debtor's petition is as follows :—"The arbitrator has filed his award. Judgment-debtor's pleader intimates that no objection will be preferred on either side as it is based upon compromise. It is not necessary to grant time for filing of objections.

"It is ordered that the award be approved and this case is disposed of in terms

thereof. The judgment-debtor withdraws from the objections which are therefore rejected and the case is dismissed."

On the order-sheet attached to the proceedings on the application for execution the order runs as follows :—

"In this case (No. 56 of 1906), the judgment-debtor took certain objections to the execution. The matters were referred to arbitration. The arbitrator has filed an award based upon the amicable settlement of the parties. The award is approved and accepted by the Court and in terms thereof the original decree is modified, and a decree is to be substituted as set forth in the award and agreed upon by both parties. This execution case is dismissed in terms of the said award, each party bearing his own costs."

Though recorded on two order sheets the two orders are obviously orders in one and the same matter and must be read together. In the result we find that the judgment-debtor's petition of objection, and the decree-holder's application for execution of the decree of 1895 were alike dismissed, and an order made that in place of the subsisting original decree there should be substituted a decree in modified terms based on the arbitrator's award.

These orders were passed on the 18th March 1907 and on the 25th August 1908 were embodied in a formal decree signed by the decree-holder but apparently not by the judgment-debtor's pleader.

This decree recites the decree-holder's application for execution, the judgment-debtor's objections, the reference to arbitration, the report on award of the arbitrator and finally declares that the decree is in accordance within the said award.

The decree-holder now applies for execution of this decree of the 18th March 1907 and 25th August 1908. The application states that the first instalment due on the 18th May 1907 had been paid, and no further payment having been made, execution is sought in respect of the second instalment.

The judgment-debtor without denying the payment of the first instalment objected (1) that execution of the decree of 1895 was barred by limitation. (2) That the reference to arbitration and the arrangement or compromise made in 1907 were contrary to law, and (3) that the orders and decree based on the arbitrator's award were made without jurisdiction, and were therefore null and void and incapable of execution.

The Sub-Judge held that the original decree of the Court of Small Causes had been adjusted, or extinguished, and that the validity of the substituted decree could not be questioned in execution proceedings.

On appeal the District Judge held that the Court of the Subordinate Judge to which the decree of the Small Causes Court had been sent for execution had no power to substitute another decree in place thereof, and that the decree so substituted was therefore a nullity, and incapable of execution.

The decree-holder now appeals to this Court, and on his behalf it is urged that the decree of 1895 should be regarded as extinguished or adjusted by the proceedings of the 18th March 1907, that this adjustment was certified to the Court by the decree-holder, and that the decree thereupon made by the Court of the Subordinate Judge upon the arbitrator's award should be regarded as one made substantially in accordance with the provisions of secs. 525 and 526 of the Code of Civil Procedure 1882. It is also urged

that the Respondents are estopped from questioning the orders made by the Subordinate Judge on the 18th March 1907.

On behalf of the Respondents, judgment-debtors, it is contended that the proceedings before the arbitrator represent merely an agreement to give time, that such agreement is void by reason of the provisions of sec. 257A of the Code of Civil Procedure, 1882, that if the orders of the 17th March 1907 are to be regarded as orders made under sec. 210 of the said Code, they were made without jurisdiction, that even if the agreement extinguished or superseded the original decree, the remedy of the decree-holder was by suit, and not by application in execution, and lastly that the procedure prescribed in secs. 525 and 526 of the Code of Civil Procedure, 1882, not having been followed, the orders of the 18th of March 1907, and the formal decree in pursuance thereof cannot be regarded as orders and a decree made under the provisions of those sections.

Now, if we have in the present case merely an agreement to give time, it cannot be disputed that by reason of sec. 257A of the Code of Civil Procedure, 1882, that agreement is void. Similarly if we have merely an agreement, or contract, extinguishing and superseding the original decree there can be no question that the decree-holder Appellant's remedy was by suit.

Thus the questions that arise for determination are:—

(1) Whether the orders of the 18th March 1907, and the decree in pursuance thereof should be regarded as orders and a decree made under sec. 526 of the Code of Civil Procedure, 1882, and (2) if not, whether the orders of the 18th March 1907 should be regarded as orders made under sec. 210 of the Civil Procedure Code, 1882, whether the Respondents are estopped from questioning the said order and whether the original decree as modified by those orders can now be executed.

At first sight it might seem that in his report of the 18th March 1907, the arbitrator makes no award, but merely informs the Court of an arrangement arrived at by the parties. But it is clear that the Court to which the report was submitted interpreted the arbitrator's expressed approval of the arrangement as an award, and that the parties then and since accepted this interpretation. Even in his present petition of objection the judgment-debtor speaks of the arbitrators roidad or award, and I am of opinion that we should not now place any different construction upon the arbitrator's report.

Secs. 506 to 522 of the Code of Civil Procedure, 1882, do not appear to contemplate references to arbitration by the Court in execution proceedings, and this indeed is or was one of the contentions of the judgment-debtor Respondent. The present reference may therefore be taken as one made without the intervention of any Court.

As already found, an award was made on the reference, and the report of the arbitrator contained a prayer that the Court should be pleased to confirm the award.

Though submitted or handed to the Court by the arbitrator the application was signed by the decree-holder, and may therefore be regarded as in effect the present Appellant's application that the Court should pass the orders, in accordance with the award. It is true that the Court did not register and number the application but the provision in this behalf appears to be one made mainly for statis-

tical purposes, and the Court's failure to comply therewith is not in my opinion an omission which should be regarded as affecting the essential character of the application as a suit, or as prejudicing the rights of parties.

It is true also that the Court did not issue notice to the other party to the arbitration, that is the judgment-debtor Respondent, but that also, it appears to me, is at most an irregularity and cured in the present instance by the fact that the judgment-debtor had himself signed the application, had notice and intimated to the Court through his pleader that he had in fact no cause to show. By the orders of the 18th March 1907, the Subordinate Judge thereupon in effect pronounced judgment according to the award, and the decree now sought to be executed followed.

In this view, no question of jurisdiction arises, for the submission to arbitration and the making of the award were both within the jurisdiction of the Subordinate Judge within whose jurisdiction also both parties reside.

For these reasons I am of opinion that the orders and decree of the 18th March 1907 should be regarded as order and a decree made under sec. 526 of the Code of Civil Procedure, 1882, that they superseded or extinguished the decree of 1895, and that the decree sought to be executed is capable of execution.

I may here notice the suggestion that even if the orders and decree of the 18th March 1907 are to be regarded as order and a decree made under sec. 526, even so they and the arbitrator's award should be construed as providing merely that on failure to pay the sums specified the decree-holder shall be at liberty to realise by execution of the original decree. As that decree is barred execution has become impossible.

I am unable to accept this view. If and in so far as it refers to the original decree, the decree of March 1907 may be said to incorporate that decree, and in so far as read with the award it provides that certain sums shall be paid, on or before certain specified dates, is in itself a decree to be enforced and executed. If it be said that this was not the intention of the parties or the arbitrator, the reply is that the order of the 18th March 1907 was made in the judgment-debtor's presence and that his remedy was by appeal.

But I am not prepared to accept the view that the decree of the 18th March is in excess of the award. The substantive portion of the award was that the original decretal amount should be treated as the whole sum due and should be paid on four specified dates. The somewhat obscure sentence following upon the prayer that the award should be confirmed may be treated as surplusage and was apparently so regarded by the Court to which the award was submitted. As, in the view I have taken, the decree sought to be executed is one made under sec. 526 of the Code of Civil Procedure, 1882, and is capable of execution I need not discuss the second question.

For the reasons given I should decree this appeal with costs.

[Owing to this difference of opinion the case was laid before the Chief Justice for reference to a third Judge. Under secs. 98 and 108 of the Civil Procedure Code, their Lordships stated the point of law on which they differed in the following terms :—

"Should the award and the order of the 18th March 1907 be regarded and treated

as an award and order under secs. 525 and 526 of the Civil Procedure Code, 1882, and should the decree of the 25th August 1908 be executed as a decree made in accordance with an award made under the said section."]

The JUDGMENT OF CHATTERJEE, J., to whom the point was referred was as follows :—

CHATTERJEE, J.—The decree-holder obtained a decree for Rs. 1,360 in the Calcutta Small Cause Court in 1895 and had it transferred to the Court of the Subordinate Judge of Nadia for execution. The seventh application was made in 1906 and was entered as Execution Case No. 108 of 1906 and the seventh objection by the judgment-debtor was numbered as Misc. No. 56 of 1906. Pending this execution the parties applied for referring all matters in dispute between them to the arbitration of Babu Prosanna Kumar Bose, a local pleader, and the Court made the reference accordingly. Before the arbitrator the parties agreed to certain terms under which the decretal amount as it then stood was to be paid in certain instalments failing which the decretal amount could be recovered by the attachment and sale of the properties of the judgment-debtor. The arbitrator asked that the agreement might be confirmed and his report was signed by both the parties. The Judge passed a fresh decree in accordance with this report. The first instalment of Rs. 400 under the new arrangement was paid on the 15th May 1907 just within 12 years of the original decree and the formal decree was signed on the 25th August 1908. The decree-holder then applied for executing this decree on the 31st March 1909 for the second instalment and the judgment-debtor at once turned round and objected that the decree of 1895 was the only decree that could be executed and the later decree was *ultra vires* so that execution was barred under sec. 230 of the Civil Procedure Code. The first Court allowed execution to proceed but the District Judge on appeal accepted the objection of the judgment-debtor. On second appeal by the decree-holder there has been a difference of opinion between the two learned Judges before whom the appeal was heard and hence this reference under secs. 98 and 108 of the Civil Procedure Code, Act V of 1908. The decree-holder contended before the learned Judges (1) that the Nadia Court was within its jurisdiction in passing a new decree and its action had in any case warrant under secs. 525 and 526 of the old Civil Procedure Code, (2) that a decree having been already passed the executing Court had no jurisdiction to go behind the decree, (3) that the judgment-debtor was estopped from making the objection that he now made.

Mr. Justice Coxe overruled all these objections but Mr. Justice Teunon was of opinion that the first ground was good and did not therefore think it necessary to go into the two other grounds. The point in difference has been stated by the learned Judges as "should the award and the order of the 18th March 1907 be regarded and treated as an award and order under secs. 525 and 526 of the C. P. C., 1882, and should the decree of the 25th August 1908 be executed as a decree made in accordance with an award made under the above sections?" The reference is limited in scope in accordance with the provisions of the new Code and I have to deal with this limited question only. This question must however be determined in view of the peculiar circumstances of the case by reference to

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the peculiar relative positions in which the parties have placed themselves by their conduct and subject to the limitation imposed on permissible contention by reason of such conduct. So approaching the case I think that the judgment-debtor cannot be heard to say that the arbitration initated at his instance was not an arbitration, that the award consented to by him was not an award or the decree passed in his presence and submitted to by him was not a decree. The Subordinate Judge of Nadia was perfectly competent to deal with the execution case and to dispose of all disputes relating to the execution of the decree. He had therefore what is called inherent jurisdiction over the subject-matter. If he could make a reference of the dispute to an arbitrator, the proceedings were in due course of law. If he could not the reference was an irregularity which could be waived and the party so waiving the irregularity would be barred by his own conduct from complaining of such irregularity afterwards. But supposing the whole action of the Court in reference to the arbitration was *ultra vires* and null and void, there was nothing in law to prevent the parties from appointing an arbitrator to settle their differences and then the award of the arbitrator would be one within sec. 525 and the decree under 526. Lord Watson in delivering the judgment of the Privy Council in the case of *Ledgard* v. *Bull* (1) says "The District Judge was perfectly competent to entertain and try the suit if it were competently brought and their Lordships do not doubt that in such a case a Defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process, although they may constitute the Judge their arbiter and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the Defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time would have led to the dismisssal of the suit." Applying these principles to present case I hold that as between the parties to the case there was an award of the arbitrator which may at the least be a private award under sec. 525, the Court purported to pass a decree which on the above view would be one under sec. 526 of the C. P. Code and the propriety of such a decree cannot be called in question by the judgment-debtor in execution. In the result, therefore, I answer the question asked in the affirmative. The decree-holder is entitled to the costs of this hearing and I assess the same at 2 gold mohurs.

[On the case coming on for final disposal, the following judgment was passed by their Lordships Coxe and Teunon, JJ.

"Appeal No. 308 will be decreed. The order of the District Judge will be set aside and the execution will proceed. The Appellant will be entitled to his costs of this Court, which we assess at two gold mohurs, and of the lower Appellate Court"].

Appeal allowed.

(1) I. L. R. 9 All. 91 : s. c. L. R. 13 I. A. 134 (1886).

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE ORDER
No. 528 OF 1910.

CASPERSZ, J. SHARFUDDIN, J. 1911, Heard, 31, July and 3, August. Judgment, 3, August.	BIDHU SEKHAR BANDAPADHYA, Decree-holder, Appellant, *v.* SUDHURY MAHATABUDDIN and another, Judgment-debtors, Respondents.

Civil Procedure Code (Act V of 1908), Or. 20, r. 11, and Or. 34, r. 6—Personal decree against mortgagor—Court's discretion to direct payment by instalment—Judicial discretion—Second appeal.

In making a decree under Or. 34, r. 6 of the Civil Procedure Code against a mortgagor personally, the Court may direct the payment of the decretal amount in instalments under Or. 20, r. 11 of the Code.

Whether or not the Court exercised a sound judicial discretion in making the order cannot be reviewed in second appeal.

BALGOBINDRAM BHAKAT *v.* CHHEDILAL SAHA (2) *distinguished.*

This was an appeal from an order of E. Panton, Esq., District Judge of Burdwan, dated the 23rd of July 1910, confirming an order of Babu Achinta Nath Mitta, 1st Munsif of Burdwan, dated the 23rd of April 1910.

The Appellant mortgagee applied under Or. 34, r. 6 for a personal decree against the Respondents mortgagors for the balance of the mortgage-debt which remained undischarged after the mortgaged properties had been sold in pursuance of a decree for sale obtained on the mortgage. The Respondents prayed for an order under Or. 20, r. 11 allowing them to pay the amount by instalments. The Munsif having acceded to this prayer, the decree-holder appealed to the District Judge who in dismissing the appeal observed as follows :—

"The Appellant obtained a mortgage decree against the Respondents. The original debt was Rs. 400 with interest this amounted to Rs. 1,600. Rs. 700 was realised by sale of the mortgaged property. The Munsif in decreeing the suit for the balance ordered its payment by monthly instalments of Rs. 10, on default of two consecutive instalments the whole amount to fall due. . . . . . There is evidence that the judgment-debtors are men of small means and taking the circumstances into consideration I am unable to hold that the Munsif in making the order did not exercise a sound discretion. It is contended that the decree being a mortgage decree, Or. 20, r. 11 does not apply to it. But it is a decree for the payment of money and in my view there is no force in the argument."

The decree-holder preferred this second appeal.

Babu Kshetra Mohun Sen for the Appellant.

Babu Shorashi Charan Mitra for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the decree-holder against an order of first Court, confirmed by the lower Appellate Court, allowing the judgment-debtors to pay by instalment of ten rupees per mensem, the amount decreed under Or. 34, r. 6 corresponding to sec. 90 of the Transfer of Property Act, 1882.

It is urged that Or. 20, r. 12, which provides for payment by instalment, is not applicable to the case of decrees in mortgage suits, and that in the circumstances of this case, the order for payment by instalments, postponing the satisfaction

(2) 11 C. L. J. 481 (1910).

BIDHU SEKHAR BANDAPADHYA *v.* SUDHURY MAHATABUDDIN.

of the decree for a term of about seven years, is bad as not passed in the exercise of a proper judicial discretion.

No reported authority cited to us is in point. The case of *Shankarapa Dargo* v. *Danapa Virantapa* (1) was decided before the passing of the Transfer of Property Act, and, no doubt, it lays down that the indulgence granted by sec. 210 of the former Code of Civil Procedure only applies in cases to which the section strictly applies, that is to say, in cases where decrees are passed in money suits. There is an observation, however, in the judgment of Melvill, J., from which we gather that a decree for payment by instalments may be passed where the decree is against an agriculturist personally, though not a decree for the recovery of money by the sale of the agriculturist's immoveable property. In the present case, there can be no question that the decree passed against the judgment-debtor is a personal decree; it is, also, a decree for the payment of money.

Or. 20, r. 11 says—"Where and in so far as a decree is for the payment of money, the Court may, for any sufficient reason at the time of passing the decree, order that the payment of the amount decreed shall be postponed or shall be made by instalments, with, or without interest, notwithstanding anything contained in the contract under which the money is payable." The rule does not say—'where and in so far as the decree is passed in a suit for the recovery of money'; nor does the 'contract' under which the amount decreed was payable exclude an original mortgage contract. In the circumstances of Or. 34, r. 6, the decree is no longer directed against the mortgaged property; but in virtue of the contract, it binds the judgment-debtors personally. The decree has been passed under Or. 34, r. 6 in accordance with the judgment, and the general provisions relating to judgments and decrees embodied in Or. 20 undoubtedly cover the decree, based on an antecedent judgment, which is allowable under Or. 34, r. 6.

Furthermore, the decree now passed must be executed under the general provisions of the Code, and we cannot regard Or. 34 as self-contained. We cannot say that because there are no provisions for payment by instalments in the Or. 34, the general provisions of Or. 20, r. 11 do not apply. Viewing the decree as it appears to be, a decree for the payment of a definite sum of money, we think that it was open to the lower Appellate Court to pass the order it has passed in favour of the judgment-debtors. The first contention, therefore, is overruled.

The second contention is one which we cannot entertain in second appeal. The case relied on, *Balgobindram Bhakat* v. *Chhedilal Saha* (2) was not a second appeal, but a rule in which the judgment of a Small Cause Court Judge, permitting the decretal amount to be paid by instalments, was sought to be modified, and the learned Judges held that the discretion under Or. 20, r. 11 must be exercised in a judicial manner. We think that, in second appeal, the question of discretion cannot now be gone into. It is, perhaps, somewhat anomalous that the decree-holder should be kept out of his money for seven years; but, on the other hand, he has already recovered a substantial sum nearly double the amount of his original debt. So that the hardship complained of is more apparent than real.

The appeal, accordingly, fails and is

(1) I. L. R. 5 Bom. 604 (1881).

(2) 11 C. L. J. 481 (1910).

dismissed with costs. We assess the hearing fee at two gold mohurs.

Appeal dismissed.

[CRIMINAL APPELLATE JURISDICTION.]

APPEAL NO. 211 OF 1911.

HOLMWOOD, J. SHARFUDDIN, J. 1911, 19, April. — MEHER SARDAR and others, v. THE KING-EMPEROR.

Jury trial—Misdirection—Citation of rulings in the charge to the jury—Right of private defence, when trespassers have begun cutting crop.

When trespassers began cutting and carrying away crop grown by the person in possession, reasonable apprehension to the property having already commenced, the right of private defence of the latter commenced at the same time; and it was misdirection on the part of the Judge to leave it to the jury to say whether the fact that the police station was only 9 miles off from the place of occurrence did not take away that right. The reference in such circumstances to his civil remedies also amounted to misdirection.

No rulings or authorities should be cited by the Judge in his charge to the jury nor should they be asked to differentiate or form any opinion whatever on any authorities. Such procedure confuses the minds of the jury and constitutes misdirection.

This was an appeal presented on the 16th of March 1911 by the above-named accused Appellants against the conviction and sentence passed upon them by the Court of Session of Khulna (Mr. T. C. Mukerjee) on the 13th of February 1911.

The accused who were seven in number were charged with the following offences: (1) that on the 5th November 1910 at Raipur, they formed an unlawful assembly with 8 or 9 others with the common object of enforcing the right or supposed right of the accused Meher Sardar with respect to a plot of 5 bighas of land in Raipur, of which the eastern half was claimed by the complainant and the other half by Kefatulla Sana, and of assaulting the complainant and his party with *lathis* and causing hurt to them, and that as in prosecution of those objects hurt was caused to complainant Mangal Biswas, Amenuddi and Barkatulla (who had since died from the effects of the injuries), they committed the offence of rioting punishable under sec. 147, I. P. C., (2) that on the same date and at the same place, they were members of an unlawful assembly with the common object as specified in the first charge, and that as in prosecution of those common objects Kader Sardar, Kobil Sardar and others struck Barkatulla with *lathis* and Ibrahim with a wooden pole, and thereby inflicted injuries with the intention of causing death and which in fact caused the death of Barkatulla, they committed the offence of murder punishable under sec. 302, I. P. C., read with sec. 149, I. P. C. To these charges another under sec. 326 read with sec. 34, I. P. C., was added against accused Nos. 2, 3 and 4, Ibrahim, Kader and Kobil, at the instance of the public prosecutor.

It appears that one Piyar Sardar was the registered tenant of the disputed plot. Complainant, Mangal Biswas and Barkatulla (deceased), it was alleged, occupied the eastern half of the plot while the western half was in possession of Kafatulla, descendants of Badal (Piyar's brother). The case for the prosecution was that complainant and his brother Barkatulla went, on the 19th Kartic, to cut paddy from the eastern half of the plot when accused with others came to the field with *lathis*; that the ac-

MEHER SARDAR *v.* THE KING-EMPEROR.

cused asked complainant to desist from cutting the paddy ; that the complainant not minding them there was an altercation and under orders of Meher the accused Kader struck Mangal, accused Kobil and Kader struck Barkatulla with their *lathis* and that Barkatulla fell down and shortly after died.

The complainant lodged information at Satkhira Thana which resulted in a police investigation. The accused were sent up before a Magistrate and he, after a preliminary enquiry, committed them to take their trial before the Court of Session.

The Sessions Judge agreeing with the jury found them guilty.

Against the conviction and sentence passed against them, the present appeal was preferred.

Babu Jyotish Chandra Hazrah for the Appellants.—The Judge's charge contained a number of misdirections ; submits that when the accused had grown the crops and were in possession of the lands, they were entitled to resist force by force. Therefore the charge of unlawful assembly must go. The right of private defence of property moreover extends to the taking of a man's life under the circumstances mentioned in sec. 104, I. P. C. Therefore even if Kader and Kobil be charged under sec. 326, the Judge should not have told the jury that there was no right of private defence when the thana was only nine miles off. A Judge, again, is to explain the law to the jury. He should not ask them to consider the effect of rulings.

Mr. Sultan Ahmed for the Crown.—Although possession was with the accused yet there is no evidence that the accused were in such imminent danger of person or property as to be justified in taking a man's life. Therefore even if the charge of unlawful assembly fails the conviction under sec. 326 upon Kader and Kobil must in any case stand.

Babu Jyotish Chandra Hazrah in reply.—The complainants were more than four in number and their action was robbery in the eye of law and therefore my clients were justified in using violence even to the extent of taking a man's life.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal from the conviction and sentence passed by the learned Sessions Judge of Khulna upon seven persons. Agreeing with the unanimous verdict of the jury he found them guilty under sec. 147, I. P. C, and directed that they be rigorously imprisoned for one year and six months each under that section. The accused Kader Sardar and Kobil were further found guilty by the jury under sec. 326 and they were sentenced to be rigorously imprisoned for three years under that section, the sentences were to run concurrently with those passed under sec. 147.

The jury found incidentally that possession whether rightly or wrongly was with the first accused Meher Sardar and therefore following the direction of the Judge they must have found that Meher Sardar and his party had the right of private defence against the taking of their crops. They were therefore justified in using sufficient force to get rid of these people and prevent their stealing their crops and the learned Judge clearly misdirected the jury when he left it to them to say whether the fact that the police station was only 9 miles off the place of occurrence did not take away their right of private defence ; for the right of private defence of property commences when

reasonable apprehension of danger to the property commences and if persons have begun to cut and carry away your crop it cannot be said that you are bound to go nine miles to fetch the police. The reasonable apprehension of danger to the property having commenced the right of private defence has also commenced. The same consideration applies to the remedies in the Civil Court to which the learned Judge referred. The cutting and the removal could not have been prevented at the moment by the institution of any suit, and the learned Judge practically directed the jury that by taking the law into their own hands they formed themselves into an unlawful assembly and it is on this misdirection that the jury have found them all guilty under sec. 147. We notice that he has cited and commented on a number of rulings of this Court and told the jury that it was for them to say whether any of those rulings are exactly on all fours with the circumstauces of the present case. This is also a misdirection. No rulings or authorities are ever to be cited to the jury nor are they to be asked to differentiate or form any opinion whatever on any authorities. It is for the Judge and the Judge only to tell the jury what the law is, and before he tells them what it is he may consult as many authorities as he pleases and those authorities are no doubt binding upon him. The minds of the jury should never be confused by having a number of conflicting authorities or indeed any authorities laid before them. In this case the Judge not only confused the jury by laying before them a number of conflicting authorities and leaving it to them to choose between them but as we have seen he has misdirected them as to the law of the right of private defence. We have no doubt that the accused persons had the right of private defence in this case and that they did not exceed it except in so far as certain persons fractured the skull of one Barkatulla with *lathis*. This was a wholly unnecessary proceeding and quite unjustified. But as the assailants were exercising the right of private defence they cannot have formed members of an unlawful assembly.

The convictions and sentences under sec. 147, I. P. C., against all the Appellants must therefore be set aside and they must all be acquitted and released with the exception of Appellants Nos. 3 and 4, Kader Sardar and Kobil *alias* Kobeluddi, who have been further convicted by the jury under sec. 326 on the finding that it was they who struck Barkatulla the two blows on the head which the medical evidence shows fractured his skull. In so doing they undoubtedly exceeded the the right of private defence and the verdict of the jury must be upheld. But we think the sentence must be reduced to one of eighteen months' rigorous imprisonment in each case.

We accordingly direct that the accused Kader Sardar and Kobil *alias* Kobeluddi be sentenced to eighteen months' rigorous imprisonment under sect 326, I. P. C. The other Appellants will be discharged.

Appeal allowed.

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tical purposes, and the Court's failure to comply therewith is not in my opinion an omission which should be regarded as affecting the essential character of the application as a suit, or as prejudicing the rights of parties.

It is true also that the Court did not issue notice to the other party to the arbitration, that is the judgment-debtor Respondent, but that also, it appears to me, is at most an irregularity and cured in the present instance by the fact that the judgment-debtor had himself signed the application, had notice and intimated to the Court through his pleader that he had in fact no cause to show. By the orders of the 18th March 1907, the Subordinate Judge thereupon in effect pro-

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Judge within whose jurisdiction also both parties reside.

For these reasons I am of opinion that the orders and decree of the 18th March 1907 should be regarded as order and a decree made under sec. 526 of the Code of Civil Procedure, 1882, that they superseded or extinguished the decree of 1895, and that the decree sought to be executed is capable of execution.

I may here notice the suggestion that even if the orders and decree of the 18th March 1907 are to be regarded as order and a decree made under sec. 526, even so they and the arbitrator's award should be construed as providing merely that on failure to pay the sums specified the decree-holder shall be at liberty to realise by execution of the original decree. As that decree is barred execution has become impossible.

I am unable to accept this view. If and in so far as it refers to the original decree, the decree of March 1907 may be said to incorporate that decree, and in so far as read with the award it provides that certain sums shall be paid, on or before certain specified dates, is in itself a decree to be enforced and executed. If it be said that this was not the intention of the parties or the arbitrator, the reply is that the order of the 18th March 1907 was made in the judgment-debtor's presence and that his remedy was by appeal.

But I am not prepared to accept the view that the decree of the 18th March is in excess of the award. The substantive portion of the award was that the original decretal amount should be treated as the whole sum due and should be paid on four specified dates. The somewhat obscure sentence following upon the prayer that the award should be confirmed may be treated as surplusage and was apparently so regarded by the Court to which the award was submitted. As, in the view I have taken, the decree sought to be executed is one made under sec. 526 of the Code of Civil Procedure, 1882, and is capaple of execution I need not discuss the second question.

For the reasons given I should decree this appeal with costs.

[Owing to this difference of opinion the case was laid before the Chief Justice for reference to a third Judge. Under secs. 98 and 108 of the Civil Procedure Code, their Lordships stated the point of law on which they differed in the following terms :—

" Should the award and the order of the 18th March 1907 be regarded and treated

as an award and order under secs. 525 and 526 of the Civil Procedure Code, 1882, and should the decree of the 25th August 1908 be executed as a decree made in accordance with an award made under the said section."]

The JUDGMENT OF CHATTERJEE, J., to whom the point was referred was as follows:—

CHATTERJEE, J.—The decree-holder obtained a decree for Rs. 1,360 in the Calcutta Small Cause Court in 1895 and had it transferred to the Court of the Subordinate Judge of Nadia for execution. The seventh application was made in 1906 and was entered as Execution Case No. 108 of 1906 and the seventh objection by the judgment-debtor was numbered as Misc. No. 56 of 1906. Pending this execution the parties applied for referring all matters in dispute between them to the arbitration of Babu Prosanna Kumar Bose, a local pleader, and the Court made the reference accordingly. Before the arbitrator the parties agreed to certain terms under which the decretal amount as it then stood was to be paid in certain instalments failing which the decretal amount could be recovered by the attachment and sale of the properties of the judgment-debtor. The arbitrator asked that the agreement might be confirmed and his report was signed by both the parties. The Judge passed a fresh decree in accordance with this report. The first instalment of Rs. 400 under the new arrangement was paid on the 15th May 1907 just within 12 years of the original decree and the formal decree was signed on the 25th August 1908. The decree-holder then applied for executing this decree on the 31st March 1909 for the second instalment and the judgment-debtor at once turned round and objected that the decree of 1895 was the only decree that could be executed and the later decree was *ultra vires* so that execution was barred under sec. 230 of the Civil Procedure Code. The first Court allowed execution to proceed but the District Judge on appeal accepted the objection of the judgment-debtor. On second appeal by the decree-holder there has been a difference of opinion between the two learned Judges before whom the appeal was heard and hence this reference under secs. 98 and 108 of the Civil Procedure Code, Act V of 1908. The decree-holder contended before the learned Judges (1) that the Nadia Court was within its jurisdiction in passing a new decree and its action had in any case warrant under secs. 525 and 526 of the old Civil Procedure Code, (2) that a decree having been already passed the executing Court had no jurisdiction to go behind the decree, (3) that the judgment-debtor was estopped from making the objection that he now made.

Mr. Justice Coxe overruled all these objections but Mr. Justice Teunon was of opinion that the first ground was good and did not therefore think it necessary to go into the two other grounds. The point in difference has been stated by the learned Judges as "should the award and the order of the 18th March 1907 be regarded and treated as an award and order under secs. 525 and 526 of the C. P. C., 1882, and should the decree of the 25th August 1908 be executed as a decree made in accordance with an award made under the above sections?" The reference is limited in scope in accordance with the provisions of the new Code and I have to deal with this limited question only. This question must however be determined in view of the peculiar circumstances of the case by reference to

the peculiar relative positions in which the parties have placed themselves by their conduct and subject to the limitation imposed on permissible contention by reason of such conduct. So approaching the case I think that the judgment-debtor cannot be heard to say that the arbitration initiated at his instance was not an arbitration, that the award consented to by him was not an award or the decree passed in his presence and submitted to by him was not a decree. The Subordinate Judge of Nadia was perfectly competent to deal with the execution case and to dispose of all disputes relating to the execution of the decree. He had therefore what is called inherent jurisdiction over the subject-matter. If he could make a reference of the dispute to an arbitrator, the proceedings were in due course of law. If he could not the reference was an irregularity which could be waived and the party so waiving the irregularity would be barred by his own conduct from complaining of such irregularity afterwards. But supposing the whole action of the Court in reference to the arbitration was *ultra vires* and null and void, there was nothing in law to prevent the parties from appointing an arbitrator to settle their differences and then the award of the arbitrator would be one within sec. 525 and the decree under 526. Lord Watson in delivering the judgment of the Privy Council in the case of *Ledgard* v. *Bull* (1) says "The District Judge was perfectly competent to entertain and try the suit if it were competently brought and their Lordships do not doubt that in such a case a Defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process, although they may constitute the Judge their arbiter and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the Defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time would have led to the dismissal of the suit." Applying these principles to present case I hold that as between the parties to the case there was an award of the arbitrator which may at the least be a private award under sec. 525, the Court purported to pass a decree which on the above view would be one under sec. 526 of the C. P. Code and the propriety of such a decree cannot be called in question by the judgment-debtor in execution. In the result, therefore, I answer the question asked in the affirmative. The decree-holder is entitled to the costs of this hearing and I assess the same at 2 gold mohurs.

(1) I. L. R. 9 All. 191; s. c. L. R. 13 I. A. 134 (1886).

[On the case coming on for final disposal, the following judgment was passed by their Lordships Coxe and Teunon, JJ.

"Appeal No. 308 will be decreed. The order of the District Judge will be set aside and the execution will proceed. The Appellant will be entitled to his costs of this Court, which we assess at two gold mohurs, and of the lower Appellate Court"].

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 4784 OF 1911.

WOODROFFE, J.
TEUNON, J.
1911,
5, September.

ABDUL KARIM ABU AHMED KHAN GHAZNAVI and another, Defendants, Petitioners,
v.
ABDUS SOBHAN CHOUDHRY and ors., Plaintiffs, Opposite Party.

Civil Procedure Code (Act V of 1908), sec. 92—Government if may empower a Judge to try a particular suit pending before another Court.

A suit for the administration of a public charity under sec. 92, Civil Procedure Code, was properly instituted before the District Judge. Subsequently the Government by a notification empowered a Subordinate Judge to try that suit and the District Judge thereupon transferred the suit to the said Subordinate Judge.

Held—*That as the notification was directed to a particular Judge and purported to deal with a particular litigation which was at that date already pending before another Court it was not such a notification as was contemplated by sec. 92, Civil Procedure Code.*

Held further—*That the Subordinate Judge had therefore no jurisdiction to try the suit and the District Judge had no power to transfer the suit to him.*

This was a Rule granted on the 23rd of August 1911, against an order of Babu Behari Lal Chatterjee, Subordinate Judge of Mymensingh, dated the 15th of August 1911.

The facts of the case were briefly as follows:—

The suit was instituted by the Plaintiffs for the proper administration of an alleged *wakf* estate under the provisions of sec. 92, Civil Procedure Code, in the Court of the District Judge of Mymensingh. After the suit was pending in that Court for some time, the Government of Eastern Bengal and Assam on the 12th July 1911 upon a representation made by the District Judge and forwarded by the High Court issued the following notification empowering Babu Behari Lal Chatterjee, a Subordinate Judge of Mymensingh, under sec. 92, Civil Procedure Code, to try the suit.

"No. 1110 J. Babu Behari Lall Chatterjee, Subordinate Judge, Mymensingh, is empowered under sec. 92 of the Code of Civil Procedure to try or dispose of Suit No. 1 of 1910 instituted by Nawab Abdus Sobhan Choudhry and others against Abdul Karim Abu Ahmed Khan and others, Defendants, pending in the Court of the District Judge of Mymensingh."

On the 18th July after this notification was received, the then District Judge transferred the suit to Babu Behari Lal Chatterjee, Subordinate Judge. The case came on for hearing before that Court on the 15th August 1911 when the Defendants raised preliminary objections on the grounds *inter alia* that the notification of the Local Government was illegal, that the Local Government had no authority under sec. 92 of the Code to empower a Court to try a part-heard suit, and that there was no authority in the Local Government to empower a Court to try a particular suit.

The Subordinate Judge overruled these objections. Against this decision of the learned Subordinate Judge the Defendants moved the Hon'ble High Court which issued this rule.

Dr. Rash Behari Ghose (with him *Babu Akhil Bandhu Guha*) for the Petitioners.—The order is wholly illegal. *First*, the notification authorises Babu Behari Lal Chatterjee to try the suit. Under sec. 92 the

Government can only empower a Court but Babu Behari Lal Chatterjee is not a Court. *Secondly*, the power which the Government can give must be one to try all suits and not any particular suit and certainly not a suit pending in another Court. The Government has really purported to transfer the suit. The Eastern Bengal and Assam Government has certainly no authority to transfer a pending suit from one Court to another.

Mr. B. Chakravarti (with him *Babus Umesh Chandra Ghosh* and *Nares Chandra Sen-Gupta*) for the Opposite Party submitted that the general power of Government included the particular power. So the Government could empower a Court to try a particular suit as well as a whole class of suits. The Government had not purported to transfer the suit. What they had done was only to create another Court of competent jurisdiction and once such Court was created it was the District Judge who transferred the suit as he had power to do under sec. 24. If the Plaintiff had withdrawn the suit from the District Judge's Court and presented it before Babu Behari Lal Chatterjee it would be perfectly legal. The objection therefore even if valid was highly technical there being no question that the suit was properly instituted and that the Subordinate Judge would undoubtedly have jurisdiction but for a technical defect.

Dr. Ghose for the Petitioners was not called upon to reply.

The JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—This Rule must, I think, be made absolute, because the notification of the 12th July 1911 was not such a notification as was contemplated by sec. 92 of the Code of Civil Procedure. It was a notification directed to a particular Judge and purported to deal with a particular litigation ; and that litigation was, at the date of the notification, already pending in the Court of the District Judge. It follows that the Subordinate Judge of Mymensingh was not competent to try or dispose of the suit and the District Judge had no power to transfer the suit to a Court which was not then competent to dispose of it. In, however, making this rule absolute I desire to make it clear, in order to avoid any possible objection in future, that the District Judge has, notwithstanding anything that has hitherto been done, power to try this suit. The result of our holding that the Subordinate Judge was not competent to try the suit is that the District Judge effected nothing by his order of transfer and therefore the suit remained where it was originally instituted. The District Judge, therefore, has jurisdiction to try the suit ; and we think, having regard to the circumstances of the case and also to the waste of time that has been involved by reason of the infructuous proceedings in the Court of the Subordinate Judge, that this case should be heard as soon as possible, that is to say as soon as the Judge can conveniently hear it.

We may also say, having regard to the statements made to us, that if there is pressure of work in the Judge's Court, an application may properly be made by him for assistance in carrying on his work as District and Sessions Judge.

In the circumstances of the case the Rule is made absolute, without costs.

Let the record and this order be sent down at once.

Rule made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

APPEAL NO. 211 OF 1911.

HOLMWOOD, J. SHARFUDDIN, J. 1911, 19, April. | MEHER SARDAR and others, v. THE KING-EMPEROR.

Jury trial—Misdirection—Citation af rulings in the charge to the jury—Right of private defence, when trespassers have begun cutting crop.

When trespassers began cutting and carrying away crop grown by the person in possession, reasonable apprehension to the property having already commenced, the right of private defence of the latter commenced at the same time; and it was misdirection on the part of the Judge to leave it to the jury to say whether the fact that the police station was only 9 miles off from the place of occurrence did not take away that right. The reference in such circumstances to his civil remedies also amounted to misdirection.

No rulings or authorities should be cited by the Judge in his charge to the jury nor should they be asked to differentiate or form any opinion whatever on any authorities. Such procedure confuses the minds of the jury and constitutes misdirection.

This was an appeal presented on the 16th of March 1911 by the above-named accused Appellants against the conviction and sentence passed upon them by the Court of Session of Khulna (Mr. T. C. Mukerjee) on the 13th of February 1911.

The accused who were seven in number were charged with the following offences: (1) that on the 5th November 1910 at Raipur, they formed an unlawful assembly with 8 or 9 others with the common object of enforcing the right or supposed right of the accused Meher Sardar with respect to a plot of 5 bighas of land in Raipur, of which the eastern half was claimed by the complainant and the other half by Kefatulla Sana, and of assaulting the complainant and his party with *lathis* and causing hurt to them, and that as in prosecution of those objects hurt was caused to complainant Mangal Biswas, Amenuddi and Barkatulla (who had since died from the effects of the injuries), they committed the offence of rioting punishable under sec. 147, I. P. C., (2) that on the same date and at the same place, they were members of an unlawful assembly with the common object as specified in the first charge, and that as in prosecution of those common objects Kader Sardar, Kobil Sardar and others struck Barkatulla with *lathis* and Ibrahim with a wooden pole, and thereby inflicted injuries with the intention of causing death and which in fact caused the death of Barkatulla, they committed the offence of murder punishable under sec. 302, I. P. C., read with sec. 149, I. P. C. To these charges another under sec. 326 read with sec. 34, I. P. C., was added against accused Nos. 2, 3 and 4, Ibrahim, Kader and Kobil, at the instance of the public prosecutor.

It appears that one Piyar Sardar was the registered tenant of the disputed plot. Complainant, Mangal Biswas and Barkatulla (deceased), it was alleged, occupied the eastern half of the plot while the western half was in possession of Kafatulla, descendants of Badal (Piyar's brother). The case for the prosecution was that complainant and his brother Barkatulla went, on the 19th Kartic, to cut paddy from the eastern half of the plot when accused with others came to the field with *lathis*; that the accused asked complainant to desist from cutting the paddy; that the complainant not minding them there was an altercation and under orders of Meher the accused Kader struck Mangal, accused Kobil and Kader struck Barkatulla with their *lathis*

MEHER SARDAR *v.* THE KING-EMPEROR.

and that Barkatulla fell down and shortly after died.

The complainant lodged information at Satkhira Thana which resulted in a police investigation. The accused were sent up before a Magistrate and he, after a preliminary enquiry, committed them to take their trial before the Court of Session.

The Sessions Judge agreeing with the jury found them guilty.

Against the conviction and sentence passed against them, the present appeal was preferred.

Babu Jyotish Chandra Hazrah for the Appellants.—The Judge's charge contained a number of misdirections ; submits that when the accused had grown the crops and were in possession of the lands, they were entitled to resist force by force. Therefore the charge of unlawful assembly must go. The right of private defence of property moreover extends to the taking of a man's life under the circumstances mentioned in sec. 104, I. P. C. Therefore even if Kader and Kobil be charged under sec. 326, the Judge should not have told the jury that there was no right of private defence when the thana was only nine miles off. A Judge, again, is to explain the law to the jury. He should not ask them to consider the effect of rulings.

Mr. Sultan Ahmed for the Crown.—Although possession was with the accused yet there is no evidence that the accused were in such imminent danger of person or property as to be justified in taking a man's life. Therefore even if the charge of unlawful assembly fails the conviction under sec. 326 upon Kader and Kobil must in any case stand.

Babu Jyotish Chandra Hazrah in reply.—The complainants were more than four in number and their action was robbery in the eye of law and therefore my clients were justified in using violence even to the extent of taking a man's life.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal from the conviction and sentence passed by the learned Sessions Judge of Khulna upon seven persons. Agreeing with the unanimous verdict of the jury he found them guilty under sec. 147, I. P. C, and directed that they be rigorously imprisoned for one year and six months each under that section. The accused Kader Sardar and Kobil were further found guilty by the jury under sec. 326 and they were sentenced to be rigorously imprisoned for three years under that section, the sentences were to run concurrently with those passed under sec. 147.

The jury found incidentally that possession whether rightly or wrongly was with the first accused Meher Sardar and therefore following the direction of the Judge they must have found that Meher Sardar and his party had the right of private defence against the taking of their crops. They were therefore justified in using sufficient force to get rid of these people and prevent their stealing their crops and the learned Judge clearly misdirected the jury when he left it to them to say whether the fact that the police station was only 9 miles off the place of occurrence did not take away their right of private defence ; for the right of private defence of property commences when reasonable apprehension of danger to the property commences and if persons have begun to cut and carry away your crop it cannot be said that you are bound to go nine miles to fetch the police. The reasonable apprehension of danger to the pro-

perty having commenced the right of private defence has also commenced. The same consideration applies to the remedies in the Civil Court to which the learned Judge referred. The cutting and the removal could not have been prevented at the moment by the institution of any suit, and the learned Judge practically directed the jury that by taking the law into their own hands they formed themselves into an unlawful assembly and it is on this misdirection that the jury have found them all guilty under sec. 147. We notice that he has cited and commented on a number of rulings of this Court and told the jury that it was for them to say whether any of those rulings are exactly on all fours with the circumstances of the present case. This is also a misdirection. No rulings or authorities are ever to be cited to the jury nor are they to be asked to differentiate or form any opinion whatever on any authorities. It is for the Judge and the Judge only to tell the jury what the law is, and before he tells them what it is he may consult as many authorities as he pleases and those authorities are no doubt binding upon him. The minds of the jury should never be confused by having a number of conflicting authorities or indeed any authorities laid before them. In this case the Judge not only confused the jury by laying before them a number of conflicting authorities and leaving it to them to choose between them but as we have seen he has misdirected them as to the law of the right of private defence. We have no doubt that the accused persons had the right of private defence in this case and that they did not exceed it except in so far as certain persons fractured the skull of one Barkatulla with *lathis.* This was a wholly unnecessary proceeding and quite unjustified. But as the assailants were exercising the right of private defence they cannot have formed members of an unlawful assembly.

The convictions and sentences under sec. 147, I. P. C., against all the Appellants must therefore be set aside and they must all be acquitted and released with the exception of Appellants Nos. 3 and 4, Kader Sardar and Kobil *alias* Kobeluddi, who have been further convicted by the jury under sec. 326 on the finding that it was they who struck Barkatulla the two blows on the head which the medical evidence shows fractured his skull. In so doing they undoubtedly exceeded the right of private defence and the verdict of the jury must be upheld. But we think the sentence must be reduced to one of eighteen months' rigorous imprisonment in each case.

We accordingly direct that the accused Kader Sardar and Kobil *alias* Kobeluddi be sentenced to eighteen months' rigorous imprisonment under sec. 326, I. P. C. The other Appellants will be discharged.

Appeal allowed.

THE

Calcutta Weekly Notes.

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NOTES.

NOTICES.

The High Court, Original Side, and its offices will be closed from Thursday, the 7th to Tuesday, the 12th, December 1911, inclusive, on account of the Imperial Durbar to be held at Delhi, and also on Saturday the 30th December 1911, and Wednesday the 3rd, and Friday the 5th, January 1912, in honour of the visit of Their Majesties the King-Emperor and Queen-Empress to Calcutta.

By order
J. H. HECHLE,
Registrar.

HIGH COURT,
The 28th November, 1911.

The High Court, Appellate Side, and its offices will be closed from Thursday, the 7th to Tuesday, the 12th December 1911, inclusive, on account of the Imperial Durbar to be held at Delhi, and also on Saturday the 30th December 1911, and Wednesday the 3rd, and Friday the 5th, January 1912, in honour of the visit of Their Majesties the King-Emperor and Queen-Empress to Calcutta.

By order,
R. L. ROSS,
Registrar.

HIGH COURT,
The 25th November 1911.

The constitution of Benches and the distribution business amongst them from to-day will be as llows :—

PRESIDENCY AND BURDWAN GROUPS.—The on'ble Mr. Justice Coxe and the Hon'ble Mr. stice N. R. Chatterjea.

RAJSHAHI AND PATNA GROUPS.—The Hon'ble r. Justice Caspersz and the Hon'ble Mr. Justice Chatterjee.

CRIMINAL BUSINESS (Other than the undefended es).—The Hon'ble Mr. Justice Holmwood and Hon'ble Mr. Justice Sharfuddin.

APPEALS UNDER Rs. 1,000.—The Hon'ble Mr. Jstice Carnduff.

ORIGINAL SIDE.—The Hon'ble Mr. Justice Chitty and the Hon'ble Mr. Justice Fletcher sitting singly.

CRIMINAL SESSIONS.—The Hon'ble Mr. Justice Woodroffe.

N.B.—On the return of the Judges proceeding to Delhi the routine of the 20th November will be resumed.

WE ACCORD OUR MOST HEARTY AND LOYAL WELCOME to their Majesties the King-Emperor and Queen-Empress who landed in Bombay on last Saturday. The visit of His Majesty to the Indian Empire is a unique event both in the history of this country and of England as well. We have great hopes, therefore, that the visit of the King-Emperor will prove of great constitutional importance and of lasting benefit to the Indian people in other ways.

IT IS NEEDLESS FOR US TO GO INTO THE HISTORY of the origin and the gradual development of British power in India on the present occasion. We are quite on sure grounds in saying that the Sovereignty of India vested in the British Crown for good in 1858 by the Parliamentary Statute of 21 & 22 Vict. c. 108 and the Royal Proclamation known as the Mutiny Proclamation of that year (see Ilbert, 1st edn., p. 101). Since then the Royal Titles Act of 1876 (39 & 40 Vict. c. 10) authorised the assumption of the title of Emperor of India by the Sovereign. It is, therefore, not absolutely necessary that the Emperor of India should be crowned in India.

BUT THE ASSUMPTION OF THE TITLE OF EMPEROR of India was celebrated by a Durbar at Delhi by the then Viceroy Lord Lytton. Following this precedent a similar Durbar was held by Lord Curzon after the Coronation of His Late Majesty King Edward VII. These Viceregal Durbars are of little constitutional importance except in so far as they go to establish the suzerainty of the King-Emperor over the Indian Princes and Rulers. As for the relationship as established between the Sovereign and the Indian subjects by the Proclamation of 1858, the Viceroys at those Durbars took no step forward for a progressive fulfilment of the pledges given under this Charter, which has rightly been described as the Magna

Charta of India. We may observe in passing that almost every thoughtful Indian subject felt at the time of the last Durbar that Lord Curzon committed a very serious blunder in not referring to this Proclamation on behalf of His Majesty. The mischief of it has however been annulled by the re-affirmation of the Proclamation by his late Majesty at the Jubilee of the Proclamation on 1st November 1908.

HIS LATE MAJESTY ON THIS OCCASION confirmed by Royal Proclamation the title that the Proclamation of 1858 had popularly acquired in this country *viz.* "The Great Charter," thus dissipating to the winds the views of some enemies of Indian progress that the Proclamation of 1858 was a mere embodiment of a few pious wishes and was of no constitutional importance (see. 13 C. W. N., p. i). His Majesty's Indian subjects have always understood paragraph 9 of the Great Charter of 1858 to confer on them the same status of citizenship as belongs to British subjects in any other part of the Empire. That they were right in their views is also confirmed by his late Majesty's Proclamation of 1st November 1908 (*Ibid*, p. ii) which referred approvingly to their claim of equal citizenship. It has also been maintained by the intellectual section of His Majesty's subjects in India that the equality of citizenship guaranteed by the Charter of 1858 carries with it the incidental right to representative government and His late Majesty's Proclamation of 1908 not only lends an express recognition to that view but also goes on to convey to us the assurance that "the politic satisfaction of such a claim will strengthen and not impair existing authority and power."

WE MUST ADMIT THAT THE EXISTING FORM OF Government in India, which is more or less absolute in its character, is a heritage that has come down to us from the Indian Rulers. It is only in 1858 that the British Crown assumed direct Sovereignty over India and solemnly pledged to bind itself to the Indian subjects by the "same obligations of duty" as to all its other subjects, which in other words meant the defining of their status as one of equal citizenship. The fulfilment of this obligation implied the modification of the autocratic form of Government that existed before. All this could not be done in a day but could only be accomplished, as it is gradually being done, in course of time. But what the people of India feel with regard to the matter is that the constitutional pledges of this great Charter should not be allowed to be ignored or their fulfilment retarded by those who have been charged with the Government of this country.

THE PROCLAMATION OF 1858 ALSO, AS A MATTER of fact, embodies in it the Royal Oath for India. In paragraph 3 it calls upon all subjects within the Indian "territories to bear true allegiance" to the Crown and its "heirs and successors." In paragraph 9, the Crown reciprocates by binding itself to the Indian subjects "by the same obligations of duty which bind us to all our other subjects," and the oath portion of it comes in where it declares that the obligations "by the blessing of the Almighty God, we shall faithfully and conscientiously fill." The binding obligations of the oath and the duty clause of the Great Charter makes the King-Emperor as much a constitutional monarch of India as His Majesty is a constitutional King of Great Britain, Ireland and the Dominions beyond the Seas. We have, therefore, good reasons to be proud of the position that India occupies in the constitutional framework of the British Empire. His Majesty the King-Emperor's genuine sympathy for his Indian subjects is well known and the desire of doing lasting good to them is indeed very strong in the Royal mind. We have every reason to hope therefore that His Majesty's Proclamation of the 12th of December next will ever be memorable in the history of India and will mark a new era in the constitutional progress of the country.

ALTHOUGH THE SECRETARY OF STATE FOR INDIA exercises all the executive functions of the Crown yet his presence in India is in no way likely to affect the position and powers of the Governor-General in Council or of the Viceroy. As a matter of fact all the responsible duties of the Governor-General in Council are performed with the previous sanction of the Secretary of State. There is no statutory obligation on the Secretary of State to consult his Council on any question relating to India before coming to a decision. He is no doubt responsible to the Cabinet and through the Cabinet to the Parliament. So he can while in India give his assent to any measure proposed by the Government of India provided he is confident that the measure would meet with the approval of the Cabinet.

THE EXERCISE OF THE FUNCTIONS AND AUTHORITY of the Governor-General in Council would thus be more facilitated than otherwise by the presence of the Secretary of State in India. It must not also be supposed that the presence of the Secretary of State will overshadow in any way the dignity and position of the office of the Viceroy. The Secretary of State is only a representative of the executive functions of the Crown, but the Viceroy can alone in his person represent the State and ceremonial functions of the Crown in India. Bu the presence of the King-Emperor would obvious

affect the Viceroy's position as such. Hence the order of His Majesty in Council that the powers and position of the Governor-General or, more properly speaking, of the Viceroy will remain as before during the presence of the King-Emperor in India.

THE ORDER IN COUNCIL MUST THEREFORE BE taken to refer more to the ceremonial State functions than to the constitutional power of the Governor-General. For the most important powers and duties of the Governor-General are of statutory authority and do not seem to be any wise affected by the presence of the Sovereign in the country. Even such powers as are vested in the Government as the representative of the Crown and independently of any statute is vested not in the Governor-General alone but in the Governor-General and Council. So that powers like that of granting pardon or of making treaties and arrangements with Asiatic States, if they are at all affected by the presence of His Majesty in India, are not touched by the Order in Council in question which only refers to the powers, &c., of the Governor-General. So that the only important respect in which the position of the Governor General during His Majesty's stay here might have been affected would seem to be as regards the powers exercised by him as representing the Sovereign as the Fountain of Honour and his position as Viceroy in connection with State ceremonials. These however do not exhaust all contingencies that may possibly require the benefit of this order, inasmuch as the Governor-General has generally all such powers, prerogatives, privileges and immunities appertaining to the Crown as are consistent with the law in force in India, and but for such order complication might possibly arise with respect to any one of such residuary prerogatives, should occasion arise for its exercise. The Order in Council however altogether excludes such possibility besides maintaining the dignity and position of the Viceroy unaffected by the presence of the Sovereign in person.

THE DEATH OF MR. JUSTICE GRANTHAM REMOVES from the English Bench a Judge who unlike his colleagues used to give expression to strong political views from the Bench. It was not long ago that Mr. Asquith, from his place in the House of Commons, strongly deprecated his conduct in this respect. The deceased Judge was of an old type of a Tory gentleman and was on the whole a very fair judge on questions unconnected with politics. He had a distinguished career at the Inns of Court and achieved some record victories at Parliamentary elections before he was elevated to the Bench in 1886. But for his impulsive nature his judicial career would have been a greater success.

WE PUBLISH BELOW A VERY INTERESTING ACcount of the legal aspects of Coronation in Hindu India. Coronation is a convenient term to use by reason of its present day associations, though the wearing of the Crown did not play any important part in the *abhiseka* annointing of a Hindu Sovereign, where religious ceremonies, the ascent to the throne and the oath formed the important elements. The account given in the *Mahabharata* of the Coronation oath and its earlier history points to a remarkable element of likeness between Indian customs of such distant date and the English custom which prevails to this day.

CORONATION OATHS OF HINDU SOVEREIGNS.

[BY MR. KASHI-PRASAD JAYASWAL, B A. (OXON), BAR-AT-LAW.]

The coronation of Hindu Sovereigns was a sacrament, yet it came more under the realm of the lawyer than that of the ritualist. There is an interesting story in the Hindu epic the Maha-Bharata to illustrate this view. On the occasion of Yudhishthira's assuming imperial dignity at Indraprastha (Delhi) most of the princes in the assembly of princes and people (1) were greatly dissatisfied on a point of precedence. The Pandavas had decided to honor Krishna as the first guest. Krishna was the most remarkable figure of the time, but his was not a crowned head. He belonged to the *Vrishnis*, occupying the territory now called Kathiawar, who had a republican constitution. The great rulers of India treated him with contempt (2). Shishupala, King of the Chedis of the South, gave vent to the feeling of the dissatisfied party. In reproaching the Emperor for the great error in the sacred ceremony, he is made to say :

"Sons of Pandu, you are ignorant! you do not know what law is! The Gangeya (Bhishma) (3) has also little knowledge and therefore he has transgressed the Smritis." [Shabha Parva, xxxvii, 3].

Thus, it would appear, a correct apprehension of the procedure of the coronation ceremony was supposed to fall within the province of law. And there were reasons for this supposition.

(1) "Despatch soon messengers to invite all * * Invite all the Brahmanas of the kingdom, all the owners of land, all the Vaisyas and all the respectable Shudras." Shabha Parva, xxiii, 41, 42.

(2) The story only reflects one of the numerous struggles which went on in India between tribal republics and newly founded monarchies of the sixth century B. C. The Buddhist Jatakas furnish several recorded instances.

(3) Bhishma, the eldest of the Kurus, acted as Director of Ceremonies.

The office of the monarch, his duties and obligations, had always been a subject of Hindu Law. His position is precisely described in the Smritis, and, he is consequently brought under the law. This is quite in keeping with the general attitude of the Hindu mind towards the majesty of law. Law, to the Hindu lawyer, was eternal. Even Gods, in his eyes, were subject to Law ; the King *a fortiori* could not be exempt from it (4). Hence constitutional laws were laid down in a special chapter in the Smritis called the *Rajadharma* (the Law of the King). The office of the King being defined by law, coronation was naturally viewed as a matter within the knowledge of the lawyer.

There was another legal aspect of the Hindu coronation. In performing this sacrament the King-elect had to utter certain promises in the form of oaths. Oaths, though originally a sacerdotal institution, came early within the domain of Hindu jurisprudence.

A complete detail of the coronation ceremony is to be found neither in any of the ritualistic works nor in any of the legal treatises. The sacerdotal *Shrauta Sutras* concern themselves purely with particulars of the Vedic texts to be repeated and other functions of a ritualistic nature ; the legal Smritis pre-suppose the knowledge of the ceremony, they only casually mention the *abhisheka* (the annointing). But "Coronation" consisted of more than the repeating of the mantras and the sprinkling of waters. It was coupled with a number of other functions which had a popular customary origin. Among these was the taking of the Coronation Oath. Specimens of these oaths are preserved in the great encyclopaedia of Hindu civilization, the Maha-Bharata, and there is reason to believe that the sacred vows were more or less stereotyped.

(a) "Do you swear from your heart, by word of mouth and in fact, 'I will take care of and tend the country, regarding it as the Deity and this ever and always.'

(b) "'I will act unhesitatingly according to the law as prevails here and in accordance with the policy of the Ethics of Government. *I will never act arbitrarily.*'" (5).

These two were the fundamental solemn promises made by one who would the next moment become King by the answer given to him in the traditional phrase 'Let it be so' (एवमस्तु). That these were the stereotyped forms may be inferred from the fact that the portion embodying them is declared to be of the 'Shruti authority of the highest order (श्रुतिरेषा परा lix, 110), amongst men.'

To these oaths were added others to suit circumstances, as is evidenced by one appended to them in the Mahabharata, (Verse, 108), which stands out on account of its incongruous style and subject-matter.

The Coronation oaths seem to have had a popular origin. Prior to the rise of large monarchies, and more so, that of the Empire (300 B. C.), the normal constitution of the states in India was republican which had grown out of the tribal assembly-system of the Vedas. These republics have been found in the vernacular literature of the 6th century B. C. by Pali Scholars, and that their strength was actually measured by Alexander is recorded by Greek writers. Some of them survived the Empire or perhaps reasserted themselves and came down up to the 4th century A. D. It appears that there obtained a system of oath-taking amongst these little republics. On the model of the Government of the republics certain corporate institutions were constituted in the country. The Buddhist brotherhood was copied by the Buddha from the Lichchavi constitution. Trade guilds (*shreni*, *sangha*) were called little sovereignties, merchant companies were similar bodies. The Buddhist *sangha* took a vow, the guilds and merchant companies had their vows (समयानुबन्धाः, 15 C. W. N. ccxci). These corporate bodies being descendants of republics, the feature of oath may be presumed in their parents ; and the Coronation oaths may have been substantially the same as those administered to the head of a republic (6). Indeed they bear distinct traces of a higher ideal of social life than that generally seen under Hindu monarchs. The doctrine which regarded the country (भौमं) as God was surely different from that which treated the inhabitants of the country as mere children (प्रजाः).

'How originated the word Raja, O Bharat, as it is generally used. Having hands and arms and neck like others, subject like others to the same kinds of pains and pleasures..................in fact, similar to others regarding all the attributes of men, why does one man, *viz.*, the King, govern

(4) Cf. 'Law is the King of Kings, far more powerful and rigid than they ; nothing can be mightier than law.' (Vedic Text translated by Sir William Jones—Vayavahara Darpana).

(5) प्रतिज्ञां चाभिरोहस्व मनसा कर्म्मणा गिरा ।
पालयिष्याम्यहं भौमं ब्रह्म इत्येव चासकृत् ॥
यश्चात्र धर्मो नीत्युक्तो दण्डनीतिव्यपाश्रयः ।
तमशङ्कः करिष्यामि स्ववशो न कदाचन ॥

Shanti Parva lix, 106, 107.

(6) Compare the oath to follow the law with the following : 'At first there was no monarch, no monarchy, . . . all men used to protect one another by law' Mahabharata, Shanti Parva, lix, 14.

the rest of the world containing many brave and intelligent persons, (Shanti, lix, 5-8)?'

This was the question put by Yudhisthira which elicited from Bhishma this history of Coronation Oaths. "There must be some mighty reason for all this because it is seen that the whole world bows down to one man as if to a god." The 'mighty reason' was explained by Bhishma with a historical account of the institution of Hindu monarchy. 'There was no monarchy and no monarch,' he related, in early times, and that then the people protected one another by law. As they thus lived, they found in time that mutual co-operation was not sufficiently powerful and law itself began to suffer. These men in consultation with Gods decided to elect a Monarch. The Gods gave them Virajas who however refused to be king. His three successors followed as 'Lords,' the fourth one 'built an empire and became arbitrary.' Evidently they had not taken any oaths, coming, as they were, from Gods to men. The fifth Lord of Divine origin, called Vena, proved to be quite 'unlawful' to the people, and he was removed. Thereupon now the sages elected a man called Prithu, a relation of the head of a frontier-tribe, the Nishadas. He promised faithfulness and the above oaths were administered to him. He was annointed, and as he 'pleased the people' he was called the 'Pleaser' (Raja).

Such is an historical theory devised to explain the Hindu coronation oaths and the institution of Hindu monarchy. Law underlies the whole theory and is dominant in the oaths themselves. The legal position of the Hindu King was that of a constitutional monarch, bound by contractual oaths, made supreme under the ægis of law and held responsible to law in theory and to his council in practice.

Reviews.

STEVENS' ELEMENTS OF MERCANTILE LAW. Fifth Edition. *By Herbert Jacobs, B. A., Bar-at-Law. Butterworth & Co., London and Calcutta.*

The Law of Contract is the foundation on which the whole superstructure of Mercantile Law has been built. The general principles of the law of Contract and of the closely allied subjects of Agency, Partnership, Sale of Goods, Carriage of Goods, Shipping, Insurance, Suretyship, Guarantee, are very clearly and concisely explained in this handbook. Further, the outlines of Company Law, the law relating to Cheques, Bills and Negotiable Instruments, Patent, Trade-mark, Copyright, Bankruptcy, Arbitration, are also well presented under the respective headings. The chapter on Stock Exchange Transactions as also those on Arbitration, Patent, Trade-mark and Copyright are new additions and they thoroughly maintain the character of the work aiming at accuracy of statement within a small compass. Although this small volume is intended for students undergoing training as chartered accountants and intending to appear at accountantship examinations in London, yet every one connected with the mercantile line of business will find it a very useful guide with regard to matters dealt with in this book.

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THE INDIAN DECISIONS, (Old Series), Vol. I, Supreme Court Reports, Bengal. *T. A. Venkasawmy Row, Madras. Law Printing House, Mount Road. 1911.*

Mr. Venkasawmy Row, the nephew of the late Mr. Sanjiva Row, has been ably following up his uncle's schemes of legal publication and the present is not the least remarkable of the lines along which those schemes have developed under his hands. The present volume contains a verbatim reprint of (1) Morton's Reports, 1774 to 1841, (2) Bignell's Reports, 1830 to 1831, (3) Montriou's Reports, 1846 and (4) Fulton's Reports, 1835 to 1844. Although the cases reported in these volumes are still living authorities, they have long ceased to be accessible to the general body of legal practitioners, and Mr. Row has done a real service to the profession in reprinting them and thus making them accessible to all. The excellent get up of the compilation adds to its attractiveness.

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THE INDIAN DECISIONS, (New Series). Allahabad. Vol. I, January 1875 to May 1880. Madras. *The Law Printing House, Mount Road. 1911.*

The present compilation shows rather greater originality than the one just noticed. The decisions of the Allahabad High Court and of the Privy Council on appeal from that Court reported whether in the official or the non-official reports and passed within the dates above specified are reprinted in this volume in the chronological order. As the compiler has not yet obtained the permission of Government to reprint the reports from the Indian Law Reports, he has had to limit himself to reprinting the judgments only from those reports, and he has also had to rewrite the head-notes. There is in this volume as in the one already noticed a full subject-index and tables of cases. There is no question that the book as a whole with its chronological arrangement of decisions will be found useful.

SETTLEMENT PARICHAYA (সেটেলমেণ্ট পরিচয়). *By Niranjan Chandra, B. L. Price annas 2.*

In this booklet the Record-of-Rights procedure followed by Settlement Officers popularly known as "Settlement," is explained in easy Bengalee.

The information regarding the different stages of the work is accurate and in the course of explanation the suggestions conveyed both to landlords and tenants as to what is to be done by them before the commencement of the settlement work, during its progress and up to its completion will be found very useful by them. Every zemindar's *amla* who is not well-acquainted with the English language and the law will do well to read this little work.

AN EPITOME OF ROMAN LAW. *By Subodh Chandra Sarkar, B. L., Pleader, Alipore, Calcutta. M. C. Sarkar & Sons, Book-sellers and Publishers, 75, Harrison Road. Price Rs. 1-4.*

This is a fairly reliable summary of the most salient features of Roman law, intended to assist students in preparing for their examinations. There is a glossary of terms which as well as a reprint of the Calcutta University B. L. questions annexed at the end with references to the pages of the book where the answers may be found should prove useful to students. There are besides some useful footnotes.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL.—*Rex.* v. *Hill.* Before JUSTICES DARLING, COLERIDGE AND HAMILTON. 23rd October 1911.

Misdirection of jury—Prisoner's defence however weak must be left to the jury.

This was an appeal against a conviction for felonious wounding. The case for the prosecution was that a police-constable saw the Appellant in a street behaving in a peculiar manner and when he spoke to the prisoner he was stabbed. The Appellant's story was that he acted in self-defence after he had been struck by the constable. The trial Judge suggested that the Appellant was insane, and undefended as the Appellant was, he was not allowed to state his defence at all. In the summing up the trial Judge asked the jury to find whether or not he was insane. The jury found him insane and brought in a verdict of guilty. The Appellant contended that he was entitled to have his defence however weak left to the jury. The Court allowed the appeal and quashed the conviction. In the course of his judgment Mr. Justice Darling observed :-

The Appellant was indicted for felonious wounding, and did not deny the wounding, but said he did it in self-defence. Therefore there was a question whether, if entitled to defend himself at all, he used force more than sufficient to protect himself against the officer's violence. It might be that the defence was a thoroughly bad one, but it ought to have been left to the jury. The only question in fact left was whether or not the Appellant was insane.

The Court had no means of going into the question whether he was insane or not since the decision in *Rex* v. *Machardy* (T. L. R. 1911). Speaking for the present members of the Court, they would wish a reconsideration of that case, which was a decision of a majority only. In their opinion the present case did not come within the exception in the proviso to sec. 4 (1) of the Criminal Appeal Act, 1907, for it was a miscarriage of justice if a prisoner's defence, however weak was not left to the jury—*Rex* v. *Dinnick* (74 J. P. 32). No doubt the Recorder thought he was acting in the Appellant's interest, and that he had found a better defence for him than he had found for himself.

Mr. Oddie for the Appellant.

Mr. Boyd for the Crown.

B. D. *Appeal allowed.*

COURT OF APPEAL.—*Stoddart* v. *Union Trust, "Ld."* Before LORDS JUSTICES WILLIAMS, BUCKLEY AND KENNEDY. 24th October 1911.

Assignment of a chose in action—Whether the Defendant can rely on fraud of the assignor in an action by the Assignee—Assignee's notice or knowledge of fraud, if material.

This was an application by the Plaintiff for judgment or a new trial. The Plaintiff, an assignee, sued to recover money from the Defendant alleged to be due in respect of a certain contract of sale to the assignor. The defence was that the sale was void for fraudulent misrepresentations. The jury found that there were misrepresentations and that the Defendants suffered damage which was assessed. At the trial the Jury was not asked whether the Plaintiff when he took the assignment had notice of the fraudulent misrepresentations as the result of which the contract was made. The Court below gave judgment against the Plaintiff who appealed. The Court allowed the appeal. In the course of his judgment LORD JUSTICE VAUGHAN WILLIAMS said :—

It was not suggested that counsel on either side asked to have this question of knowledge put to the jury. In dealing with this case he was therefore bound to treat it that this was a contract entered into for good consideration and that there was an absence of any knowledge on the part of the Plaintiff of any fraudulent misrepresentations. He must treat him as an innocent assignee for value, and the question arose whether under those circumstances there was anything either in law or in equity which prevented the Plaintiff from succeeding, taking into consideration the facts found by the jury.

On the authorities he was bound to say there was nothing which would prevent the Plaintiff from recovering and also under sec. 25, sub sec. 6, of the Judicature Act, 1873, which provided that "any absolute assignment, by writing under the hand of the assignor of any debt or other legal chose in action . . . shall be . . . . effectual in law (subject to all equi ies which would have been entitled to priority over the right of the assignee if this Act had not passed)." Under these circumstances the old difficulties had been done away with as to choses in action not being assignable, and that the assignee could not bring his action in his own name but only in the name of the assignor. The result of that sub section was that a Plaintiff would not have been restrained in equity from enforcing the debt of which he was assignee if he was an assignee for value without notice of the fraud. That seemed to be the effect of the authorities. He was bound to confess that he gave effect to them with some reluctance.

He hoped that he might have found in *Young* v. *Kitchin* (L. R., 3 Ex. D., 127) and in the judgment of Lord Hobhouse in *The Government of Newfoundland* v. *Newfoundland Railway Company* (13 A. C., 199) sufficient to enable him to say that the assignee here when he brought his action so far stood in the shoes of the assignor, that the Defendants could rely as defence on the fraud of the assignor. Unfortunately he could not say that here, and it was right that he should give the reason. The limitations seemed to him to be those which were stated by Baron Cleasby in *Young* v. *Kitchin* at p. 130 thus:—The Judicature Act, 1873, sec. 25, sub-sec. 6 (1), says that the assignment of a debt or other legal chose in action shall be subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,' that is, subject to all equities which would be enforced in a Court of Equity." It would not be true to say that in a Court of Equity a Defendant could not in any case set up a defence based on fraud inducing the contract. He thought that he could not in any case set up a defence bassed on fraud including the contract. He thought that he could set up the defence that the particular contract ought to have been set aside and cancelled on the ground of fraud, but whether he could have done so or not in the present case was immaterial because he had not in fact done so, as he had so acted with reference to the subject-matter of the contract that he could not put it back *in statu quo*.

The only question here was whether the Defendants were in such a position that they could not rely on the fraud. In his opinion they could not. The matter had been discussed at length in the Court below and there was a finding of the jury to the effect that it was Price who was guilty of the misrepresentations. He did not think it was entirely consistent with justice that an assignee of a chose in action, even though innocent, should be able to bring this action without any regard to the fraud of the assignor. Such a proposition was not true as regards chattels; unfortunately it was true of choses in action. But as regards these it was not invariably true. The *Newfoundland* case laid down that unliquidated damages might now be set off against an assignee if flowing out of and inseparably connected with the dealings and transactions which also gave rise to the subject of the assignment.

Messrs. Scott, Fox, K. C, and Abinger for the Appellant.

Messrs. Salter, K. C., and Cairns for the Respondent.

B. D. *Appeal allowed.*

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD MACNAGHTEN. LORD ROBSON. SIR JOHN EDGE. MR. AMEER ALI. 1911, 31st, October.	BHAGWATI PERSHAD SINGH, Appellant, Petitioner, *v.* BIJAI BAHADUR SARAN PERSHAD SAHAI and 2 others, Respondents.

Special leave—Admissibility and proof of documents, not substantial question of law.

This was a petition for special leave to appeal to His Majesty in Council under the circumstances hereinafter mentioned. The Petitioner, as Plaintiff, instituted the present suit against the Respondents, as Defendants, in the Court of the Subordinate Judge of Gorakhpur. The plaint alleged *inter alia* that one Suraj Bali Singh, a Hindu, died childless on the 6th day of July 1874, leaving him surviving as his heir his widow Gajraj Kunwar, the third Respondent, who took a Hindu widow's estate in the property left by the deceased; that on the 2nd day of August 1907, Gajraj Kunwar executed a deed, whereby she purported to make a gift of the properties left by her late husband to the 1st and 2nd Respondents, who were the sons of one Mussammat Bansraj Kunwari, deceased; that the said deed of gift recited that the said Bansraj Kunwari was the daughter of the 3rd Respondent and her late husband and the 1st and 2nd Respondents were consequently their grandsons. The Petitioner alleged that the said Bansraj Kunwari was in fact the daughter of one Bir Bhadar Singh, a brother of the Petitioner; that the Petitioner was the next reversionary heir of the said Suraj Bali Singh, and that Gajraj Kunwar had no power to alienate by a deed of gift the property left by her late husband, but she executed the said deed,

dated the 2nd day of August 1907, with a view to defeat the Petitioner's reversionary right. He prayed for a declaration that the 1st and 2nd Respondents were not the grandsons; Suraj Bali Singh and that the said deed of gift dated the 2nd day of August void.

Gajraj Koer filed her written statement denying that the Petitioner was the next reversionary heir of her late husband Suraj Bali Singh, and alleging that the said Bansraj Kunwari was her late husband's daughter, and that the 1st and 2nd Respondents were their grandsons. She also pleaded that the suit was barred by limitation and that she was the absolute owner of certain properties comprised in the deed of gift.

On the 28th day of January 1908, the 1st and 2nd Respondents filed a joint written statement wherein they raised the same pleas as those raised by the 3rd Respondent and on the same date all the Respondents through their Counsel admitted that if the said Bansraj Kunwari were not the daughter of the said Suraj Bali Singh, the Petitioner would be his next reversionary heir.

On the pleadings the Subordinate Judge framed the following issues :—

(1) Is the Plaintiff's claim barred by limitation?

(2) Was Mussammat Bansraj Kunwari the daughter of Suraj Bali Singh?

(3) Does the property mentioned in para. 5 of the written statement form part of Suraj Bali's estate?

At the trial the Petitioner objected that certain documents produced by the Respondents were not admissible in evidence on various grounds, but his objections were overruled and the said documents were so admitted.

That after recording the oral and documentary evidence adduced by the parties the Subordinate Judge delivered his judgment on the 6th day of November 1908 and passed a decree dismissing the suit with costs on the 24th day of November 1908. On the 1st and 3rd issues he held that the suit was not barred by limitation and that the property mentioned in para. 5 of the written statement formed part of the estate of the late Suraj Bali Singh. With regard to the 2nd issue he decided that the burden of the proof lay on the Petitioner, who must prove that Bansraj Kunwari was not the daughter of Suraj Bali Singh and that the Petitioner failed to discharge the onus that lay upon him. With regard to the oral and documentary evidence adduced by the Petitioner he was of opinion that the latter did not bear directly on the question as to the parentage of the said Bansraj Kunwari, and that the former was fully rebutted by the documentary evidence adduced by the Respondents.

Against the decree of the Subordinate Judge the Petitioner appealed to the High Court. He contended *inter alia* that in considering his witnesses' evidence as to the parentage of Bansraj Kunwari, the learned Subordinate Judge misunderstood the scope of sec. 30 and overlooked the provisions of sec. 50 of the Indian Evidence Act, that the copy of the Patwari's report of 1874 was not admissible in evidence and the learned Subordinate Judge erred in relying upon it in support of his conclusions; that the entries in the copies of the khewats of one particular year 1292 Fasli relied upon by the Subordinate Judge were not admissible in evidence, and, even, if they were admissible in evidence, they were of no value as they were not corroborated by the production of khewats for previous years and were contradicted by the copies of the khewats of other years; and that the written statement of Mussammat Gajraj Kunwar, the 3rd Respondent, had not been duly proved, and was not admissible in evidence against the Petitioner.

On the 7th day of April 1910, the said High Court delivered its judgment and passed a decree dismissing the Petitioner's appeal with costs. The learned Judges, who heard the appeal, were of opinion that there was a conflict of testimony in the case and that where such a conflict existed it was satisfactory to have documentary evidence as a guide. They then relied upon the documentary evidence of the Respondents hereinbefore referred to and came to the conclusion that the decision of the lower Court that Bansraj Kunwari was the daughter of the late Suraj Bali Singh was not wrong.

The High Court refused to grant leave to appeal on the ground that there was no question of law involved and their decree was one affirming the decree of the Court below. Hence this petition.

Mr. L. DeGruyther, *K. C.* (*Mr. Parekh* with him) submitted that the appeal raised substantial questions of law as to the admissibility and proof of certain documents.

Their Lordships rejected the petition.

Mr. Edward Dalgado, Solicitor for the Petitioner.

B. D. *Leave refused.*

[ORDINARY ORIGINAL CRIMINAL JURISDICTION.]

SESSIONS CASE.

CARNDUFF, J. 1911, 6, February. } EMPEROR, Complainant, *v.* KERAMUT SIRDAR, Accused.

Evidence Act (I of 1872), sec. 30—Co-accused—Plea of guilty—Removal of co-accused from dock—Co-accused's confession—Admisibility as against the other prisoner.

When one co-accused pleads guilty and is removed from the dock and the other accused alone is tried:

Held—*That the confession of the former cannot be taken into consideration as against the latter under sec. 30 of the Indian Evidence Act for there has been no joint trial.*

QUEEN-EMPRESS *v.* PAHUJI (1) *followed.*

Mr. Shelley Bonnerjee for the Crown.

The JUDGMENT OF THE COURT was as follows :—

CARNDUFF, J.—In this case five persons were placed before me in the dock, all charged with dacoity. Four of them pleaded guilty, while the fifth pleaded not guilty. I recorded the former plea and indicated my acceptance of it by directing that, in accordance with my usual practice, the accused be brought up for sentence at the end of the Sessions. The fifth is now on his trial alone, and the question has been raised whether certain statements made by the others can now be proved and taken into consideration against him under sec. 30 of the Evidence Act. Taking the same view as was taken in *Queen-Empress* v. *Pahuji* (1), I am of opinion that this cannot be allowed.

[At the close of the trial of Keramut, who was found guilty by the jury, his Lordship ordered the other accused to be brought up and sentenced all of them to various terms of rigorous imprisonment.]

A. K. G.

(1) I. L. R. 19 Bom. 195 (1894).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 62 OF 1910.

JENKINS, C. J. WOODROFFE, J. 1911, 20, July. } AMLOOK CHAND PARAK *v.* SARAT CHUNDER MUKERJEE.

Code of Civil Procedure (Act V of 1908), Or. 41, r. 20—Application for leave to add one as party Respondent—Courts' discretion—Mortgage decree—Transfer of Property Act (IV of 1882), secs. 88 and 89—Order for sale, application for—Limitation—Limitation Act (IX of 1908), Sch. II, Arts. 181, 182, 183—"Enforce a judgment," meaning of—Execution.

The fact that the time for preferring an appeal has expired does not preclude the Appellate Court in a fit case from adding a party to the suit whom the Appellant has failed to bring in as Respondent as a party Respondent under Or. 41, r. 20 of the Civil Procedure Code.

An application made on the 3rd July 1909, for an order absolute for sale by a mortgagee who had obtained the preliminary decree on his mortgage in the High Court on the 16th December 1886, was barred by Art. 183 of Sch. II of the Limitation Act (IX of 1908), or the corresponding article of Act XV of 1877.

The application was one to "enforce a judgment" within that article.

The meaning of the word "enforce" is not limited to realization by execution but may have a wider meaning.

HORENDRA LALL RAI CHOUDHURI *v.* MAHARANI DASI (1) *referred to.*

MADHUB MONI DASI *v.* PAMELA LAMBERT (2) *distinguished.*

(1) [1901] L. L. 28 I. A., p. 89.
(2) 15 C. W. N. 337 (1910).

AMLOOK CHAND PARAK *v.* SARAT CHUNDER MUKERJEE.

This was an appeal from an order made by Mr. Justice Fletcher, dated the 13th day of May 1910, on an application made in Suit No. 477 of 1886, for an order that the Plaintiff be at liberty to add Upendra Lall Bose as a party Defendant and that the Plaintiff be at liberty to proceed to sell, pursuant to the decree made in the suit on the 16th December 1886, an undivided quarter share of the Defendant Sarat Chunder Mukerjee of and in the premises No. 30 formerly No. 49, Clive Street, in the town of Calcutta, and Nos. 2 and 3, Bishoo Babu's Lane, Kidderpore, and the family dwelling-house at Kidderpore, and that all necessary and usual directions should be given.

It appeared that by a mortgage, dated the 25th January 1886, and made between the Defendant of the one part and the Plaintiff of the other part the Defendant mortgaged his ¼th share in the properties in question to the Plaintiff. The Defendant alleged that no consideration money was paid by the Plaintiff to him.

On the 10th December 1886, the Plaintiff instituted this suit against the Defendant to enforce the said mortgage. On the 16th of December 1886, the parties consented to a decree in the following terms:—

"It is ordered and decreed with the consent of the Plaintiff by his Counsel and of the Defendant in person that the Defendant do at the end of 6 months from the date hereof that is on the 15th of June 1887, on the middle floor of the Court House opposite the Registrar's room pay to the Plaintiff the sum of Rs. 25,382-8-0 with interest thereon at the rate of 12 per cent per annum until payment. And it is further ordered and decreed with the like consent that upon payment as aforesaid the Plaintiff do reconvey or retransfer the properties comprised in the mortgage in the plaint in this suit mentioned free from incumbrances done by him or any person claiming by from or under him. But in default of such payment as aforesaid it is further ordered and decreed with the like consent that the properties comprised in the said mortgage be sold with the approbation of the Registrar. * * * * And it is further ordered and decreed with the like consent that the money to arise from such sale be paid into Court to the end that the same may be duly applied in payment of the said sum of Rs. 25,382-8-0 with interest thereon as aforesaid. And it is further ordered and decreed with the like consent that if the money to arise from such sale should not be sufficient for the payment in full of the said sum of Rs 25,382-8-0 with interest thereon as aforesaid the Defendant do pay to the Plaintiff the amount of deficiency together with the Plaintiff's costs of this suit."

The Defendant did not pay the said sum of Rs. 25,382-8-0 to Plaintiff "at the end of 6 months" from the decree.

On the 8th of April 1903, the Defendant purported to sell his share in the premises No. 30, Clive Street, to one Norendra Krishna Bose and on the 1st of December 1903 Norendra transferred his interest to Upendra Lall Bose who in the beginning of January 1908 as attorney for the said Defendant, Sarat Chunder Mukerjee, is alleged to have proposed to the Plaintiff Appellant that he should enter satisfaction of the decree in this suit and offered to pay to the Petitioner Rs. 1,000 which he subsequently raised to Rs. 2,000 and who alleged that he had spent large sums of money on the property.

The only step taken by the Plaintiff to enforce the decree until the present application was an application for execution on a tabular statement dated the 2nd of May 1887. Next came the present application made more than 23 years after the date of the decree.

Messrs. B. Chakravarti, B. C. Mitter and *N. Sircar* for the Appellant.

This is an application under the Transfer of Property Act for an order for sale. It has been decided over and over again by this Court on appeals from Courts subordinate to it that there is no period

of limitation within which an application for an order of sale may be made under that Act. The Court is therefore bound to make an order for the sale of the property.

Messrs. S. P. Sinha and *P. R. Das* for the Defendant-Respondent.

In the present case his Lordship has to decide what is the effect of the consent decree in the suit. That portion of the decree which orders the Defendant to pay to the Plaintiff Rs. 25,382-8-0 on the 15th June 1887, is the real substantial portion of the decree, the rest of the decree being purely conditional on the Defendant failing to obey the order to pay the amount on the 15th of June 1887. The application is merely to enforce the decree and that being so it is barred by Art. 180 of the Limitation Act, 1877, as not being made within 12 years from the 15th June 1887. The argument of the learned Counsel for the Plaintiff-Appellant that the present application could be made at any time after the decree even if it be more than 100 years is an alarming one.

Mr. S. R. Das for the Respondent, U. L. Bose, supported.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The Appellant is a mortgagee, and the mortgage under which he claims is dated the 25th of January 1886. On the 16th of December 1886, he obtained a decree on his mortgage by consent. On the 3rd of July 1909, he made the application out of which the present appeal arises : and by the application, he asks that he may be at liberty to add Upendra Lal Bose as a party Defendant to the suit, and that thereafter he may be at liberty to proceed to sell, pursuant to the decree made in this suit on the 16th of December 1886, an undivided quarter share of the Defendant Sarat Chunder Mukerjee of and in premises No. 30 formerly No. 49, Clive Street, Calcutta, and Nos. 2 and 3, Bishoo Babu's Lane, Kidderpore, and the family dwelling-house at Kidderpore, and that for the purpose of such sale all necessary directions may be given to the Registrar. Mr. U. L. Bose's position is that on the 8th of April 1903 he became a purchaser of the Clive Street property, and in his affidavit he states that "he is a *bonâ fide* purchaser for full market value, that he had no notice of the Plaintiff's claim, that he had laid out large sums of money with borrowed funds in the improvement of the property and that other persons besides himself have got an interest therein and that it would be extremely hard if after the lapse of 23 years the Plaintiff is allowed to assert a claim which he had given up years ago."

The case was heard by Mr. Justice Fletcher, the parties before him being the applicant, the mortgagee, on the one side, and on the other, the mortgagor and Mr. U. L. Bose who resisted the application with success. From the judgment of Mr. Justice Fletcher the present appeal has been preferred ; and, I will, at the outset deal with a point taken on behalf of Mr. U. L. Bose. His name does not appear as a Respondent, and, therefore, it is maintained, as against him the judgment of Mr. Justice Fletcher cannot be touched. But it appears that the Appellant, according to his lights, made every effort he could to make Mr. U. L. Bose a party Respondent. He may not have proceeded in the most approved manner, still undoubtedly he was anxious to have Mr. U. L. Bose as a Respondent, and naturally anxious. Having failed in his endeavour because, he says, he could not persuade

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the Court officers to grant the necessary process, he has applied under r. 20, Or. XLI that Mr. U. L. Bose may be added as a Respondent here. It has been suggested that the Court has not power to do that inasmuch as the time for appealing has elasped. Counsel has even been able to cite a case which he thought bore out that view, but I think the case has been misunderstood and it merely amounts to this that it is a question for the Court in its discretion to determine in each case whether or not it will make an order contemplated by r. 20, Or. XLI. I have indicated the circumstances under which it became necessary to make the application in this case, and I think that the Appellant certainly is entitled to ask that Mr. U. L. Bose should be made a party, and that therefore the order to that extent should go. Therefore, I propose to deal with this appeal on the footing of Mr. U. L. Bose being a Respondent before us.

It will be seen that the two critical facts are, first, that the decree on the mortgage was made so far back as the 16th of December 1886, and that the present application is made in 1909. Those dates have naturally prompted the Respondents to raise a plea of limitation and to suggest that there must be some mode of limiting litigation. The question that we have to decide is whether the applicant is right when he contends that he is, so far as this application goes, free from the law of limitation.

Now the decree first provides for a personal decree against the mortgagor and this is followed by a provision for the return of documents and so forth on payment in accordance with this personal decree. Then there is a provision that in default of payment there is to be a sale of the property, and it is further ordered that if the money realised by such sale shall not be sufficient for the payment in full of the sum of Rs. 25,382-8 as. with interest, that being the amount for which the personal decree was passed, then the the Defendant should pay to the Plaintiff the amount of the deficiency together with the Plaintiff's costs. The decree is in a sense peculiar, and that has led to a contention before us on the part of the Respondents that it does not come within the provisions of the Transfer of Property Act in general or of secs. 88 and 89 in particular. No doubt, if those sections be read literally, that is so. On the other side it is contended that the decree comes within the provisions of the Transfer of Property Act, and it is on that ground principally that it is contended in the light of the cases that the present application is not barred.

For the purpose of my judgment I will assume that this decree is within the Transfer of Property Act, and I prefer to put it on that broad ground rather than to seek minute distinctions, though I can quite see that the decree does encourage the distinctions which have been suggested.

Now if it be a decree, as the Appellant before us contends, under sec. 89 of the Transfer of Property Act, and was such a decree in 1886 when it was passed, then it is clear, that no further decree was to follow on it. All that was to follow on it was, under sec. 89, an order for sale :— It is no use our looking into expressions in the cases, for the purpose of determining this ; the Act itself is clear and plain. It provides in sec. 88 that there shall be a decree for sale. Sec. 89 provides that if such payment, that is the payment contemplated by the decree, 'is not made, the Plaintiff or the Defendant, as the case may be, may apply to the Court for an order

absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in sec. 88; and thereupon the Defendant's right to redeem and the security shall both be extinguished.' Now, what is, speaking generally, the nature of that order for sale? In *Horendra Lal Roy Choudhuri* v. *Maharani Dasi* (1), there was a decree for sale, substantially as there was here, and the Respondents in that case, the mortgagors, being in default, the Appellant petitioned for an absolute order for sale. Lord Davey in disposing of the case says in the course of his judgment, "under the circumstances it is not surprising that the Respondents were not able to find the money on the stipulated day; and thereupon the present Appellant presented a petition for realization of his entire decree by sale of the mortgaged properties." He goes on to say, in describing what had been done by the learned Subordinate Judge who acceded to the application: "The learned Subordinate Judge in the first instance gave the Appellant execution for the whole amount of his decree." So that, at any rate, it appeared to the Privy Council and to Lord Davey in that case that an application for an order for sale was a petition for realization by the mortgagee of his decree.

Now this case falls within the provisions either of Art. 183 or Art. 181 of the Limitation Act, it does not fall within the provisions of Art. 182. Art. 183 deals with an application "to enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction or an order of His Majesty in Council," and provides a period of twelve years from when a present right to enforce the judgment, decree or order accrues to some person capable of realising the right." If this case comes within Art. 183, it is free from the embarrassment of the conflicting decisions which have arisen under Art. 182. If and so far as this can be regarded in the words of Lord Davey, as 'an application for realization of a decree,' it is not unfair to say that it is an application to enforce a judgment. The word "enforce" has a fairly obvious meaning. We have been referred to one or two dictionaries as to what its meaning is. But I take it to be clear, even apart from the dictionaries, that the word "enforce" is not limited to realization by execution but may have a wider meaning. So even if it can be said that the present proceeding is not strictly in execution but is a form of judicial relief under a decree, it still would legitimately come within the expression "to enforce a decree,"—And it seems to be manifest that it is either a proceeding in execution or a proceeding for judicial relief under a decree; and I see no reason why Art. 183 should not apply. If that be so, then it follows that this application is out of time.

I do not propose to make more than a passing reference to the argument that has been addressed to us in relation to Art. 181.

There have been brought to our notice numerous cases on Art. 181 and Art. 182—Arts. 178 and 179 of the former Limitation Act which they reproduce—with a view to showing that these articles did not apply in the past to an application under sec. 89 of the Transfer of Property Act, and that by parity of reasoning they could not govern applications under

(1) (1901) L. R. 28 I. A., p. 69.

the substituted provisions of Order XXXIV of the Code of Civil Procedure. In this connection it has been a matter of argument and of considerable contest before us as to whether this case is to be decided by reference to the old Code and the old Limitation Act. or by reference to the new Code and the new Limitation Act, both of which came into operation on the 1st of January 1909. If the view I have expressed as to the application of Art. 183 be right, no question of this kind arises inasmuch as the Plaintiff in 1886 obtained a decree which required no supplemental decree, but required only an order. Had the decree been an incomplete one and required a further decree, then having regard to the way in which Acts in reference to procedure are to be construed, possibly the provisions of the present Code would have been applicable. But, be that as it may, I fail to follow the line of reasoning which would suggest that Art. 181 would still not have presented a bar to the application for this further decree. One object in view when the present Code was passed was to end, as far as possible, the conflict of decisions which embarrassed the Courts, and among those conflicting decisions were those which dealt with two points:—*First* of all, whether an application for an order under sec. 89 of the Transfer of Property Act was an application in execution or not, and, *secondly*, whether, if it was not an application in execution, Art. 181 constituted a bar on the ground that the application was one not contemplated by Code of Civil Procedure. Those were not the only points that were sought to be set at rest, but those were prominent among them. And, the Act indicates that the scheme whereby these two sets of conflicts were to be composed was, in the first instance, by making it clear that an application which was to follow on a preliminary decree for sale, was not to be an application in execution, inasmuch as the next step under Or. XXXIV, r. 5 is not for an *order* for sale but for a decree for sale. And the mode in which the other conflict was composed was by taking the provisions as to mortgage suits out of the Transfer of Property Act and bringing them within the Civil Procedure Code, so that it would no longer be possible to contend that Art. 181 applied on the ground that these applications are not under the provisions of the Civil Procedure Code. I am aware that there is an opinion expressed in *Madhub Moni Dasi* v. *Pamela Lambert* (2), which it may be difficult to reconcile with this, but it is not a decision, for as I read the judgment in that case, the learned Judges expressly refrained from deciding the point which was a necessary preliminary to its becoming a point calling for actual decision. It could only be a point for decision if and when it was decided that the new Code applied. But so far from there being any such decision, the learned Judges not only expressly refrained from deciding this, but the decision actually passed by them in effect negatived the view that the case fell under the new Code, for in conformity with the terms of the application out of which the appeal arose they decided that there should be an *order* absolute and not a final *decree* for foreclosure. I have referred to this matter, as I desire for future consideration, when the point actually arises for decision, whether or not Art. 181 presents a bar to an application for a final decree, whether it be under r. 5 or r. 3 of Or.

(2) 15 C. W. N. 837 (1910).

AMLOOK CHAND PARAK *v.* SARAT CHUNDER MUKERJEE.

XXXIV when that application is made beyond the time contemplated in Art. 181, for as yet there has been no actual decision on this point in the view I take of the case reported in *Madhub Moni Dasi* v. *Pamela Lambert* (2).

The result is that for the reason which I have indicated in the earlier part of my judgment, I think Mr. Justice Fletcher rightly decided that the present application was barred, and that therefore this appeal should be dismissed with costs: Mr. U. L Bose is entitled to a separate set of costs.

WOODROFFE, J.—I agree.

Babu Bhringeswar Srimani, Attorney for the Appellant.

Mr. U. L. Bose, Attorney for the Respondent.

A. K. G. *Appeal dismissed.*

(2) 15 C. W. N. 387 (1910).

[FULL BENCH REFERENCE.]

IN

APPEAL FROM ORIGINAL DECREE No. 45 OF 1908.

JENKINS, C. J.
WOODROFFE, J.
MOOKERJEE, J.
CARNDUFF, J.
CHATTERJEE, J.
1911,
Heard,
18, August.
Judgment,
5, September.

LALIT MOHAN GHOSH and others, Plaintiffs, Appellants,
v.
THE GOPALI CHUCK COAL Co., LD., Defendants, Respondents.

Transfer of Property Act (IV of 1882), secs. 105, 107—Registration Act (III of 1877), sec. 17, cls. (b) *and* (d)*—Registered lease—Reduction of rent and variations in other incidents, if may be agreed to orally—Rent, if interest in immoveable property.*

All the essential incidents of a lease of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent must be embodied in one or more documents duly registered.

Provisions about the amount of rent, the time of payment thereof and the consequences of default relate to essential incidents of the lease.

SUBRAMANIAN CHETTIAR *v.* ARUNACHALAM CHETTIAR (2) *relied on.*

The case of RAJA DURGA PROSAD SINGH *v.* RAJENDRA NARAIN BAGCHI (1) *has therefore been correctly decided in so far as it determines that a document embodying an agreement for reduction of rent under a previously existing lease registered as required by sec. 17* (d) *of the Indian Registration Act, requires registration.*

A document which varies the amount of rent to be paid under an existing lease registered as required by sec. 17 (d) *of the Indian Registration Act, as also the incidents of such payments,* viz., *the date of payment and consequences of default of payment, requires registration.*

This was an appeal preferred on the 31st of January 1908, against the decree of Babu B. B. Chatterjee, Subordinate Judge of Purulia, dated the 24th of September 1907.

The appeal came on for hearing before Woodroffe and Caspersz, JJ., who on 11th of August 1910 referred certain points arising therein for decision by a Full Bench.

(1) 10 C. L. J. 670: s. c. I. L. R. 37 Cal. 293, 303 (1909).

(2) 6 C. W. N. 865: s. c. L. R. 29 I. A. 138; I. L. R. 25 Mad. 603; 12 Mad. L. J. 479 (1902).

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The ORDER OF REFERENCE was as follows :—

WOODROFFE AND CASPERSZ, JJ.—This suit is brought by the Plaintiffs as heirs of the late Nanda Lal Ghose to recover royalties in respect of a coal mining lease held by the Defendant. The original lease, dated 25th July 1896, was by Nanda Lal Ghose in favour of certain persons forming the Kurkend Coal Syndicate. This syndicate assigned its rights under the lease to the New Kurkend Coal Syndicate Ld., a joint stock company, on the 13th November 1899. The latter company attorned to the lessor and paid royalties to him in terms of the original lease. Subsequently and on the 22nd December 1903 the rates of royalty were by a registered deed of that date altered. The royalty payable as so altered was 6 annas per ton for steam coal, soft coke, hard coke and steam rubble, three annas per ton for B. B. rubble and dust free instead of the sliding scale provided for in the original lease. This document confirmed the original lease in other respects including the terms under which royalty was payable quarterly and if not paid, interest was chargeable on all sums unpaid at the rate of 1 per cent. per month. The New Kurkend Coal Syndicate worked under this arrangement but does not appear to have done well, the royalty for 1905 became overdue, and the liquidation of the company became necessary. Then at the close of 1905, and the commencement of 1906 negotiations (which were subsequently embodied in letters) took place with a view to the payment of the overdue royalty and the reduction of the rates of future royalties on coal. On the 18th January 1906, Messrs. McLeod and Co., Managing Agents of the colliery, wrote to the proprietors as follows :—

"New Kurkend Coal Syndicate —
The 18th January 1906.

To
Babu Nanda Lal Ghose.

Dear Sir,

We confirm our conversation of date to the following effect.—That you reduce the royalty to be charged on coal raised at this property to the under-mentioned rates.

Steam Coal	... 4½	annas.
Rubble ...	... 4½	"
Dust ...	... 2	"

as a permanent arrangement to hold good from the 1st January 1906. As regards the royalty due for the year 1905, we have to thank you for agreeing to allow this to remain over until it is convenient to make payment which we will make as soon as possible. As explained to you, it may be necessary to put the existing company into liquidation and to make over the property to another company, but in terms of our lease from you, you will duly be advised of any arrangement that may be contemplated. We beg to thank you for patiently listening to the declaration of the company's position and our views as (torn) for your considerate treatment as evidenced by the reduction in royalty you have made and the accom modation as regards back royalty due.

We are, Dear Sir,
Yours faithfully,
McLeod & Co.,
Managing Agents."

This was followed by a letter from the proprietor, dated the 20th January 1906, on which is based the main argument in the appeal.

"9, College Square,
Callcutta, the 20th January 1906.

To
Messrs. McLeod & Co.,
Managing Agents,
New Kurkend Coal Syndicate Ld.

Dear Sir,

I am in receipt of your letter, dated the 18th instant. Since my interview with your Mr. N. A. McLeod I have consulted my lawyers about my position regarding the royalty due for the year 1905 in case it may be necessary for you to put the existing company into liquidation and make over the property to another company, and I have been advised that it would not be at all safe for me to allow this sum to remain over until it is convenient for you to make payments.

So I beg to inform you that I shall be glad to help you in your present difficult situation by reducing and altering the royalty to be charged on coal raised at this property to the under-mentioned rates.

Steam coal	...	4½ annas.
Rubble ...	...	4½ „
Dust ...	...	2 „

Hard and soft coke, as in the deed, as a permanent arrangement not to hold good from the 1st January 1906 as you say but from the date on which you will pay me the royalty due for the year 1905, and on condition of your paying me the royalty hereafter monthly.

If you, however, fail to make payment of the royalty consecutively for 3 months, this letter will be cancelled, and I shall be entitled to the rates of royalty as stipulated in our deed.

Yours faithfully,
Nanda Lal Ghose."

The effect of this letter is as follows: The royalty for steam coal is reduced from 6 annas to 4½ annas. The rates for soft coke and hard coke remain the same. The rate for steam rubble is reduced from 6 to 4½ annas. The rate for B. B. rubble is enhanced from 3 to 4½ annas per ton and on dust which was originally free is imposed a new charge of 2 annas per ton. The above changes affect the rate only and the result of such changes in fact has been according to past working to reduce the total royalty payable. The second alteration which this agreement effects is as to date of payment of royalty which is to be paid monthly and not quarterly as heretofore.

As a necessary effect of such alteration a third is effected. The original term as to the payment of interest on royalty in arrear after the quarterly date disappears, as the royalty is to be paid monthly. In lieu, however, of this a new and fourth term is embodied, *viz.*, that if there is a failure to pay royalty for three consecutive months the agreement is cancelled and royalty becomes payable according to the terms of the existing lease. It has been contended for the Respondent that the condition that the agreement has to come into effect not from the 1st January 1906, but from the date on which the royalty for the year 1905 was paid was waived. In our opinion this is not so. That royalty was fixed by a letter of the 27th January 1906 at Rs. 10,000. Of this Rs. 8,000 was paid on the 31st January. The fact that Nanda Lal Ghose gave on the 3rd February time to pay up the balance does not affect the matter. This waived his demand for immediate payment only. But the agreement for reduced royalty, if enforceable, would not come into operation until the payment was made which was on the 28th June 1906. On this point we agree with the lower Court. On the 20th February 1906 Nanda Lal Ghose died. In March and April his heirs (it is said in ignorance of the facts) received royalty at the reduced rates mentioned in the letter of their father of the 20th January 1906 to which we refer as the agreement. They were then inform-

ed that negotiations were taking place for the transfer of the lease to the Defendant company. On the 20th June 1906 the New Kurkend Coal Syndicate, which was then in voluntary liquidation, and its liquidator assigned the colliery lease to the Defendant company. That deed which was registered recites that the original lease of the 25th July 1896 had been ultimately modified by the document of the 22nd December 1903 and the covenant by the Defendant company in favour of the assignor was to pay the rent or royalty mentioned in such last-mentioned document. By inadvertence, however, the company's solicitors overlooked the fact that the document of the 22nd December 1903 had itself been modified by the agreement of the 20th January 1906. In June the company offered payment of royalty for the months of March, April and May at the reduced rate provided for in the agreement and this offer was repeated as regards subsequently accruing royalties. The Plaintiff refused, however, to accept them and claimed payment according to the terms of the document of the 22nd December 1903. On the 24th August 1906 the New Kurkend Coal Syndicate and its liquidator attempted to repair the omission to which we have referred and by a registered document, dated 24th August 1906, reciting the agreement of the 20th January 1906 and the fact that it had been inadvertently omitted from the assignment of the 20th June 1906, assigned to the Defendants the full benefit of such agreement (which was set out in the schedule) to the intent and purpose that the assignment effected by the principal indenture might, with effect from the date when the agreement came into operation, be read and construed as if in and by the same indenture the properties, rights and premises comprised in the lease of the 25th July 1896 had been expressly assigned with the full benefit of and subject to as well the said agreement as the agreement of the 22nd December 1903 with full power and authority for the company to specifically enforce the said agreement.

It has been suggested that this transfer was ineffectual because at its date the company had been wound up and the liquidator discharged. No such issue was raised in the lower Court. No order of discharge has been produced. Under sec. 187 of the Companies Act the syndicate would not have been dissolved until three months after the sending in of the accounts. Mr. McLeod seems in his evidence to have wrongly assumed that he was discharged when he sent in his account. We hold that this contention fails.

As we have said the Plaintiffs refused the Defendants' money. We are satisfied that under the circumstances there was a sufficient tender by the Denfendants.

The Plaintiffs worked for some time apparently under the idea that the Defendant company would sue for specific performance. But as the company were apparently advised that this was not necessary and did not sue, the Plaintiffs instituted this suit claiming the recovery of Rs. 7,863-4-15 as royalty on the basis of the rates contained in the document of the 22nd December 1903. The Defendant company set up the subsequent agreement of the 20th January 1906, and claiming that reduced rates are chargeable under that agreement, have paid into Court the sum of Rs. 6,657-6-6. The lower Court has accepted this view of the case subject to the modification that it has considered, and as we think rightly, that if reduced rates are payable they are

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so payable only from the date when the back royalty for 1905 was paid.

The Appellant has raised a number of objections which we deal with before treating of the substantial question which we desire to refer to the Full Bench. In our opinion, if other consideration than that involved in the substitution of agreements is necessary, the letter of the 20th January 1906 on its face shows consideration as for instance in the substitution of monthly for the previous quarterly payments. The agreement was not, as contended, a mere personal agreement with the New Kurkend Syndicate of which it was not intended that the Defendant company should have the advantage. The correspondence shows that the royalty was reduced with the object of inducing some other substantial company to work the colliery. Nor in our opinion does any question arise as to the parties not being *ad idem* over the matter. There was no question as to the meaning of the terms of the letter of the 20th January 1906. The difference which has arisen between the parties, and which as stated has been decided against the Defendants, was due to the latter's contention that the term as to the date when the reduced royalties were to come into operation had been subsequently modified by later correspondence. We hold with the lower Court that that is a mistaken view of the effect of such correspondence. It is then said that the assignment of the 22nd June 1906 was inoperative because it was an assignment of a mere right to sue. But such a right must be distinguished from a right which (as here) arises out of an interest. What was here assigned was the benefit of an agreement in connection with and arising out of the lease held by the Defendant company. It has been nextly said that the agreement is inoperative because there has been default in payment of royalty for three consecutive months. If the Plaintiffs have rightly refused to take the money offered by the Defendants the question does not arise, but if they have wrongfully refused (and they have been offered the money) they cannot set up such wrongful refusal to bring the clause of forfeiture into operation.

The substantial question in this case is whether the agreement of the 20th January 1906 required registration or not. If it did, the Defendant company took nothing by the subsequent assignment of its benefit to them.

If that agreement constitutes a lease as the Appellants contend, then under sec. 17, cl. (*d*) of the Registration Act, it should have been registered. And on this ground documents containing the essential elements of a lease such as the area of the land, the nature of the interest conveyed, the duration of the tenancy and the rental have been held to be leases and as such requiring registration [see *Biraj Mohinee Dasee* v. *Kedar Nath Karmokar* (3), *Raja Durga Prosad Singh* v. *Rajendra Narain Bagchi* (1)]. In our opinion, however, the document is not a lease but an agreement which modifies the conditions of a lease in three particulars, *viz.*, the amount of rent or royalty, the period at which rent or royalty is payable, and the result of default of payment of rent or royalty. The variations thus touch the question of rent or royalty only. But then it is further contended for the Appellants that assuming that it is not a lease and that it can be treated merely as an agreement for reduction and pay-

(1) 10 C. L. J. 570 : s. c. I. L. R. 37 Cal. 293, 303 (1909).

(3) I. L. R. 35 Cal. 1010 (1908).

ment of rent it is in effect an agreement purporting to limit and create an interest in immoveable property under cl. (*b*) of sec. 17 and requires registration. For the Respondent company it is contended, *firstly*, that cl. (*b*) of sec. 17 does not affect leases or (apparently) matters touching leases which are governed by cl. (*d*) and, *secondly*, that if that be not so the letter does not affect an interest in immoveable property and fall within cl. (*b*). Rent or royalty though derived from land are, it is argued, not interest in immoveable property within the meaning of cl. (*b*). Reliance is placed on *Satyesh Chunder Sircar* v. *Dhunpat Singh* (4), where it was held that an agreement which did not operate as a lease but was merely a variation by way of abatement of rent did not require registration. In *Obai Goundan* v. *Ramalinga Ayyar* (5), it was held following the last case that a document given by the owners of land to his tenant varying the terms of tenancy with reference to the amount of rent to be paid, is not an instrument relating to an interest in immoveable property and does not require registration. The principle of these cases was approved and applied in *Hara Prosad Das* v. *Ram Narain Chowdhury* (6). The Bombay case cited [*Shrinivasbhat* v. *Waman Narsingh* (7)] seems to have been to a similar effect though the decision was otherwise justifiable on the ground that the agreement related to a matter of a value less than Rs. 100.

Learned Counsel for the Appellant has contended that the decisions of this Court referred to are *obiter dicta*. It may be a question whether if that be so the same observation does not apply to the case on which he has relied [*Raja Durga Prosad Singh* v. *Rajendra Narain Bagchi* (1)]. In that case it was held that the document in fact constituted a lease which we hold not to be the case here and it was further held that there was no consideration. The learned judges however went on to say that even if that document in question could be treated merely as an agreement for reduction of the rent it was in effect an agreement purporting to limit an interest in immoveable property and thus required registration. The learned Judges base their decision on certain English cases dealing with the Statute of Frauds and on inferences derived from the Privy Council decision in *Subramanian Chettiar* v. *Arunachalam Chettiar* (2). They distinguished the cases of *Satyesh Chunder Sircar* v. *Dhunpat Singh* (4) and *Beni Madhub Gorani* v. *Lal Moti Dassi* (8) holding as regards the first-mentioned case that were it not that the agreement had been admitted in the plaint, the Court would have held that the document required registration. But this does not appear to us to be so, for what the Court stated was that had there been no admission the question of registration would "arise" and be "important." It, however, then held that it was not necessary that the agreement in question should be registered.

In this conflict of authority we refer to the Full Bench the determination of the following questions :—

1. Has the case of *Raja Durga Prosad Singh* v. *Rajendra Narain Bagchi* (1)

(4) I. L. R. 24 Cal. 20 (1896).
(5) I. L. R. 22 Mad. 217 (1899).
(6) 11 C. L. J. 22 25 (1909).
(7) P. J. 1893.

(1) 10 C. L. J. 570: s. c. I. L. R. 37 Cal. 293, 303 (1909).
(2) 6 C. W. N. 865: s. c. L. R. 29 I. A. 138; I. L. R. 25 Mad. 603; 12 Mad. L. J. 479 (1902).
(4) I. L. R. 24 Cal. 20 (1896).
(8) 6 C. W. N. 242 (1898).

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been correctly decided in so far as it determines that a document though not amounting to a lease requires registration if it be an agreement for reduction of rent under a previously existing registered lease.

2. Does a document which is not a lease but which varies the amount of rent to be paid under an existing registered lease as also the incidents of such payments, *viz.*, the date of payment and consequences of default of payment, require registration.

Dr. Rash Behari Ghose (with him *Babus Jogesh Chandra Dey*, *Mohendra Nath Roy*, *Narendra Nath Sett and Srish Chunder Dey*) for the Appellants.

The amount of rent is an essential term in the lease. The argument on the other side is, that you can vary one such term one day, another the next day, and so on, and yet the lease would remain the same. *Sanderson* v. *Graves* (9), per Lord Bramwell, p. 247, *Subramanian Chettiar* v. *Arunachalam Chettiar* (2). The object of sec. 107, Transfer of Property Act, is to have the whole of the terms of a lease put in a registered document. You cannot gather the terms of a lease partly from a registered and partly from an unregistered instrument. The question in the last cited case would not have arisen if payment of rent was but a collateral personal agreement. See arguments before the Judicial Committee in *Subramanian Chettiar* v. *Arunachalam Chettiar* (2) reported in 12 Mad. L. R. 479-483. The question is, did the agreement in question affect the incidents of the tenure in any way?

[The CHIEF JUSTICE.—Is there not a current of authority against you?]

I would show there is not. The earliest case is *Baijnath* v. *Putsohee* (10).

If the document did not require registration as being a lease, registration would be necessary because it affects an interest or benefit arising out of land. Refers to sec. 3 of the Registration Act (definition of immoveable property), also to sec. 17 (*b*). Rent not due (or future rent) is an interest in immoveable property. *Venkaji* v. *Shidramapa* (11), *Mangala* v. *Subbia* (12); Dart on Vendors and Purchasers (6th Ed.), pp. 219-220, 336; *Donellan* v. *Read* (13).

Again "Rent" is a first charge on the tenure (assuming for the present that royalty is rent). A document affecting the amount of the charge should be registered.

Registration was necessary because, moreover, it was a sale of an interest in land. *Gawan* v. *Christie* (14), *Munro* v. *Didcoll* (15). Rights conferred are not incorporeal rights.

The decisions of this Court which seem to support a contrary view are distinguishable.

Satyesh Chunder Sircar v. *Dhunpat Singh* (4). The agreement to accept reduced rent was admitted by the lessors in the pleadings (see sec. 65, Evidence Act). None of the cases referred to by Ghose, J., were cases on the Transfer of Property Act. *Obai Goundan* v. *Ramalinga Ayyar* (5), whilst purporting to follow the case in *Satyesh Chunder Sircar* v. *Dhunpat Singh* (4), goes beyond it, and

(2) 6 C. W. N. 865 : s. c. L. R. 29 I. A. 138; I. L. R. 25 Mad. 603 at pp. 605, 606, 611; 12 Mad. L. J. 479 (1902).

(9) L. R. 10 Ex. 234 (1875).

(4) I. L. R. 24 Cal. 20 (1896).

(5) I. L. R. 22 Mad. 217 at p. 220 (1899).

(10) 20 W. R. 36 at p. 37 (1873).

(11) I. L. R. 19 Bom. 663 at pp. 665, 666 (1894).

(12) I. L. R. 34 Mad. 64 at p. 66 (1910).

(13) 3 B. & Ad., p. 890 at pp. 904, 905 (1832)

(14) L. R. 2 Sc. App., p. 273 at p. 288 (1873).

(15) [1911] A. C., p. 140 at p. 148.

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cannot be treated as authority. *Hara Prosad Das* v. *Ram Narain Chowhury* (6) was a case of a *dowl.* There was no question of abatement and it follows the Full Bench case, *Luchmissur* v. *Dakho* (16). *Sarat Chandra* v. *Nitya Gopal* (17), *Beni Madhub Gorani* v. *Lal Moti Dassi* (8) is a peculiar case. The document was a collusive one the object of which was to induce other tenants to pay a higher rent. The case has been distinguished in *Raja Durga Prosad Singh* v. *Rajendra Narain Bagchi* (1) and *Lakhatulla* v. *Bishwambhar* (18).

Your Lordships are not in any way embarrassed by a long line of cases in which a different rule from that I am contending for has been laid down. This is not one of those cases where title to real property will be disturbed if a long series of decisions was overruled.

Mr. Bagram (with him *Babu Monmatha Nath Mukherjee*) for the Respondent.

The contract in question does not affect title to immoveable property. The Registration Act does not touch contracts. The essential part of an interest which is transferred by a lease is the right to enjoy. "Rights or benefits to arise out of land" means proprietary rights or interests which one person has over the lands of another. Rights like rent which the owner himself has in his own land, cannot be so described.

"Leases" are separately dealt with in cl. (*d*) of sec. 17 of the Registration Act. Cl. (*b*) has nothing to do with leases. A lease may be for service, *e.g.*, as engineer. Can such service be described as fit to arise out of the land"?

The Privy Council in *Subramanian Chettiar* v. *Arunachalam Chettiar* (2) merely decided whether the term as to payment of the money was included in the lease, or in other words whether the two documents were part and parcel of one. The arguments of Counsel and observations of Judges in course of argument should not be referred to as authorities. I do not contend that all the component elements in the lease should not be incorporated in the registered instrument. Many of the terms must however be of a purely contractual character, and there is, I submit, nothing to prevent the parties from varying the obligations arising thereunder. The right to enjoyment and the duration of the lease make up the interest which is transferred by the lease and a lease in its essence is a transfer of an interest in property. Moreover by cl. (*d*) of sec. 17, the registrability of a lease is made to turn on the duration. If rent had been treated as an interest affecting immoveable property then a lease for two months at a rent of Rs. 10,000 would require registration contrary to the provisions of the Registration and the Transfer of Property Acts. What must be registered under cl. (*b*) of sec. 17 of the former Act is some interest in the property which is measurable in value of Rs. 100, not money or rent. Decisions which lay down that rent is a benefit to arise out of land is based on a misapprehension. A rent charge created in favour of one person in another person's land may be such an interest not rent which the owner derives from his own land, *Southwell* v. *Scotter* (19). There is nothing

(1) 10 C. L. J. 570: s. c. I. L. R. 37 Cal. 293, 303 (1909).
(6) 11 C. L. J. 22 at p. 24 (1909)
(8) 6 C. W. N. 242 (1898).
(16) I. L. R. 7 Cal. 708 (1881).
(17) 13 C. L. J. 284, 287 (1910).
(18) 12 C. L. J. 646 (1910).

(2) 6 C W. N. 865: s. c. L. R. 29 I. A. 138; I. L. R. 25 Mad. 603; 12 Mad. L. J. 479 (1902).
(19) 49 L. J. R. (Q. B.), p. 357 (1880).

to prevent the duration part and the money part in a transaction to give a lease from being put in two different documents. The former may require registration, the latter will not. *Premium* is mentioned in the definition of lease. But the Privy Council expressed a doubt whether the *premium* must be specified in the document.

A letter varying rent is admissible under sec. 92, Evidence Act.

Rent is not regarded as property in the Transfer of Property Act. *Burjorji* v. *Muncharji* (20).

Suppose the rent is commuted. Must this also be registered as an essential part of a lease?

The two Acts deal with transfer of rights *in rem* not with rights in *personam*. Freedom of contract as to these latter is left untouched.

There is a substantial current of authority in my favour and Dr. Ghose's endeavour to distinguish them has been unsuccessful.

The decision in *Raja Durga Prosad Singh* v. *Rajendra Narain Bagchi* (1) is based on the argument before the Privy Council in the case of *Subramanian Chettiar* v. *Arunachalam Chettiar* (2), an argument based on English precedents and Statute of Frauds cases, not on a proper interpretation of the Indian Statutes.

Nor can mining leases be treated as being sales and not leases. All the incidents are those of a lease with this difference that under a mining lease you can consume the property. Moreover parties have throughout treated it as a lease.

(1) 10 C. L. J. 570 : s. c. I. L. R. 37 Cal. 293, 303 (1909).

(2) 6 C. W. N. 865 : s. c. L. R. 29 I. A. 138 ; I. L. R. 25 Mad. 603 ; 12 Mad. L. J. 479 (1909).

(20) I. L. R. 5 Bom. 143 (1880).

Rent is not a charge under the Transfer of Property Act.

[THE CHIEF JUSTICE draws attention to para. 8 of the lease.]

It is charged on our property not on the demised property.

Dr. Ghose in reply. The policy of the Legislature is to introduce a public system of registration of transfer of interests in land. The whole policy would be defeated if the rent reserved could be left out. From the document it further appears that a registered document was in the contemplation of the parties.

C. A. V.

The JUDGMENT OF THEIR LORDSHIPS was as follows :—

The questions referred for decision to the Full Bench have been framed as follows :—

(1) Has the case of *Raja Durga Prosad Singh* v. *Rajendra Narain Bagchi* (1) been correctly decided in so far as it determines that a document, though not amounting to a lease, requires registration if it be an agreement for reduction of rent under a previously existing registered lease?

(2) Does a document which is not a lease but which varies the amount of rent to be paid under an existing registered lease as also the incidents of such payments, namely, the date of payment and consequences of default of payment require registration?

It is necessary to premise at the outset that the original lease in the case before the Court, dated the 25th July 1896, and varied by a registered deed, dated the 22nd December 1903, was compulsorily registrable under sec. 107 of the Transfer of Property Act and sec. 17 (*d*) of the Indian Registration Act. The answers to

(1) 10 C. L. J. 570 : s. c. I. L. R. 37 Cal. 293, 303 (1909).

the questions propounded consequently depend upon the construction of these two sections. Sec. 107 of the Transfer of Property Act provides that a lease of immoveable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. The plain intent of the section is that all the essential incidents of a lease of this description must be embodied in one or more documents duly registered. It is not necessary to attempt, on the present occasion, an exhaustive enumeration of all the essential incidents of such a lease: it is sufficient to hold that provisions about the amount of rent, the time of payment thereof, and the consequences of default, relate to essential incidents of the lease. This view receives support from the terms of sec. 105 of the Transfer of Property Act, and is involved in the decision of the Judicial Committee in *Subramaniam Chettiar* v. *Arunachalam Chettiar* (2). The answer of the Full Bench to the questions referred are, therefore, as follows :—

(1) The case of *Raja Durga Prosad Singh* v. *Rajendra Narain Bagchi* (1) has been, for the reasons given here, correctly decided, in so far as it determines that a document embodying an agreement for reduction of rent under a previously existing lease registered as required by sec. 17 (*d*) of the Indian Registration Act, requires registration.

(2) A document, which varies the amount of rent to be paid under an existing lease registered as required by sec. 17 (*a*) of the Indian Registration Act, as also the incidents of such payments, namely, the date of payment and consequences of default of payment requires registration.

The case will be returned to the Division Bench, with this expression of opinion. The costs of the hearing before the Full Bench will abide the result of the appeal—hearing fee, five gold mohurs.

(1) 10 C. L. J. 570 : S C I. L. R. 37 Cal. 293, 303 (1909).

(2) 6 C. W. N. 865 : S. C. L. R. 29 I. A. 138 ; I. L. R. 25 Mad. 603 ; 12 Mad. L. J 479 (1902).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos. 2627, 2785, 2384, 2786 AND 2787 OF 1907.

MOOKERJEE, J.	GIRIS CHANDRA GUHA
TEUNON, J.	and others,
1911,	Appellants,
Heard, 25 and	*v.*
26, January.	KHAGENDRA NATH
Judgment,	CHATTERJEE and anr.,
23, February.	Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 12, 13, 167—Suit for rent—Unregistered transferee of permanent tenure who has paid landlord's fee, if necessary party—Sale in execution of rent-decree obtained against recorded tenant only—Decree, if money decree only—Benamdars *if necessary parties—Notice to annul incumbrances signed by Deputy Collector—Validity.*

The transfer of a permanent tenure is completed upon payment of the landlord's fee prescribed by sec. 12 irrespective of its acceptance by the landlord and thereupon the landlord is bound to look to the transferee for payment of rent accruing due since that date.

It is not necessary in such a case that the transferor himself should have had his name registered in the landord's books.

Where the landlord sues for such arrears of rent without making the transferee a Defendant, the decree obtained in the suit only operates as a decree for money.

The mere circumstance that a notice

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under sec. 167, Bengal Tenancy Act, is signed by a Deputy Collector does not invalidate such notice, if he acted on behalf of the Collector.

The landlord is not bound to join in his suit for rent, as party Defendants, persons who are merely benamdars.

This was an appeal preferred against a decree of Babu Asutosh Banerjee, Subordinate Judge of Backergunge, dated the 19th of July 1907, confirming that of Babu Pramatha Krishna Singha, Munsif of Barisal, dated the 4th of May 1904.

The facts of the case will appear from the judgment.

Babus Dwarka Nath Chuckerbutty, Gunada Charan Sen and *Rames Chandra Sen* for the Appellants.

Babus Tara Kishore Chaudhuri, Purna Chandra Chatterjee and *Brojo Lal Chakrabarti* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—The substantial question of law raised in this appeal is one of some novelty and turns upon the true construction of sec. 13 of the Bengal Tenancy Act. The circumstances under which the question has been raised are of some complexity, but may be briefly narrated in so far as it is necessary to state them for our present purpose. The Plaintiff is owner of a zemindari which bears No. 2694 on the revenue roll of the Collector of Backergunge. Under the zemindari is a transferable taluk known as Kamdeb Guha, which was in existence so far back as 1810, but has not been traced back to the time of the Permanent Settlement. On the 20th June 1898, the Plaintiff purchased the taluk at a sale held in execution of a decree obtained by him in a suit for the recovery of arrears of rent. The sale was confirmed on the 4th April 1899, and possession delivered to the purchaser on the 29th July following. The Plaintiff was, however, unable to obtain actual possession of all the lands, as the Defendants alleged that they were in occupation on the basis of under-tenures created by the talukdars. The result was that on the 29th August 1900 the Plaintiff had notices under sec. 167 of the Bengal Tenancy Act served through the Collector, and on the 15th April 1903 commenced the present litigation for ejectment of the Defendants on the ground that their subordinate interest, if any, had been extinguished and they were consequently trespassers in possession. The Defendants resisted the claim on various grounds amongst which it is sufficient to mention two, namely, *first*, that the decree obtained by the Plaintiff in the suit for recovery of rent instituted by him in 1895 had not the characteristics of a rent-decree, and consequently, the sale in execution thereof had not affected the under-tenures; and, *secondly*, that the notices under sec. 167 of the Bengal Tenancy Act were not in accordance with law, and were, therefore, ineffectual to extinguish the interest of the under-tenure-holders. The Court of first instance made a decree in favour of the Plaintiff; upon appeal the District Judge reversed that decision and dismissed the suit. On appeal to this Court, the decree of the District Judge was reversed, and the case remanded for reconsideration. After remand, the Subordinate Judge has affirmed the decision of the original Court. The Defendants have now appealed to this Court, and on their behalf the decree of the Subordinate Judge has been assailed on two grounds, namely, *first*, that as some of the owners of the taluk were not made parties to the suit of

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1895 for recovery of arrears of rent, the decree cannot operate as a decree for rent, under the Bengal Tenancy Act; and *secondly*, that as the notices under sec. 167 of the Bengal Tenancy Act were not in conformity with the provisions of the law, the under-tenures have not been annulled.

In so far as the first of these questions is concerned, the case for the Defendants was that certain persons of the name of Chandra Kanto Basu, Raj Kumar Guha the Chakrabarties and the Kanjiballis, who had an interest in the taluk, ought to have been but were not joined as parties to the rent suit. The learned Subordinate Judge has found, with regard to the first two of these persons, that they were *benamdars* and had no beneficial interest in the taluk. The landlord, therefore, was not bound to join them as parties Defendants, and the true character of the decree obtained by him cannot be affected by their absence from the suit. *Joy Govind* v. *Monmotha Nath* (1). In so far as the Chakrabarties and the Kanjiballis are concerned, he has not found whether in 1895 they had any subsisting interest in the taluk, although there are isolated expressions in his judgment which may indicate that he was not impressed with the soundness of the position attributed to them. He has held, however, that their absence from the suit for rent could not affect the character of the decree as they were said to have been representatives in interest of persons who had never registered themselves in the books of the landlord. The view taken by the learned Subordinate Judge in substance is that if a person interested in a transferable tenure was not registered in the books of the landlord, and if subsequently to the passing of the Bengal Tenancy Act, his interest was sold in execution at the instance of a creditor, the purchaser could not claim to be joined as a party Defendant to a suit for rent, even though he might have paid the fees prescribed by sec. 17 of the Bengal Tenancy Act read with the provisions of sec. 13. To put the matter in another way, the view of the Subordinate Judge is that as a sale in execution of a decree for arrears of rent against the registered tenant would be operative against an unregistered co-sharer of the tenant, the purchaser of the interest of the unregistered co-sharer occupies no higher position. In the case before us, at a sale held in execution of a decree for rent against the recorded tenants, the taluk was purchased in 1864 by one Gagan Chandra Das who transferred the same to four persons on the 13th September 1864. Of these four persons, two, Gokul Guha and Ramsagar Guha, were registered in the books of the landlord; the other two, Chandrakala and Krishnapriya, were not so registered. There were successive devolutions of the property by reason of sales in execution of decrees for rent obtained by the landlord against the recorded tenants or their representatives, but the details are not necessary for our present purpose. It is sufficient to state that the representatives of the unrecorded tenants executed a mortgage in 1871; the mortgagee enforced the security and brought the property to sale when it was purchased by one Chandra Kumar Basu on the 22nd June 1887. There was another mortgage in 1882 for the satisfaction whereof a share of the taluk was sold in execution in 1888, when the Chakrabarties and the Kanjiballis became interested in the property. It will be observed that the sales we have mentioned took place after the provision

(1) L. R. 33 Cal. 580 (1906).

of the Bengal Tenancy Act had come into operation, and consequently, the fee prescribed by sec. 13 was paid. The question, therefore, arises whether if it is established that the Chakrabarties and the Kanjiballis were persons beneficially interested in the taluk, the omission to make them parties in the suit of 1895 affected the nature of the decree.

Sec. 13 of the Bengal Tenancy Act provides that upon a sale in execution of a permanent tenure under a decree other than a decree for arrears of rent due in respect thereof, the Court shall require the purchaser to pay into Court the landlord's fee prescribed by sec. 12. It cannot be disputed that the transfer in favour of the purchaser is completed upon payment of the fee irrespective of its acceptance by the landlord. *Kristo Bulluv Ghose* v. *Kristo Lal Singh* (2), *Chintamoni Dutt* v. *Rash Behari Mondul* (3) and *Mohesh* v. *Saroda* (4). It follows consequently, that as soon as the title of the purchaser has been perfected, the landlord is bound to look to the transferee for payment of rent which has accrued due since that date. No doubt, as contended by the learned Vakil for the Respondent, sec. 13 does not expressly lay down what consequences are to follow from a compliance with its provisions, nor does it define the results which follow from failure to comply with them. But the object of the framers of the section is, in our opinion, perfectly plain. Under the law as it stood before the Bengal Tenancy Act was passed, the landlord was entitled to look to his recorded tenant for all rent until the name of the transferee had been recorded in his books. *Sham Chand* v. *Brojonath* (5), *Fatit* v. *Hari* (6). Consequently, difficulties of the gravest character arose when the landlord demanded an exhorbitant registration fee or when the transferee was called upon to prove that the landlord had notice of the transfer and had refused to recognise his rights. Sec. 13 as framed removes both these difficulties; a prescribed fee has to be paid by the purchaser and the notice is to be served upon the landlord by the Collector, so that if the procedure laid down in sec. 13 is followed, the fact of the sale is duly notified to the landlord. But it has been argued that the operation of sec. 13 ought to be restricted to cases in which the transferor has his name registered in the books of the landlord. We may observe incidentally that the question could arise only where, as here, the interest of the transferor was acquired before the Bengal Tenancy Act came into force. In our opinion, the language used by the Legislature in sec. 13 cannot rightly be restricted in the manner suggested. Sec. 13 applies to transfers of all permanent tenures, and it is immaterial whether the name of the tenant at the time of the sale has or has not been previously recorded in the books of the landlord. In fact, if the narrow construction suggested by the Respondent, were adopted, the policy of the Legisture at the time when the Bengal Tenancy Act was passed, might be completely nullified. It is well known that at that time there were many tenures the holders of which had not been able to get their names registered in the books of the landlord, and if the cases of all these tenures were, for all time to come, excluded from the operation of the beneficial provisions of sec. 13, the very object of the framers of the statute would be defeated in a large

(2) I. L. R. 16 Cal. 642 (1880).
(3) I. L. R. 19 Cal. 17 (1891).
(4) I. L. R. 21 Cal. 433 (1893).
(5) 21 W. R. 94 (1873).
(6) I. L. R. 27 Cal. 789 (1900).

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number of instances. Such unrecorded transferees were, in no sense, trespassers and were entitled to recognition at the hands of the landlord. [*Sarkies* v. *Kali Kumar* (7), *Nobeen Kishen* v. *Shib Persad* (8), *Bhooputee Roy* v. *Umbica Churn* (9); sec. 27, Act X of 1852, sec. 26, Act VIII of 1869, B. C.)]. In fact, the unrecorded transferee of a transferable tenure is a tenant, though his name is not on the books of the landlord. *Azgar Ali* v. *Asaboddin Kazi* (10). The difficulty, which was created under the old law, of which an illustration may be seen in the case of *Khetter Mohan* v. *Pran Kristo* (11), is completely avoided under the Bengal Tenancy Act, and if the landlord, in spite of notice that the tenure has passed into the hands of a transferee who has deposited the fee, chooses to bring a suit for rent against the recorded tenant, he does so at his own risk, and has no reasonable ground for complaint if it ultimately turns out that the suit has not been properly constituted and the decree made therein cannot operate as a decree for rent. When a landlord finds that the name of one person is borne on his books as that of the tenant, but the fee has been paid and notice served at the instance of a purchaser of the tenure as the property of a person whose name has not been registered [see sec. 13 and form of notice under that section, Appendix I, Schedule I, Form 4], there is no reason why he should not join the transferee as a party Defendant to a suit for rent, along with the recorded tenant if he thinks necessary, so as to avoid possible future dispute as to the frame of the suit and the effect of the decree. It is worthy of note that if a different interpretation were adopted as to the scope and effect of sec. 13, the operation of the other sections, similar in scope, for example, sec. 15, may be needlessly restricted. To take one illustration: after the death of A, the registered tenant, his heir B might die before he could take action under sec. 15; upon the analogy of the argument of the Respondents, the heir of B could not avail himself of the provisions of that section. We are therefore not prepared, for the reasons explained, to restrict the operation of sec. 13 in the manner suggested. If we were to accede to the contention of the Respondent, we should have to read in sec. 13 "a permanent tenure held by a registered tenant" in place of the words "a permanent tenure." We must consequently hold that the reason given by the Subordinate Judge in support of his conclusion cannot be maintained. If the Chakrabarties and the Kanjiballis were interested in the tenure at the date of the institution of the rent suit of 1895, inasmuch as they were not joined as parties Defendants, the decree could operate only as a decree for money. *Ananda Kumar* v. *Hari Dass* (12). It is necessary, therefore, to remand the case so that the Subordinate Judge may determine whether the persons left out of the suit were really interested in the tenure; and as the true position of the parties was not appreciated in the Court below, the Subordinate Judge will be at liberty to give suitable directions for the reception of additional evidence upon this point.

In so far as the second question is concerned, there is, in our opinion, no substance in it. The learned Vakil for the Appellants has contended that the notice

(7) W. R. Gap. Act X Rul. 98 (1864).
(8) 8 W. R. 96 (1867).
(9) 17 W. R. 169 (1872).
(10) 9 C. W. N. 134 (1904).
(11) 3 C. W. N. 371 (1899).

(12) I. L. R. 27 Cal. 545 (1900).

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served under sec. 167 of the Bengal Tenancy Act was not in accordance with the provisions of the law, because it does not appear to have been signed by the Collector. The notice is not on the record, and it is difficult, in the absence of all materials, to hold that it did not conform to the provisions of sec. 167. We may point out, however, that the mere circumstance that the notice was signed by a Deputy Collector would not invalidate it, if he acted on behalf of the Collector, *Mahomed Kazem* v. *Naffar Chandra* (13) *Akhoy Kumar* v. *Bejoy Chand* (14). To bring the present case within the principle of the decisions in *Ramdhon* v. *Surja Narain* (15), *Mohabut Singh* v. *Umatul Fatima* (16), the Court would have to hold that the Deputy Collector acted in excess of the powers conferred upon him. No such suggestion appears to have been specifically made in the Court below, and the Appellants are not entitled to a remand for the elucidation of this point. The second ground, therefore, cannot be supported.

The result is that this appeal must be allowed, the decree of the Subordinate Judge set aside, and the case remanded to him in order that he may determine the question, whether the Chakrabarties and the Kanjiballis had, at the date of the institution of the rent suit of 1895, any subsisting interest in the tenure. If they had, the present suit must be dismissed; if they had no subsisting interest at that time, the suit must be decreed. The costs of this appeal will abide the result.

It is conceded that this decision will govern all the other appeals, one of which (2785 of 1907) arises out of a similar suit for ejectment, and, three others (Nos. 2384, 2786, 2787 of 1907), out of suits for rent by the landlord, brought on the assumption that the intermediate tenures have been annulled so as to bring him into direct relation with the under-tenants. These appeals will, therefore, be allowed, the decrees of the Subordinate Judge will be set aside, and the cases remanded for determination of the question mentioned. The cost of these appeals will also abide the result.

We may add that in the case of one appeal (2384 of 1907), a question of *res judicata* was sought to be argued, but upon examination, it transpired that there was no substance in the contention; we need not therefore examine the matter in detail.

Appeals allowed.

(13) I. L. R. 32 Cal. 911 (1905).
(14) I. L. R 29 Cal. 813 (1902).
(15) 2 C. L. J. 99 (1905).
(16) I. L. R. 28 Cal. 66 (1900).

[CRIMINAL APPELLATE JURISDICTION.]

CRIMINAL APPEAL NO. 314 OF 1911.

CASPERSZ, J.
SHARFUDDIN, J.
1911,
Heard, 4, 5 and 6, July.
Judgment, 11, July.

KADER SUNDAR and ors., Appellants,
v.
THE EMPEROR, Respondent.

Indian Penal Code (XLV of 1860), sec. 400—Section to be strictly construed—Association for dacoity—Gist of offence—Kind of evidence sufficient to convict—Approver's testimony—Corroboration—Proof that accused members of a criminal tribe, value of—Previous conviction, value of, when no association established—Acquittal, effect of—Verification, evidence of, best evidence of Magistrate.

The offence contemplated in sec. 400 of the Penal Code is one of a very special character and entirely the creature of statute and should therefore be strictly construed.

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THE QUEEN *v.* MOOKTARAM SIRDAR (2) *referred to.*

Association for the habitual pursuit of dacoity is the gist of the offence punishable under the section.

Although the evidence need not show the same degree of particularity as to the commission of each dacoity as is required to support a substantive charge of that crime, it must be established for the purpose of conviction under the section that the accused belong to a gang whose business is the habitual commission of dacoity. The special conspiracy must be proved.

EMPRESS *v.* KURE (3), KING EMPEROR *v.* TIRUMAL REDDI (4), THE PUBLIC PROSECUTOR *v.* BONIGIRI POTTIGADU (1) *referred to.*

Corroboration of the testimony of an approver in a trial under sec. 400 must connect the accused with the offence, viz., *the association of a gang of persons for the business of habitually committing dacoity.*

The general criminality of a tribe or caste cannot be imputed to individual members operating in gangs where the prosecution is under sec. 400, and the fact that members of the tribe generally were alleged to have been implicated in several dacoity within a period of ten years proceeding the trial was not sufficient proof against the persons under trial when it appeared that the tribe contained within it thousands of human beings.

Where association for the purpose of habitually committing dacoity had not been made out the mere fact that some of the accused had been previously convicted of dacoity or theft or had been bound down to be of good behaviour under sec. 110, Cr. P. C., was of no consequence.

The fact that some of the persons undergoing trial for an offence under sec. 400 had once been sent up on a charge of dacoity of which they were acquitted could not be relied on to prove that they were habitual dacoits. No adverse inference can be drawn against accused persons after their acquittal.

THE EMPEROR *v.* NANI GOPAL GUPTA (5), REX *v.* PLUMMER (6) *followed.*

BONAI *v.* THE KING-EMPEROR (7) *distinguished.*

Where a confession was verified by a Magistrate, the proper course for the prosecution was to examine the Magistrate himself and not the other verification witnesses whose evidence would be inferior to his.

This was an appeal presented on the 19th of April 1911, against a conviction and sentence under sec. 400, I. P. C., passed upon the accused Appellants on the 15th of February 1911, by Babu Raj Krishna Banerjee, Officiating Additional Sessions Judge of Bogra, agreeing with the opinion of all the assessors.

The facts of the case material to this report will appear from the judgment.

Babu Monmatha Nath Mukherjee for the Appellants.

Mr. Sultan Ahmed with *Moulvi Khorshaid Hossein* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The Sessions Judge, concurring with the four assessors, has convicted the 29 Appellants for belonging to a gang of persons associated for the purpose of habi-

(1) I. L. R. 32 Mad. 179 (1908).
(2) 23 W. R. Cr. 18 (1875).
(3) A. W. N. for 1886, 65, 66.
(4) I. L. R. 24 Mad. 523 (1901).
(5) 15 C. W. N. 593 (1911).
(6) (1902) 2 K. B. 339.
(7) 15 C. W. N. 461 (1911).

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tually committing dacoity and he has sentenced Appellants Nos. 2 and 27 to transportation for life and the other Appellants to rigorous imprisonment for seven or five years. The trial of the case occupied two months in the Court of Sessions, but the substantial question for determination is a simple one, namely, whether the approver, Bayan Sandar, has been adequately corroborated in respect of each of the Appellants. Six Appellants Nos. 8, 10, 14, 15, 17, 26 may be excluded at the outset, because the learned Deputy Legal Remembrancer intimated, during the hearing, that he was unable to support their convictions. There remain 23 Appellants including two (Nos. 2 and 18) who made confessions in the Magistrate's Court.

The case for the Crown is that the *Sandars* are a semi-criminal tribe, dwelling in boats, wandering and predatory by habit and instinct, that the Appellants belonged to a gang of *Sandars* opera ing during the years 1891—1909, in the districts of Bogra, Pubna, Rungpur, Mymensingh and Rajshahye, and that the numerous dacoities that took place were the work of this gang which, however, did not invariably consist of the same persons but committed dacoities in detachments.

Bayan Sandar, the approver, was convicted in the Gadakhali Dacoity case in February 1909. Subsequently, on the 11th April 1909, he made a detailed confession to a Magistrate of the crimes he had been guilty of, as a member of the gang, and this was "verified" by another Magistrate. On this basis, the 29 Appellants were sent up for trial with the result we have mentioned.

The Sessions Judge, after reci ing the history of the initiation of the case and stating the general effect of the evidence of Bayan, proceeds to give, in tabular form, a list of the dacoities and thefts in which Bayan implicated himself and the Appellants who are his relations.

The tabular form gives a list of eighteen criminal occurrences, the date of each such occurrence, the names of the persons implicated by the confession of Bayan and by his evidence in Court, and the documents (first informations, etc.) and the witnesses proving the occurrence. But the numerous witnesses mentioning the Appellants merely say that they are *Sandars* that they live in boats, and that the boats congregate in *bahars*, that is in flotillas, at various places in the net work of rivers which constitute a peculiar feature of that part of the country. The witnesses identify the Appellants in one sense, but they do not connect them or any of them with the tabulated occurrences. Identification of this kind does not carry the case for the Crown very far in a prosecution under sec. 400, I. P. C. though no doubt such evidence and the other evidence in this case might be valuable if the proceedings had been for bad livelihood or with reference to the Criminal Tribes Act (now, Act III of 1911). The general criminality of a tribe or caste cannot be imputed to individual members operating in gangs where the prosecution is under sec. 400, I. P. C. See *The Public Prosecutor* v. *Bonigiri Pottigadu* (1). Similarly, the documents specified do not prove that particular persons were named as having been concerned in any occurrence to which they relate. In seven occurrences only, *Sandars* were suspected as having committed the offence reported. None were convicted. The utmost that can be said is that *Sandars* were seen within a distance of three miles from the scenes of the occurrences at or about t

(1) I. L.

KADER SUNDAR *v.* THE EMPEROR.

time in question. We offer these observations in this place because they have an important bearing in the matter of corroboration of the testimony of the approver, and it is as well to state, at once, the difficulty we feel in dealing with the case.

The Sessions Judge, after discussing some discrepancies in the evidence of Bayan, next proceeds to consider each occurrence from the year 1892 to 1908 when the Gadakhali dacoity, in which Bayan was caught red-handed, was perpetrated. The Sessions Judge explains the nature of the corroboration, which, in his opinion, was sufficient, but we do not find anywhere that he directed his attention to what is legally adequate corroboration, that is, evidence connecting each of the Appellants with each or some of the occurrences. We may mention that the Magistrate who verified Bayan's confession was not examined as a witness, but the inferior evidence of the verification witnesses was recorded and relied on. Even so, the verification does not touch the Appellants.

The Sessions Judge then mentions certain other dacoities and thefts of which the Fulchari dacoity may be taken as a specimen. A Railway Booking Clerk (P. W. 65) says that some persons took 7 or 8 tickets, possibly, bearing consecutive numbers, at the Bogra station for Fulchari on the day in question. We are unable to hold that this fact proves that twelve of the Appellants were the dacoits—in fact, railway tickets must be issued in a consecutive series, and the clerk cannot know who the passengers are—whether dacoits or others. Moreover, Bayan said, in his confession, that only eight persons committed the Fulchari dacoity. The finding of the Sessions Judge is in general terms, that,—"There appears reason to think *Sandars* committed those dacoities and thefts." He also says that a large number of *Sandars* were seen staying with their boats at the different centres of their association; that thefts and dacoities increased in the quarter where they used to stay; that the *Sandars* were kept under Police surveillance, and their boats used to be regularly searched. It is a fact of importance that no stolen property was ever recovered in any of these searches.

The Sessions Judge concludes his judgment with a consideration of the case of each of the Appellants, by his analysis is not conclusive and does not go beyond his previous estimate of the evidence.

In dealing with the judgment of the Sessions Judge we have inevitably expressed the views we are constrained to adopt on the essential aspects of the case. The learned Deputy Legal Remembrancer and the learned Vakil for the Appellants have afforded us the greatest assistance in examining the bulky record in which, it is admitted, much irrelevant matter is contained. The arguments of the learned Deputy Legal Remembrancer may now be considered in their order, and we proceed to do so.

It is argued for the Crown (1) that evidence proving an offence under sec. 400, I. P. C., need not be of the same quality as in the case of ordinary offences; (2) that in seven dacoities, during the shorter period 1899—1909, *Sandars* were referred to as being concerned in the same, and that their presence near the scenes of the occurrences affords sufficient corroboration of the story of Bayan; (3) that four of the Appellants (Nos. 7, 9, 21, 25) were sent up but acquitted in the Fulchari dacoity (P. W. 65, 75, 204); (4) that the previous convictions of some of the Ap-

THE

Calcutta Weekly Notes.

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Contents.

THE HIGH COURT REMAINS CLOSED FROM THE date of the state entry of the King-Emperor George V into the historic city of Delhi on the 7th of December to the day of the holding of the Imperial Durbar there on the 12th of December, both days inclusive. All India is obviously awaiting pronouncements that are likely to be made in the King-Emperor's Proclamation and the Governor-General's anouncements that are to follow. There is a wide-spread belief that His Majesty, who has been to India before, has not come out to this ancient land either on any pleasure trip or for any enhancement of personal or political prestige for which there is little to be wished for by the Crowned Head of the British Empire. His Majesty, therefore, must have come on a mission of peace and good-will to the people which would strengthen the bonds of union between the Sovereign and the subjects and spread contentment in the land.

WE OBSERVED IN OUR LAST ISSUE THAT THE visit of King George V to India is not without its constitutional significance to the United Kingdom as well. The King during any prolonged absence from Great Britain could not by exercise of any prerogative right appoint a Regent who can only be appointed by an Act of Parliament. So His Majesty has appointed "Councillors of the State," which may be said to mark an innovation in former practice. In Norman times during the absence of the King his functions were exercised by the Chief Justiciar by virtue of his being the Chief officer of the Crown. Henry III was the first to appoint during his absence "Guardians of the Realm." Subsequent Kings followed this practice and ordinarily appointed the *custodis regni* without any sanction from Parliament. The Lords Justices, as these guardians of the realm were called, exercised all the prerogatives of the Crown.

BUT OWING TO THE REVOLUTION EFFECTED IN THE modes of communication by modern science it is no longer necessary for the Sovereign to constitute any guardians and justices of the kingdom and invest them with royal authority as was done by George I during his absence in Hanover in 1719. His Majesty, therefore, in constituting the "Councillors of the State" has not considered it necessary to invest them with authority for the exercise of any Royal prerogative. This Council is composed of Prince Arthur of Connaught, the Archbishop of Canterbury, Lord Loreburn (the Lord Chancellor) and Lord Morley. They are prohibited from dissolving Parliament or granting peerages or dignities except under instructions from the King and they are to refrain from acting in any matter or thing on which it is signified by the King, or appears to them, that His Majesty's special approval should be previously obtained. The Royal warrant further provides "any instructions transmitted by Us by telegram or such other means of communication, will have the same effect as if they were given by Us in writing under our sign manual."

SIR JOHN MACDONNELL, THE DISTINGUISHED JUDICial statistician and jurist, opened his Quain Lectures on Comparative Legal Procedure by giving an account, amongst other celebrated trials, of the trial of Socrates in Greece. This gives us a fair idea of the method and procedure in Greece in conducting such important trials. Trial in Greece as in ancient Rome took more the form of impeachment before a public assembly than a regular

trial held before a modern law Court or the ancient law Courts in India. In Greece every citizen above 30 years of age was considered eligible as a judge. We are told that a Court of 500 such judges were formed for trying the great philosopher for impiety. A magistrate presided over the assembly but he had little power, as all questions relating to the case was determined by votes. The charge or indictment was also singularly vague. Socrates was arraigned for trial before this assembly and the indictment against him was as follows:—"Socrates does evil. He does not believe in the Gods that the State believes in, but introduces other new Deities. He corrupts youth. Punishment death."

THE JUDGES, NO DOUBT, TOOK AN OATH "TO vote according to the laws, to listen with attention to the accuser and the accused and to do what was just." But in an assembly of this kind religious and political prejudices, personal grudge and ill-will materially influenced the members who sat in judgment. Oratory, which used to be cultivated as an art in Greece, always played a great part in influencing judgment at these trials. The prosecutors and their partisans in their impassioned appeals did not hesitate to rouse the religious passion and prejudices of the assembly and this to no small extent swayed the judges in pronouncing their verdict. By the merciless exposure of the absurdity of the old beliefs and superstitions in the market places, Socrates had made many enemies amongst the influential men of the time. Like all the great and true martyrs of this world he stood out for "truth," stubbornly refused in his Apologia to stoop for mercy and did not even hesitate to criticise his accusers. It must have been due to his luminous exposition of truth, his honesty, courage and force of character that 219 members voted in his favour. But as has often happened in world's history, this great apostle of truth fell a victim to the prejudices of his contemporaries. But on his death eternal "truth" again triumphed and made him immortal amongst men for all times to come.

WE HAVE SUGGESTED IN THESE COLUMNS BEFORE the more frequent adoption in India of the Probation system of treatment of criminals. We have great pleasure, therefore, in publishing below the following note on the subject from the *Journal of the Society of Comparative Legislation.* As a preliminary to that, as we have observed before, some officers from the Education Department should be trained from abroad for carrying on the work of supervision during the period of Probation

The system of probation is closely allied to that of the indeterminate sentence, but it is differentiated in this, that it dispenses with imprisonment altogether. The system has spread with remarkable rapidity. Started in Massachusetts in 1875, it has extended itself to thirty-seven States of America, to Great Britain, Germany, Hungary, Canada, Australia and New Zealand. Here it is chiefly identified with Children's Courts and juvenile offenders, but in America it has a wider scope and is fast becoming an essential adjunct of the judicial system for all offences not demanding commitment to prison. "It saves the offender," as Sir Ruggles Brise points out, "from the stigma of imprisonment his family from loss of wages, and the public from the expense of the prisoner's support. Certainly nothing could be more unsatisfactory than the present method of short sentences. The futility of it is forced on us in every day's newspaper, and if scientific confirmation were needed it may be found in Prof. Liszt's three famous paradoxes: (1) The probability that any one will commit a crime is greater if he has already been punished than if he had never been punished; (2) the probabilty that any one will commit a crime increases with the number of punishments he has already undergone; and (3) the probability that a man who is released from punishment will commit a new crime in the shortest possible time increases with the length of sentence he has undergone. But if the probation system is to be effective—this is Sir Ruggles Brise's opinion—it must be worked by officers duly appointed by the State to keep offenders under strict and organised supervision, otherwise the system may only mean immunity for the malefactor.

"INDETERMINATE SENTENCES" WHICH ARE COMmon in America and are also being introduced in England for dealing with old offenders or hardened criminals, seem to suggest that under this new system old offenders are to be shut up in prison for ever. But in reality it means something very different. The following note therefore in the same journal reviewing the report of Sir Ruggles Brise, the British representative at the Eighth International Penitentiary Congress held at Washington, will be found instructive.

At present the treatment most in favour in the States is the "indeterminate sentence" This is strictly a misnomer—there is no "indeterminate sentence" in the sense of a sentence with out a limit—a maximum or a minimum The indeterminate sentence is used as a catch phrase to indicate opposition to the "retributory" element in the punishment of crime. It is for making, not the guilt of the criminal, but his potentiality for reformation, the test for the duration of punishment, and it entrusts the power of judging of this potentiality of reformation not to the judiciary but to boards of parole. This is more than a mere change of method: it marks a new attitude towards crime. In America public opinion is much more tolerant than in the older communities. It is less impressed with the guilt of the offender than the necessity of reclaiming him to honest citizenship. On this attitude towards crime Sir Ruggles Brise offers a very just criticism "You cannot," he says, "expel human nature with a fork, and moral indignation against the perpetrator of an anti-social act is in human nature, and will demand certainty and fixity of punishment when there is full responsibility for the deed. It is a misnomer and a fallacy to refer to this healthy moral sentiment as a desire for vengeance or as the old classical idea of expiation. In its modern shape it merely expresses the determination of the human consciousness that the system of rights should be maintained and that the person who violates it should be punished." Nevertheless the "indeterminate sentence"—the individualisation of punishment, as it may be called—carried the day at the Congress.

THE GERMAN COURTS OF LAW.

We have noticed in these columns before the German system of legal education (15 C. W. N. cclxxxiv). To appreciate the system of administration of justice in Germany it is necessary to remember that every law student who wishes either to practise as an advocate or enter the judicial service of the State must after passing his legal examinations undergo practical training in all degrees of legal work from that of a ministerial officer of the Court to that of assessors and judges. Naturally even the ordinary judges of very limited jurisdiction in Germany are all very well-trained lawyers. Considering the qualifications and training of the Judges their salaries seem to us to be ridiculously low. But the German view of English legal and judicial remuneration is that it is based on an artificial standard which is disproportionately high compared to other professions.

The number of law Courts and Judges is so very large in Germany that justice may truly be said to have been brought to the door of every German subject. Notwithstanding the low scale of judicial salary, the German exchequer spends quite an enormous sum in the administration of justice. In appreciating the full significance of the figures we furnish below it is necessary to remember that the population of Prussia is nearly equal to that of England and is less than one-half of that of the Presidency of Bengal.

The Department of Administration of Justice is in charge of a Minister of Justice who gets £2,500 annually and an official residence. The IMPERIAL COURT of Leipzig which is the highest Court of Appeal, is not merely the final Court of Appeal for Prussia but for the whole of the German Empire and comprise 100 judges including the President. The Imperial Court may be said to correspond to the House of Lords and Privy Council. But the judicial strength of the Court is something inconceivable under the English judicial system. This Imperial Court is divided into Senates—seven members constituting a quorum. Each of the Senates is bound by the previous decision of another Senate. But should any Senate desire to depart from the principle of law laid down by another Senate, the question has to be submitted for determination by all the other Senates civil and criminal respectively.

In the other Courts, German judges are not bound to follow precedents but only the Code. But as a matter of prudence and convenience they follow the decisions of higher Courts. But it sometimes so happens that a contrary view taken by a judge of the lowest Court is finally upheld by the combined Senates of the Imperial Court.

In Prussia proper there are 14 PROVINCIAL COURTS OF APPEAL, *i.e.*, one for each province and there are 513 Judges for these appeal Courts with a president, who receives a salary of £750. The Courts of Appeal are divided into Senates corresponding to something like Benches here. Five Judges constitute a quorum for these Senates.

Next comes the DISTRICT COURTS of which there are 96 in number with as many Presidents, each of whom gets an annual salary of £520. Connected with these Courts are 373 Directors, who preside over divisions consisting of three Judges of whom there are 1,304. These District Courts have unlimited civil jurisdiction. District Courts sitting as Courts of first instance in criminal cases sit in divisions of five members. These Courts sitting as Courts of Appeal in minor cases sit in divisions of three members. In felony cases or cases of more serious crime three Judges sit with a jury of 12 men, one emergency juror atttending all the time.

Below the DISTRICT COURTS there are 1,110 LOCAL COURTS with limited jurisdiction of 15. In these Courts there are 3,432 judges who sit and act singly. These judges of the local Courts also sit with two lay assessors to hear criminal cases of a petty nature. Each of the assessors in these cases have the same vote as a judge. Thus it would appear that even in minor criminal cases people have the privilege of a jury trial with the safeguard that the verdict of the majority is always binding on the judge.

In commercial cases too, the judge is always assisted by two commercial assessors and all three have equal votes. Besides the Ordinary Courts there are 240 Trade Courts and 170 Commercial Courts. These Courts determine dispute between employers and the employed.

The PROCEDURE FOLLOWED in civil cases is far more thorough than under any other judicial system known to us. The essential facts as also the means by which they are to be proved have to be set out in the pleadings and the advocates on each side have also to file their arguments. These papers are submitted to the judges and one or more members of the Court along with the President record their opinions on the case which however are not final. This only familiarises the judges with the facts as well as its legal aspects. The case is then set down for hearing and it is argued before the judges. After argument the judges hold a consultation, and if the decision depends solely on any question of law the decision is given then and there. But if the case depends on any question of facts not admitted then the judges formulate the *thema probandi* and orders the evidence which it considers essential to be taken by one or more judges. After the evidence is so taken a further hearing is given and the judges after further consultation record their opinion.

It will be interesting to sum up and compare with the figures given the corresponding figures

from the English judicial statistics. In England there are 33 High Court Judges, 5 City and 65 County Court Judges and about 300 to 400 other judicial officers such as Stipendiary Magistrates, Chairmen of Sessions, Masters, Referees, Recorders and Registrars. In Prussia, there are 488 Judges of Appeal, 1773 Judges of First Instance with untimited and 3,425 Judges of First Instance with limited jurisdiction. Altogether there are in Prussia 5,686 men occupying independent judicial capacity.

Justice being both cheap and near at hand in Germany, it is no wonder that the number of civil causes entered in Prussia in a year is about 4,300,000 as against 1,500,000 in England.

The expenditure in Prussia in 1909 under the head of "Law and Justice" was £7,600,000 and receipts £5,200,000. In India the receipts from "Law and Justice" always exceed the expenditure and so is a source of revenue rather than a burden to the State as it is in all other civilized countries of the world. The expenditure in India is about £2,550,000 and the receipts about £3,000,000, in round figures.

Correspondence.

[TO THE EDITOR OF THE "CALCUTTA WEEKLY NOTES."]

SIR,—I have the honor to enclose copies of correspondence on the subject of establishment of Arbitration Tribunals at Alipur, Calcutta, and other, important and advanced centres, for favor of your kind consideration, and such advice and instructions as to make the scheme a success.

2. It is sad to reflect how many families are being ruined by litigation, which, is playing havoc in the country. There are a few who are disposed to resort to arbitration for settlement of their disputes, but they are unable to realise their wishes for want of competent and willing arbitrators. The present scheme aims at,

(1) rendering every facility to suitors to get their disputes settled by the best judicial talents.
(2) minimising the costs of litigation,
(3) disposal of casos without loss of time by a simple procedure,
(4) affording relief to congestion, which amounts to denial of justice in many cases,
(5) opening a field for the exercise of talents, now lying dormant and useless.

3. With the view of inspiring confidence, the services of such retired judicial officers are sought as had distinguished themselves by their conspicuous services in the district concerned, and still retain full capacity for work, and for the sake of publicity and convenience, the sittings are proposed to be held in the Civil Court premises or close to them. It is also contemplated to hold inquiries on the spot very frequently, and check the proceedings of experts, in cases necessitating their employment by the presiding member personally.

4. I am glad to announce that an Arbitration Board has been established at Alipur, consisting of the following members, and that other highly qualified gentlemen are expected to join it shortly, and that the Board is now engaged in trying a partition suit referred to it by the senior Munsif of Alipur.

1. Mr. Saroda Churn Mitra, Ex-Judge, High Court, Calcutta.
2. Rai Jogesh Chunder Mitter Bahadur, Presidency Magistrate and retired District and Sessions Judge.
3. Shamsululama Moulvi Mahomed Yusuff, Khan Bahadur, Vakil, High Court.
4. Rai Jogendra Nath Mitter Bahadur, retired District and Sessions Judge.
5. Rai Debendro Chunder Ghose Bahadur, retired Government Pleader, and lately leader of the Bar, 24-Pergunnahs.
6. Babu Behary Lal Banerjee, retired Sub-Judge.
7. Babu Promotho Nath Chatterjee, retired Sub-Judge.

5. As institutions for promotion of peace and goodwill the Arbitration Boards might, I venture to suggest, be fitting memorials to commemorate the gracious visit of Their Imperial Majesties, in a tangible and lasting form.

6. May I request also the favour of your kindly making widely known the fact of the formation of the Alipur Board, the services of which are at the command of the suitors of Calcutta, the district of 24-Pergunnahs and the neighbouring districts, either gratuitously or at a low rate of fees.

I have the honor to be
Sir,
Your most obedient servant,
PROMOTHO NATH CHATTERJEE,
Hony. Secy., Arbitration Board, Alipur, Calcutta.

KALIGHAT,
The 23rd November 1911.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Actiesselskabet D. "Hercules" v. The Grand Trunk Pacific Railway Coy.* Before LORDS JUSTICES VAUGHAN WILLIAMS, BUCKLEY AND KENNEDY. 31st October 1911.

Cause of action—Its place—Jurisdiction—Residence and carrying on of business.

This was an appeal from an order of Lawrence, J. The Defendants were a Canadian Company registered in Canada and formed for building railway across the Atlantic. The Plaintiffs were a company registered in Norway and owners of *S. S. "Hercules."* The cause of action for a claim for demurrage occurred at Prince Rupert, but the Plaintiffs sued in England on the ground that the Defendants were carrying on their business there. The Defendants objected and moved the Master to cancel the writ which he did. But the Court below reversed that order from which the Defendants appealed. It was contended against the Appellants that since 1904 they had an advisory committee in London which dealt with financial matters relating to the issue of loan capital for the construction of the Railway and that they had a room in England and their name on the door. The

Appellants' case was that the raising of money in England was merely a preliminary, and that all business was really done in Canada—Reliance was placed on *Badcock* v. *Cumberland G. P. Company* (1893, 1 Ch. 362). The learned Judges dismissed the appeal. In the course of his judgment LORD JUSTICE VAUGHAN WILLIAMS remarked,

The only question he had to consider was this, whether the financial business of issuing loans was of such a character that he ought to say that although the Defendant company undoubtedly had a board of directors in this country at a fixed residence acting on its behalf and issuing advertisements in the name of the company, it ought to be held not to be carrying on business in this country because it was not carrying on the business of running railway but the business of raising money by the issue of a debenture. In his opinion it was impossible to draw any such distinction. What was done by the London board was to carry on the business of the company. The office was the office of the company, and it did not matter that there was no rent paid for that office. It was the office in which the business of the company was not only carried on, but was also advertised to be carried on.

Messrs. Atkin, K. C., and Stephens for the Appellants.

Mr. Roche for the Respondent.

B. D. *Appeal dismissed.*

CHANCERY DIVISION.—*In re Havana Cigar Protection Association, Ld.* Before MR. JUSTICE PARKER. 1st November 1911.

Trade-mark—Havana cigars—Use of Spanish brand name for articles manufactured elsewhere—Deception and false suggestion.

This was an appeal by the Havana Protection Society. The Respondents were a Dutch firm who applied for registration of a trade-mark "Los Alumbradores" affixed to their cigars and tobacco made in Holland under a label. It was opposed by the Appellants on the ground that it was calculated to deceive, for Havana cigars suggested that they were Spanish although they were actually made in Holland. The Controller-General of Patents allowed the registration which gave rise to the present appeal. The learned Judge in the course of his judgment dismissing it observed :—

The applicant's contention, amounts to this: that the use of a Spanish brand name on cigars must suggest, or at any rate is likely to suggest, that the cigars, if not Havana cigars, are at any rate made in some Spanish-speaking country, and that in the case of cigars made in Holland this will be a false suggestion. They admit that cigars, wherever made, may be legitimately described, as to size, shape, and colour, by Spanish words, for this is the common custom of the trade, but they desire to draw the line at Spanish brand name. In my opinion no such line can properly be drawn. It is, of course, possible that a brand name may suggest the country of origin, as I think was the case in *Rex* v. *Phillips* (25 T. L. R. 764), where the brand name in question was "Bella de Cuba." It is further possible that the use of a Spanish brand name coupled with the nature of the picture on which it appears, with or without the addition of other Spanish words, may suggest Havana or some other Spanish-speaking country as the country of origin of the goods. This appears to have been the case in *Rex* v. *Butcher* (24 T. L. R. 769). But it appears to me that I should be going too far if I hold that every Spanish brand name for cigars made in a country where Spanish is not spoken must contain a false suggestion. If I held this I might be throwing doubt on the propriety of many existing brand names. I might equally well hold that a French brand name for gloves or corsets made in England must necessarily be calculated to deceive.

The applicants also relied on the case of *McGlennon's Application* (25 Reports of Patent cases, 797), in which Mr. Justice Warrington refused to allow the registration of the outline of a shamrock leaf as suggesting an Irish origin for picture postcards. On reference to that case I find that the learned Judge decided entirely on the evidence before him, and was careful not to lay down any general rule. If I remember rightly, the thistle is and had long been used as their trademark for butterscotch and like wares by a well-known firm of English manufacturers. There can, in my opinion, be no such general rule as suggested. Each case must be judged by its own special circumstances. In the present case there is nothing in the label to help the contention that the Spanish brand name suggests the place of origin of the goods, and when I come to the evidence I find that the mark has actually been used in this country for 21 years, during which nearly 20,000 boxes have been sold, and yet there is no suggestion that any one has been actually deceived.

Mr. Sebastian for the Appellants.

Messrs. Walter, K. C., and Kerly for the Respondents.

B. D. *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM SUPREME COURT OF CANADA.]

LORD HALDANE.
LORD MACNAGHTEN.
LORD SHAW.
LORD ROBSON.
1911,
3, November.

THE KING
v.
LOVIT and others.

Situs *of moveable property—Application of* "Mobilia sequntur personam," *altered by Statute.*

This was an appeal from a judgment of the Supreme Court of Canada. The question at issue in the apppeal was whether the Defendants as the executors of one L deceased were liable to pay succession duty in respect of money which the testator had placed on special deposit in the St. John's branch of the Bank of British North America. The King's claim was founded on sec. 5, sub-sec. 1, of the Succession Duty Act of New Burnswick, which enacts that "all property, whether situate in this province or elsewhere, other than property being in the United Kingdom of Great Britain and Ireland, and subject to duty, whether the deceased person owing or entitled thereto had a fixed place of abode in or without this province at the time of his death, passing either by will or intestacy, shall be subject to a succession duty to be paid for the use of the Province over and above the fees provided by the chapter of these consolidated statutes relating to Probate Courts."

To this was subsequently added :—"The provisions of this section are not intended to apply and shall not apply to property outside this Province owned at the time of his death by a person not then having a place of residence within the Province, except so much thereof as may be devised or transferred to a person or persons residing within the Province." In the Consolidated Statutes for 1908 this sub-section appeared as amended by the word "domiciled" being substituted for "having a place of residence."

Their Lordships allowed the appeal. LORD MACNAGHTEN in the course of his judgment observed :—

The present case came well within the principles thus laid down, and their Lordships were of opinion that these debts were "property situate within the Province" of New Burnswick. The Defendants, however, contended that the situation of the property was to be determined, not by its actual locality, but according to the principal expressed in the maxim, "Mobilia sequntur personam." Personal property of a moveable nature was considered, they said, to follow the person of the owner and was, in contemplation of law, situate wherever he was domiciled. In that view the property was neither in London nor New Burnswick, but in Nova Scotia.

In regard to legacy and succession duties it had been held through a long series of cases that the duties were intended to be imposed only on those who became entitled by virtue of our law. The effect of that principle was to exempt from the payment of legacy or succession duties moveable property situate here which belonged to a testator domiciled abroad, for in dealing with the distribution of such property our Courts acted not on our own law, but on the law of the domicile of the testator or intestate on which the legatee or successor founded his title. Similarly, in the case of moveables situate abroad which belonged to a person domiciled here, our Courts would direct their distribution according to our law and not that of the locality where they were found. The application of this principle might be excluded by the use of apt and clear words in a Statute for the purpose, and the question was whether that had been done in the present case by a Legislature having full authority in thar behalf.

Here the Legislature of New Brunswick had expressly enacted that all property situate in the Province should be subject to a succession duty though the testator might have had his fixed place of abode or domicile outside the Province. The Act purported to exclude the application of the maxim, "Mobilia sequntur personam," as regarded personal estate within the Province belonging to persons domiciled elsewhere, but to retain it as regards the property of New Brunswick citizens situate outside the Province. The Act under consideration assimilated the tax to the probate duty. It was imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the Province, and, in the view of their Lordships, it was intended to be a direct burden on that property, varying in amount according to the relationship of the successor to the testator.

Sir R. Finlay, K. C., and *Messrs. Hazen, K. C., and Rowlatt* for the Appellant.

Messrs. Newcombe, K. C., and Jenks for th Respondents.

B. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., AND N. R. CHATTERJEA, J. APPEAL FROM APPELLATE DECREE No. 1418 OF 1909. JATINDRA NATH ROY AND OTHERS, Plaintiffs, Appellants *v.* MOZAFER ALI KHAN AND OTHERS, Defendants, Respondents. 23rd November 1911.

Rent decree—Direction that mehal in arrears should be sold first, if may be made.

Appeal from a decision of H. E. Ransom, Esq., District Judge of Nuddea, dated the 7th April 1909, modifying a decision of Babu Rajendra Lal Sadhu, dated the 12th November 1908.

The facts material to this report were as follows:— Plaintiffs brought this suit for rent; some of the Defendants made an application as follows: "............ If this suit be decreed and if the Plaintiffs try to realise money by the attachment of the moveable properties then these Defendants will be put to shame and shall suffer loss. It is, therefore, prayed that the Court may be pleased to assess damage at a low rate and at first pass a decree against the mehal in arrear and pass an order to the effect that if the whole amount be not realised thereby, the Defendants shall themselves be liable for the same ...."

The first Court in passing a decree said as follows:—"Considering the allegations disclosed in the petition and the fact that if this prayer be allowed the Plaintiffs will not be put to difficulty, it may be ordered that the land in arrears be sold first to satisfy the decree." There was a further direction in the decree that if it be insufficient, then the balance might be recovered as personal decree.

The District Judge was of the same opinion.

Some of the Plaintiffs preferred this second appeal.

Babu Surendra Chandra Sen, Vakil for Appellant, contended that the lower Courts had no jurisdiction to limit the decree as they had done, and the direction in the decree to proceed against the defaulting tenure first should be expunged.

Their Lordships gave effect to the contention.

Appeal allowed.

CIVIL APPELLATE JURISDICTION. Before CASPERSZ AND D. CHATTERJEE, JJ. MISCELLANEOUS APPEAL No. 492 OF 1909. RAJA PROMODA NATH ROY, Appellant *v.* SARA KHATUN AND OTHERS, Respondents. Heard 24th November. Judgment 28th November 1911.

Rent, suit for, by co-sharer making separate collection, making other co-sharers Defendants—Decree passed for money—Execution—Res judicata—Bengal Tenancy Act (VIII of 1885), sec. 158B.

The main question in controversy in the case was whether the decree obtained by the Appellant could be executed as a decree for rent under the Bengal Tenancy Act. The lower Court held in the negative and the decree-holder appealed to the High Court.

The decree-holder was the owner of 6 annas and the opposite party Defendants Nos. 2 to 6 were the owners of 2 annas of an eight annas mehal which was let out in putni to the ancestor of the judgment-debtors opposite parties. The decree-holder, as such 6 annas owners, brought a suit to recover arrears of rent against the putnidar making the owners of the remaining 2 annas *pro formâ* Defendants, praying for a decree for the entire rent as also, for a declaration that the decretal amount should be a charge upon the tenure in arrears. The Court of first instance held that as the rent for the 6 annas had been separately collected, the co-sharers were not necessary parties and that the claim for their share of the rent was untenable, that the Plaintiffs as part owners could not enforce a lien on the tenure, and ultimately passed a decree for a sum which was to be realised from the assets of the putnidar, Nur Mahomed Khan, who had died in the meantime, his heirs being substituted on the record in his place. This decree was made in April 1907, and there was no appeal against it. When the decree-holder sought to execute the decree as rent decree under the Bengal Tenancy Act, objection was preferred by the judgment-debtor, Sham Sunnissa Khatun, that the decree was a money decree and must be executed as such. The Court of execution reading the decree by the light of the judgment in the original suit, held the objection to be well-founded.

Held—That the suit was rightly framed as a suit for rent, and a decree properly passed therein would be capable of execution under the special procedure of the Bengal Tenancy Act. The Court, however, passed a money decree. No question of *res judicata* could arise as the question was raised not in another suit but in execution of the decree passed in the same suit. That the provisions of sec. 158B of the Bengal Tenancy Act had no application.

Dr. Rash Behary Ghose and *Babus Satis Chandra Ghose* and *Sarat Kumar Mitra* for the Appellant.

Babus Dwarka Nath Chuckerbutty, J. Bagchi and *Shyama Charan Roy* (for *Babu Hara Prosad Chatterjee*) for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and CARNDUFF, JJ. APPEAL FROM APPELLATE DECREE NO. 3175 OF 1909. NARSINGH NARAIN SINGH, Appellant *v.* AJODHYA PROSAD SINGH AND OTHERS, Respondents. Heard 20th and 21st November 1911. Judgment 28th November 1911.

Arbitration—Arbitrator's power to decide matters outside reference—Award, who can object—Civil Procedure Code (Act XIV of 1882), sec. 525—Award if can be ordered to be filed in part.

The parties to the proceeding were related to each other, and had a dispute as to a pathway for passage from the land of the Plaintiff and his brother to a village towards the north of the property of the first Defendant. On the 16th July 1908, the matters in controversy which were set out in full detail in a registered instrument of submission, were referred to the arbitration of a gentleman by name Dilkeswar Singh. He made his award on the 31st August 1908. On the 14th September following, the Plaintiff applied under sec. 525 of the Code of 1882 that the award be filed in Court. The Defendants questioned the validity of the submission, imputed misconduct and partiality to the arbitrator, alleged a revocation of the submission before the award was made and contended that the award had determined a question not included in the submission. The Courts below overruled all the objections except one, as entirely unfounded and directed the award to be filed in part. The result was that a modified decree was made in favour of the Plaintiff. The Plaintiff appealed to the High Court and on his behalf the decree was assailed in so far as it modified the award. The arbitrator found in substance that the pathway alleged by the Plaintiff and denied by the Defendants, did, as a matter of fact, exist, but he held that if the thoroughfare was allowed to continue, great inconvenience and injury would be caused to the first Defendant. In that view the arbitrator laid down a new pathway in lieu of the disputed thoroughfare. The Plaintiff was satisfied with the award in that respect but the Defendants objected that the award was in excess of the authority of the arbitrator, inasmuch as the matter covered by the submission was the existence or otherwise of the disputed pathway, and it was beyond the competence of the arbitrator to substitute in lieu thereof a new pathway. This view found favour with the Courts below and they declined to direct the award to be filed in so far as the pathway was concerned.

Held—That an arbitrator is not bound by mere rules of practice which Courts have adopted for general convenience, and he has greater latitude than Courts of law to do complete justice between the parties according to equity and good conscience. The Courts are therefore never astute to entertain technical objections to awards. But an arbitrator cannot go beyond the precise questions submitted : it will not do for him to determine any claims or demands though existing between the parties to the submission, save only those which they have agreed that he shall decide. In each case therefore where a question arises whether the arbitrator has exceeded his authority.

That only the party prejudiced by the exercise of excessive authority by the authority was entitled to object to the award by reason of it. The party in whose favour the erroneous action of the arbitrator operated, could not be heard to impeach the validity of the award on that ground.

That it was not competent to the Court in a proceeding under sec. 525 of the Code of 1882 to direct that the award be filed in part ; the Court was bound to refuse the application if in its opinion the award was open to attack in part.

Dandekar v. *Dandekar* (I. L. R. 6 Bom. 663), *Mana* v. *Mallichery* (I. L. R. 3 Mad. 68), *Tiruvengada* v. *Vaidinatha* (I. L. R. 29 Mad. 303) and *Mustapa* v. *Phulja* (I. L. R. 27 All. 526) referred to.

Dr. Rash Behary Ghose and *Babus Umakali Mukherjee* and *Ganes Dutt Singh* for the Appellant.

Babus Mohendra Nath Roy and *Chandra Sekhar Prosad Singh* for the Respondents.

A. T. M. *Appeal allowed.*

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pellants may be taken into consideration; (5) that the confessions of Appellants Nos. 2 and 18 are sufficient to complete the evidence against them.

(1) Association is the gist of the offence punishable under sec. 400 of the Penal Code, that is, association for the habitual pursuit of dacoity. The subject is fully discussed by Dr. Gour, in his second volume on the Penal Law of India, and he has collected all the cases under the section (pp. 1587—1590). The section is a highly penal one, and, as was said by Phear, J., in *The Queen* v. *Mooktaram Sirdar* (2), the offence is "one of a very special character and entirely the creature of statute." The section must, therefore, be strictly construed. Although the evidence need not show the same degree of particularity as to the commission of each dacoity as is required to support a substantive charge of that crime [*Empress* v. *Kure* (3)], it must be established, for the purpose of conviction, that the accused belong to a gang whose business is the habitual commission of dacoity. The special conspiracy must be proved—see *King-Emperor* v. *Tirumal Reddi* (4). A good illustration of the kind of evidence to be adduced in such a case as this is to be gathered from the judgment of Munro, J., in *The Public Prosecutor* v. *Bonigiri Pottigadu* (1), and we think that, in the case before us, the evidence under the seven heads (at p. 181 of the report) is almost entirely absent. For instance, it has not been shown that the Appellants move about in batches, have been arrested in batches, and are absent from home in batches, or that the Appellants have been concerned in a large number of dacoities.

(2) It follows from the principles we have just mentioned that the implication of *Sandars* generally in the number of even seven dacoities spread over the shorter period of ten years, is not sufficient proof against the present Appellants. The tribe or caste of *Sandars* contains thousands of human beings, and even one *bohor* or flotilla of fifty boats may include two hundred persons. The approver Bayan has been corroborated to some extent as to the *facts* of the dacoities, but that corroboration has no tendency to prove that the Appellants were with him on each or some of the occasions. Corroboration of the testimony of an approver must connect the accused with the offence—here, the association of a gang of persons for the business of habitually committing dacoity. In this essential respect, the evidence does not sufficiently support the story of the approver, and we may add that Bayan's deposition, which has been placed before us, is not free from important contradictions which cast doubts on his veracity. We have already noticed the vital fact that no stolen property was found in the possession of any of the Appellants; if stolen or suspicious property had been discovered, that would have been adequate corroboration.

(3) The third contention of the learned Deputy Legal Remembracer may be dismissed with the observation that the acquittal of the accused in Fulchari dacoity can only mean that they had nothing to do with that crime. See the cases of *The Emperor* v. *Nani Gopal Gupta* (5), *Rex* v. *Plummer* (6). No adverse

(1) I. L. R. 32 Mad. 179 (1908).
(2) 23 W. R. Cr. 18 (1875).
(3) A. W. N. for 1886, 65, 66.
(4) I. L. R. 24 Mad. 523 (546) (1901).
(5) 15 C. W. N. 593 (1911).
(6) L. R. (1902) 2 K. B. 339.

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inference can be drawn against the accused after their acquittal.

(4) The next argument concerns the previous convictions of some of the Appellants. Jadu (No. 23) was twice punished for dacoity. Sabed (No. 4), Rahimuddin (No. 6), Jalal (No. 11), Jadu (No. 23) and Tomiz (No. 24) were bound down to be of good behaviour under sec. 110, Cr. P. C. Lal Chand (No. 19) was convicted for theft and sentenced to three months' rigorous imprisonment. These are the previous convictions relied on. They do not carry much weight, though, no doubt, if the association for the purpose of habitually commiting dacoity, had been made out, the past history of some of the Appellants would have been significant, as was pointed out in the case of *Bonai* v. *The King-Emperor* (7).

(5) The last contention covers the case of the Appellants who confessed in the first Court (Nos. 2 and 18). We have heard the confessions read out. The Appellants did not admit the existence of a gang. No. 2 spoke of five thefts and five dacoities. No. 18 mentioned only one theft and one dacoity. The confessions were retracted before the Magistrate. In our opinion, such confessions cannot be deemed conclusive where the other evidence in the case is so wanting in precision.

The conclusion of the whole matter is that all the Appellants, including the six exempted by the learned Deputy Legal Remembrancer, are in the same category, and must be acquitted of the present charge under sec. 400, I. P. C. We regret the expenditure of public time in the trial of this case in the Court of Sessions.

The appeal is allowed. The convictions and sentences are reversed. The Appellants will be set at liberty, so far as the present proceedings are concerned.

Appeal allowed.

(7) 15 C. W. N. 461 (1911).

[PRIVY COUNCIL.]

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN.	
LORD SHAW.	MIR SARWARJAN,
LORD MERSEY.	Appellant,
MR. AMEER ALI.	*v.*
1911,	FAKHRUDDIN MAHOMED CHOWDHURI
Heard, 19 and 20, June.	and others,
Judgment, 9, November.	Respondents.

Specific performance—Infant—Contract for purchase of immoveable property by guardian or manager—Mutuality, want of—Position and powers of guardian and manager, if similar.

It is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property.

The minor in such a case not being bound by the contract there is no mutuality in it, and he cannot on attaining majority obtain specific performance of it.

MIR SARWARJAN *v.* FAKARUDDIN MAHOMED (2) *overruled.*

Quære—*Whether the position and powers of a manager and those of the guardian are the same.*

This was an appeal against a decree of the High Court of Judicature at Fort William in Bengal, dated the 6th December 1906, affirming the decree of the Subordinate Judge of Backergunj, dated the 23rd February 1904.

The suit out of which the appeal arose was brought by the first two Res-

(2) 11 C. W. N. 84 (1906).

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pondents and the predecessors in title of Respondents Nos. 3 and 4, (of whom the first was an infant suing by his next friend and duly appointed guardian), alleging that they were respectively the owners by right of inheritance of the property claimed in the plaint and that a purchase thereof at a Court auction by the Appellant's (first Defendant's) vendors was void, and they prayed that declarations be made to this effect. As regards this prayer the suit was dismissed. The Plaintiffs (Respondents) further alleged that before the said Court auction the first Defendant (Appellant) had agreed to reconvey to them the said property at the price which might be paid by him therefor and they prayed alternatively for a decree for specific performance of the said agreement.

The Subordinate Judge passed a decree for specific performance as prayed by the Plaintiffs, and the decree was affirmed by the High Court on appeal.

The principal questions in the appeal were whether the Appellant entered into the said agreement and was bound thereby, whether the Respondents or any of them were entitled to enforce it, and whether under the circumstances of the case appearing in the evidence specific performance should have been decreed, and if so, on what terms.

The circumstances giving rise to the litigation were as follows: In 1880 the Bamna estate was held in undivided shares by several persons, including Afsaruddin (who was the father of the first Respondent and husband of the second), the third Plaintiff who was represented on the record by Respondents Nos. 3 and 4, the Appellant, and one Nurunnissa, who was sister of Afsaruddin. The last-named sharer had two shares, of which the larger was described as a one anna five gundas share:—this share was mortgaged by her in that year to one Bhim Shaha, and it was with this share that the present appeal was more particularly concerned. In 1881 by agreement between the shareholders separate lands were allotted to each in respect of the several undivided shares and Nurunnissa mortgaged a part of her lands to Uma Churn Guha. On the death of Nurunnissa, which took place about 1898, her property subject to the said mortgages passed to her brother and the Appellant. Her brother died subsequently and was succeeded by Respondents Nos. 1 and 2.

In 1887 a suit was brought on the said mortgage of 1880 by Judhisthir in whom the mortgage was vested against the mortgagor and her husband and other persons who had shares in the estate. A decree was passed on 25th February 1887 for Rs. 28,534-2 and further interest: the mortgage was not redeemed; an order for the sale of the mortgage property was made and the mortgagee obtained leave to bid. The sale took place in November 1895, and the property was knocked down to the mortgagee, Judhisthir. The Appellant was under an agreement to pay the decree-holder Rs. 23,000 for the property and for the decree, which remained unsatisfied, and had made a deposit of Rs. 11,000 as part of the price. The balance was paid in 1897 when deeds were executed by the mortgagee, Judhisthir, by which the transaction was completed, and the property and the decree were duly transferred to the Appellant (Defendant No. 1) and his trustee George Garth (Defendant No. 2 in the present suit, by whose assistance he had raised the necessary funds on mortgage as stated below). A formal certificate of sale in respect of the lands was obtained from the Court in 1900.

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Meanwhile, before the sale under the said mortgage decree, *viz.*, on 25th October 1895, the agreement sued on by the Respondents was said to have been made by the Appellant and Garth. Its terms were set out in the plaint as follows :—

(1) "That the Defendants Nos. 2 and 3 would pay half and the Defendant No. 1 would pay half the amount of the Decree obtained by Judhisthir Shaha and others against Nurunnissa Khatun, which had been settled to be purchased by the Defendant No. 1, and both the parties would have equal interest in that Decree.

(2) "That among the mortgaged properties of those judgment-debtors which had been lotted up for sale, such properties as were in possession of any party would be purchased by that party at a small value, that any party would not be able to purchase the property in the possession of another, and that even if he purchased it he should have to give it back.

(3) "That both parties would jointly purchase the other properties and they would partition and take them according as they lie contiguous to their shares."

This agreement was held to be proved by a memorandum, dated 25th October 1895, which was found to have been signed by the Appellant and also by a clerk in the employment of Garth's firm who signed in the name of Garth though not by his directions. The Appellant's case was that none of the clauses of the memorandum had been carried out and no claim under the alleged agreement was made or conveyance tendered to him for execution before suit.

In October 1895 the properties of the minor and his mother (the first and second Respondents) and of the third Plaintiff were in fact in the management of Garth and his partner Wetherell (Defendant No. 3).

In or about 1895 the separate lands forming part of Nurunnissa's estate were brought to sale in execution of a decree on the other mortgage above referred to. Of these, half was bought by the present Appellant and half by Garth under an arrangement spoken to by the former. A like arrangement with regard to the execution sale of property of Mozaharuddin, who was Nurunnissa's husband, and of Nochoruddin, a distant relative, was deposed to by the witnesses. The property purchased by Garth was agreed to be sold to the Appellant. To carry out the various transactions of the Appellant above referred to, he obtained through Garth, as had been arranged in 1895, a loan of Rs. 75,000 from the Eastern Mortgage Company on a mortgage. Of this sum Garth paid Rs. 13,000 to the credit of Judhisthir, who thereupon executed, as aforesaid, a conveyance of the lands he had bought to the Appellant and an assignment of the decree to Messrs. Garth and Wetherell as trustees for the Appellant. For the purpose of discharging this mortgage in which the said decree of 1887 was included Garth was placed in possession and management of the mortgage premises. About the same time Messrs. Garth and Wetherell appeared to have come to terms with the widow (the second Respondent); and about the 16th August 1897 the third Plaintiff executed a deed of trust conveying his properties to them.

Soon after the sale which had taken place under the said mortgage decree in 1895 steps were taken on behalf of the first Respondent to have it set aside on the ground of alleged irregularities of procedure and inadequacy of price. And when the Appellant applied for the formal confirmation of the sale in 1900 his application was opposed by the Respondents, but the sale was confirmed. Thereupon on the 5th May 1900 the present Respondents filed three petitions under the Civil Procedure Code, sec. 244,

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with the object of having the sale set aside on the ground that it was attended with various irregularities, having previously on the 20th April 1900 instituted the present suit against the Appellant as first Defendant and Messrs. Garth and Wetherell *pro formâ* Defendants Nos. 2 and 3. In their plaint they set out the facts of the case from their point of view. The prayer of the plaint was as follows: "Failing the above (*viz.*, the prayer for the declaration of the Plaintiffs' title), for a declaration that the Defendant No. 1 is bound according to the contract to execute a kobala in favour of the Plaintiffs at the price paid at the auction sale, and for a decree that the Defendant No. 1 do execute the kobala on receipt of the said consideration from the Plaintiffs." The Appellant defended the suit.

Several issues were fixed for trial of which the only issue now material was as follows:—"Was there any contract between the Defendants Nos. 1 and 2 for reconveying any property to the Plaintiffs mentioned in Sch. I of the plaint? If so, what were its terms? Is the said contract enforceable by the Plaintiffs against Defendant No. 1."

The Subordinate Judge allowed the Plaintiffs' petitions setting aside the sale and dismissed the suit as according to him the Plaintiffs had been granted, upon those petitions, all the reliefs they were entitled to. From the order granting the petitions the present Appellant appealed.

The Plaintiffs also appealed against the judgment in their suits. The present Appellant's appeal came on first for disposal, and it was decided in his favour, whereupon the High Court on 25th July 1902 ordered on the appeal against the judgment in the suit that it should be remanded for the disposal of the issue aforesaid.

On the 10th February 1904 the suit came on for hearing on the remand, and oral and documentary evidence was given on both sides.

On the 22nd February 1904 the Subordinate Judge delivered judgment for the Plaintiffs. He held that the document of the 25th October 1895 was signed by the Appellant and that he was bound by its terms to convey the properties to the Plaintiffs for the price paid by him for the same and passed a decree to that effect. He said: "Mr. Garth clearly did so contract on behalf of the estates of the Plaintiffs (under his management) and that of Afsaruddin inherited by Plaintiff No. 3 which also had been given over to Mr. Garth in trust. The ekrar of 9th Bhadra, 1288, Ex. (2), also helps the Plaintiffs. And supposing these two contracts to fail, there can be no two sides to the question of equity involved in this case."

Against this judgment and decree an appeal was preferred by the present Appellant to the High Court, and the appeal having come on for disposal before a Division Bench of the High Court judgment was delivered on the 25th July 1906.

The learned Judges agreed with the lower Court that the Appellant had executed the document of the 25th October 1895. On the question whether the Plaintiffs could sue on that document they said:

"The next question is, what authority had Basanta Kumar Guha to execute the deed for Mr. Garth, and what authority had Mr. Garth to execute the deed on behalf of the Plaintiff. Basanta Kumar Guha was the manager for Mr. Garth. He admits he had no special authority to execute the agreement for Mr. Garth, but he informed Mr. Garth as soon as he had executed it for him, and

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it is clear that Mr. Garth accepted and ratified it. Then Mr Garth was at that time the manager of the estate of the three Plaintiffs. This appears from the evidence of Basanta Kumar Guha and of the Defendant himself. After the execution of the deed of management, the mother of the minor, Plaintiff No. 1, refused to register the deed, and opposed the collection of rent by Mr. Garth, but the deed did not require registration, and her opposition was subsequently withdrawn. The deed was obviously not entered into by Mr. Garth in his personal capacity. It was entered into by him as manager and for the benefit of the Plaintiffs who have accepted and ratified it, and the Defendant No. 1 cannot now, I think, be allowed to resile from it."

They observed that the subsequent conduct of Garth would not seem to have disentitled the Plaintiffs to obtain the relief they now prayed for, and as to the question of the infant Plaintiff's right to enforce specific performance of the contract they made an order referring to the Full Bench the following questions :—

"(1) Can specific performance of a contract validly entered into on behalf of a minor be enforced?

"(2) Has the case of *Fatima Bibi* v. *Deb Nath Shah* (1) been rightly decided?"

The case having come on before a Full Bench the learned Judges agreed in saying,

"I think we can only answer the question by saying that if a contract is validly entered into on behalf of a minor and there is mutuality in such contract, it might be specifically enforced. Each case must depend upon its own particular circumstances and it is difficult to lay down any general rule. As regards the case immediately before us, we cannot, sitting as a Full Bench, go into the evidence and decide whether or not this is a case in which specific performance ought to be granted." *Mir Sarwarjan* v. *Fakaruddin Mahomed* (2).

The appeal came on for disposal again before the Division Court (Rampini and Woodroffe, JJ.), and they delivered judgment, dismissing the appeal. Mr. Justice Rampini observed *inter alia*

(1) I. L. R. 20 Cal. 508 (1893).
(2) 11 C. W. N. 34 (1906).

"I can only say that I see no reason to dissent from the views already recorded in the referring Order: (1) that the contract was validly entered into, particularly when, as pointed out, it was for the benefit of the minor and was accepted and ratified by him; and (2) for the reason given 'there is no want of mutuality' in respect of this agreement. The third question raised by Babu Dwarka Nath Chakravarti is as to whether the contract can be enforced, seeing, as he contends, it renders the minor personally liable. It is, in my opinion, unnecessary to consider this contention, for, as far as I can see, the agreement which is printed at p. 2 of the paper-book in no way binds the minor personally. The material clause in the contract is clause 1. This appears to me to bind only the minor's estate which in this country a guardian or manager of a minor's property can do within the limitations contained in the referring order."

Mr. Justice Woodroffe's judgment was as follows :—

As a lengthy argument has been addressed to us upon the construction which should be placed upon the judgment of the Full Bench, I should like to state what I understand to be its meaning. It is now settled that a minor is incompetent to contract and therefore a contract by him is not voidable but void [*Mohori Bibi* v. *Dharma Das Ghose* (3)]. The effect therefore of this would appear to be that relief on a contract entered into by a minor cannot be obtained either by or against him whether by specific performance or otherwise. But a manager or guardian of a minor may enter into a contract on his behalf. If, as in the case cited to us, *Waghela Rajsanji* v. *Sheikh Masluddin* (4) (where there was an onerous covenant not for the minor's interest and imposing a personal liability on him) a guardian goes beyond his powers, his action does not bind the minor. The result of this is the same as the former case, *viz.*, that a suit based on such a transaction entirely fails as against the minor and no relief whether by specific performance or otherwise can be obtained as against him. There is left for consideration, therefore, the class of cases where a contract is entered into on behalf of a guardian or manager of a minor within the powers of the latter and which binds the ward. The question is, can specific per-

(3) I. L. R. 30 Cal. 539: s. c. 7 C. W. N. 441 (1903).
(4) L. R. 14 I. A. 89 (1887).

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formance be obtained in such cases? The Full Bench has said that a valid contract may be enforced, if there is mutuality.

In saying this I understand it to refer to the case last put. It meant by the term mutuality, as I take it, that if the contract made by a manager is one which binds the minor (a matter to be determined according to the circumstances of each case), then as the contract can both be enforced by or against him in such a case, the Court may decree specific performance. To put it quite shortly, specific performance may be granted if the contract be one which, being within the guardian's powers, binds the minor.

The question then is was the agreement in his case one which bound the minor. We have already found that it did.

It has, however, been further argued by the learned pleader for the Appellant that as the agreement in *Waghela Rajsanji* v. *Sheikh Masluddin* (4) was held not to bind the minor, so the one in suit does not bind him. He contends it does not bind him, because an agreement for sale and purchase involves a personal liability to pay the price if the agreement is carried out, as also damages in lieu of or in addition to specific performance if the agreement is broken. If this argument be sound, then no contract can ever be specifically enforced by or against a minor, though the Full Bench have held that a contract may, in certain circumstances, be so enforced. The payment of a price is necessarily involved in the notion of a sale, and relief by damages is a natural consequence of all broken contracts. What the Privy Council held in the case cited, was that the guardian who had in that case sold land could not enter into a covenant collateral to the sale binding the minor personally to indemnify the purchaser in certain events, though the question, whether property of the minor could be charged as security for the performance of such covenant, was left open. Every case must be considered with reference to its own facts and there is nothing in the agreement in this suit which in my opinion rendered it not binding on the minors. It is clearly for their benefit though, of course, the Appellant objects to the agreement being enforced against him.

The next contention is also one which, if given effect to, would stultify the decision of the Full Bench. It is first said that *Fatima Bibi* v. *Deb Nath Shah* (1) decided what is stated in the head-note to the report of that case, *viz.*, that a minor in this country cannot maintain a suit for specific performance of a contract entered into on his behalf by his guardian and nextly it is argued that the majority of the Full Bench either approved of this decision or if their *dicta* on this point be regarded as *obiter* did not at my rate overrule it with the result that it is still in force. It is certain that the Full Bench could not have meant anything of the kind, for having held that in certain circumstances a contract by a guardian or manager can be specifically enforced, it could not without manifest contradiction have at the same time approved of a decision that such a contract can never be enforced. What I understand by the observations referred to is this;—Norris, J., appears (though as my learned brother has pointed out, erroneously) to have supposed that the contract before him was entered into by the minor himself, for at the conclusion of his judgment he states that in his view of the Contract Act a minor in this country cannot contract at all. What therefore the majority of the Full Bench have said is "that assuming that the facts were as stated in the report" the case was properly decided. That is, assuming the contract was entered into by the minor himself, the case was properly decided. As a matter of fact, however, the contract was entered into by the minor's guardian, a circumstance which appears to have been overlooked by Norris, J., though not by the reporter who drew up the head-note. It is now, however, in my opinion, settled by the Full Bench and other decisions [*Khairunnessa Bibi* v. *Loke Nath Pal* (5), *Krishnasami* v. *Sundarappayar* (6), *Jamsetjee Tata* v. *Kashi Nath* (7)] that relief by specific performance may be given where the contract is by a guardian or manager and binds the minor and this is so notwithstanding the decision in *Fatima Bibi* v. *Deb Nath Shah* (1) and the observations in *Jugal Kishore* v *Ananda Lal* (8). As regards the latter case, the observations were *obiter* for though the contract in question was entered into by the guardian, the case was one in which it was held on facts that the Court should not exercise the discretion it has to grant this form of relief. I am of

(4) L. R. 14 I. A. 89 (1897).

(1) I. L. R. 20 Cal. 508 (1893).
(5) I. L. R. 27 Cal. 276 (1899).
(6) I. L. R. 18 Mad. 4'5 (1895).
(7) I. L. R. 26 Bom. 326, 327 (1901).
(8) I. L. R. 22 Cal. 545 (1895).

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opinion, therefore, that the appeal fails and should be dismissed with costs both of the reference and of the appeal.

The High Court accordingly dismissed the appeal. Hence this appeal.

Mr. L. DeGruyther, K. C., and *Mr. K. Brown*, for the Appellant, submitted that the agreement was not enforceable on behalf of or against the minor. There was no mutuality. It is settled law that a minor is incompetent to contract and a contract made by him is absolutely void. It cannot bind him. There is no difference in principle between a guardian and a manager of the minor's property. Neither can bind the minor's estate. In the present case there was no sufficient evidence to show that the contract was authorised by the Respondents or entered into for them or was ratified by them or by Garth.

Mr. A. M. Dunne, for the Respondents, submitted that the agreement was for the benefit of the minor and having been accepted and ratified by the Respondents was valid and binding. There is evidence that before judgment was given the contract had been ratified. It must now be conceded that a contract made by an infant is void, but a contract entered into by a manager on behalf of a minor is enforceable. It was so under the Hindu Law.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—This is an appeal from a decree of the High Court at Calcutta affirming a decree of the Subordinate Judge of Backergunj.

All the questions raised in the litigation but one were disposed of before the appeal was taken to the High Court, and when the case was before a Division Bench of that Court that question was made the subject of a reference to the Full Bench.

The reference was in the following terms:—"Can specific performance of a contract validly entered into on behalf of a minor be enforced?"

The reference came before the Chief Justice and four other Judges of the High Court. They agreed in returning an answer which seems to be carefully guarded and is perhaps rather enigmatical. The Chief Justice observed that the question submitted to the Court was "a wide and far-reaching question." His opinion was that they could only "answer the question by saying that if a contract is validly entered into on behalf of a minor, and there is mutuality in such contract, it might be specifically enforced." The other learned Judges concurred.

The case was then sent back to the Division Bench to be tried out on the merits. The decree under appeal to the High Court was a decree for the specific performance of an agreement for the purchase and the sale of immoveable estate. The agreement was expressed to be made between a Mr. Garth and the Appellant, Mir Sarwarjan. Mr. Garth was at the time manager of the estate of the Respondent No. 1 who was then a minor.

After observing that they had already considered the evidence and had "come to the conclusions: (1) that it was a contract validly entered into and (2) that there is mutuality with regard to it; for 'the agreement made by Mr. Garth with Mir Sarwarjan would seem to be as enforceable against the minor as it is against Mir Sarwarjan,'" the learned Judges of the Division Bench stated that they saw no reason to dissent from their views already expressed and recorded "(1) that the contract was validly entered into, particularly when, as pointed out, it was for the benefit of the minor, and was accepted and

ratified by him, and (2) for the reason given 'there is no want of mutuality' in respect of this agreement."

The agreement in question was entered into by an agent of Mr. Garth, without any express authority from him, but there was some evidence that Mr. Garth adopted or assumed to adopt the agreement on behalf of the minor. At any rate it was assumed in both Courts and it was the opinion of the Subordinate Judge that the contract was not intended to bind the manager personally, and therefore it was assumed that it was intended to bind the minor or the minor's estate. It was also assumed that the purchase was an advantageous purchase for the minor. In this judgment and for the purpose of this judgment their Lordships accept all the foregoing assumptions.

The learned Judges of the Division Bench disposed of the question of mutuality at the first hearing in the following terms: "There is no want of mutuality in this case for the agreement made by Mr. Garth with Mir Sarwarjan would seem to be as enforceable against the minors as it is against Mir Sarwarjan. The acts of a guardian in this country bind the minor. There is no difference between his position and powers and those of a manager." No other or further reason in regard to this point was given by the learned Judges when the case was referred back to them.

Without some authority their Lordships are unable to accept the view of the learned Judges of the Division Bench that there is no difference between the position and powers of a manager and those of a guardian. They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract.

Their Lordships, therefore, will humbly advise His Majesty that the appeal should be allowed, the order of the High Court discharged, and the suit dismissed.

The Respondent No. 1 must pay the costs of the appeal. Any costs paid under the order of the High Court must be repaid, but there will be no other order as to costs in the Courts below.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Morgan, Price & Co.* for the Respondents.

B. D. *Appeal decreed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

APPLICATION SUIT NO. 126 OF 1910.

STEPHEN, J.
1911.
31, January.

BASANTA COOMAR GOSWAMI
v.
KUMUDINI DASSI.

Practice—Civil Procedure Code (Act V of 1908), Or. 11, rr. 13, 18 (2)—Affidavit of documents—Inspection—Discovery.

When an affidavit of documents has been filed by one party under Or. 11, r. 13 of the Code, the other party is not necessarily precluded from subsequently applying under r. 18, para. 2 of the same Order for further inspection and discovery.

The present application for further discovery and inspection arose out of a suit in which the Plaintiff, a broker, sued the Defendant for the recovery of Rs. 6046-10-6 due to him as commission for a loan negotiation which had in fact not been

carried through but in respect of which the borrower and the lender were brought together by the Plaintiff. The suit was instituted on the 8th February 1910 and the intending borrower filed her written statement on the 11th April 1910. She denied all liability.

An order was passed on the 14th April 1910 on the application of the Plaintiff directing the Defendant to file full and sufficient affidavit of documents. The Defendant complied with this order on the 22nd April 1910. Not being satisfied with this affidavit the Plaintiff wrote to the Defendant requesting discovery and inspection of eighteen documents, chief of which were (1) the draft petition of the Defendant which was sent to Messrs. S. D. Dutt and Ghose in April 1908 for their approval in connection with the loan of 6 lacs of rupees and upon which an application for sanction of Court was made on the 8th April 1908, (2) original petition signed and affirmed by the Defendant on the 7th April 1908, and presented before Mr. Justice Fletcher on the 8th but taken back on that date when his Lordship ordered the application to be renewed upon further and fuller materials.

The Defendant failed to comply with this requisition. The Plaintiff then took out summons for an order that the Defendant do disclose and give inspection of 18 documents, particulars whereof had been set out in the list sent her on the [illegible] May, and in support of this summons filed an affidavit to the effect that these documents were relevant and in her possession.

Mr. A. N. Chaudhuri with him *Mr. A. K. Ghose* for the Plaintiff.—The filing of an affidavit of documents is not conclusive and the question of the relevancy or materiality of the documents of which we seek discovery and inspection does not arise here. Under Or. XI, r. 18 (2) of the Code the Court has discretion to make such an order as is sought. Relies on *Nrittomoye* v. *Subol Chunder* (1).

Mr. B. C. Mitter for the Defendant.—Or. XI, r. 18 (2) is the same as English Or. XXXI, r. 18 (2) and according to practice in England once an affidavit of documents is filed the matter is closed. The other party is entitled to no further discovery or inspection. *Jones* v. *Monte Video Gas Co.* (2), *Mogul Steamship Co.* v. *M'Gregor Gow & Co.* (3), *Amarendra Nath Chatterjee* v. *Kally Kissen Tagore* (4); Halsbury's Laws of England, Vol. XI, p. 61.

THE JUDGMENT OF THE COURT was as follows:—

STEPHEN, J.—In this case I am asked to make an order upon the Defendant to disclose certain documents and to allow inspection of them. The suit is one in which the Plaintiff sues for commission in respect of a loan which was in fact never effected, but in respect of which the proposed borrower and lender were brought together. The Defendant against whom the order is sought has already filed an affidavit of documents under Or. 11, r. 18. The Plaintiff asks for discovery and inspection of the documents of which he has annexed a list to his affidavit.

He is met by an argument on the part of the Defendant that her affidavit of documents precludes any further application of this kind. This is an argument which I do not think is sustainable in this Court.

Looking at the policy of Or. 11 and the language of r. 18, paragraph 2, I do not think the Defendant is thereby protected

(1) I. L. R. 28 Cal. 117 (1885).
(2) L. R. 5 Q. B. D. 556 (1880).
(3) 2 T. L. R. 762 (1886).
(4) 2 C. W. N. 17 (1897).

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from an obligation to an inspection of other documents that may be proved to be in her possession.

Several English cases have been cited before me to show that the Defendant's affidavit of documents is conclusive as to possession and also as to relevancy.

I am not prepared to say that the English practice is to be followed in all respects in this Court, but I have not had any authority cited before me which I consider obliges me to hold that a statement in the usual form that an affidavit of documents mentions all relevant documents is to be taken as an answer to a subsequent application under r. 18.

I therefore cannot suppose that the affidavit of documents under r. 13 precludes an application under a subsequent rule. I have considered the merits of the present application and I consider that most of the demands made in this case are of the nature of a fishing enquiry. Possession as regards the first item in the list annexed to the Plaintiff's affidavit is denied by the Defendant; and such denial as a matter of course must be accepted; the second item is clearly covered by the third. The engrossment there referred to shows that an offer had been made of the loan the negotiations of which form the subject-matter of the suit and I consider that the Plaintiff is entitled to inspection of No. 3; No. 4 has been waived; and as to No. 5, possession has been denied; Nos. 6 and 7, I hold to be privileged; No. 8, I hold to be covered by the affidavit of documents; as to No. 9, possession is denied; as to 11 and 13, I hold that they are not shown to be relevant; as to No. 12, inspection is waived; No. 14 is privileged; Nos. 10 and 15 are covered by the affidavit of documents; as to Nos. 16, 17 and 18, possession is denied.

The result, therefore, is that this application is granted only with regard to item No. 3. The question of costs reserved.

Messrs. S. D. Dutt & Ghose, Attorneys for the Plaintiff.

Messrs. Sanderson & Co., Attorneys for the Defendant.

A. K. G. *Application granted.*

[FULL BENCH REFERENCE.]

IN

CR. REV. No. 198 OF 1909.

JENKINS, C. J.
WOODROFFE, J.
MOOKERJEE, J.
CARNDUFF, J.
CHATTERJEE, J.
1911,
Heard,
16, August.
Judgment,
5, September.

ABBAS and others, Accused, 2nd Party, Petitioners,
v.
THE EMPEROR on the complaint of Prosunno Dutt.

Criminal Procedure Code (Act V of 1908), secs. 107, 145—Dispute as to possession of land—Likelihood of breach of the peace—Proceeding under latter section if only remedy—Successive proceedings under both sections—Proceeding under former against person not in possession.

The fact that there is a dispute concerning land likely to cause a breach of the peace does not deprive a Magistrate of jurisdiction under sec. 107 of the Code of Criminal Procedure where he is informed that any person is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility.

Whether after proceeding under sec. 107 of the Code it will be proper for the Magistrate to act under sec. 145 must depend on the circumstances of each case as it arises.

ABBAS *v.* THE EMPEROR.

The competence of the Magistrate to proceed under sec. 107 against persons not in possession must depend upon whether as against those persons the conditions specified in the section have been established.

This was a Reference to a Full Bench made on the 27th of April 1909 by a Division Bench (Caspersz and Ryves, JJ.) of certain points arising in the above Rule, which had been issued against an order of Mr. H. K. Ghosh, Deputy Magistrate of Naraingunj, dated the 23rd of September 1908, binding down the Petitioner to keep the peace, which order was confirmed by Mr. V. Dawson, Additional District Magistrate of Dacca, on the 24th of November 1908.

The material facts will appear from the Order of Reference.

The ORDER OF REFERENCE was in the following terms :—

CASPERSZ and RYVES, JJ.—This is a Rule calling upon the District Magistrate of Dacca to show cause why the order of the Deputy Magistrate, dated the 23rd September 1910, binding down the Petitioners to keep the peace, which order was confirmed by the Additional District Magistrate, on the 24th November 1908, should not be set aside in accordance with the principles laid down in the case of *Balajit Singh* v. *Bhoju Ghose* (1).

The Petitioners are the members of the second party in a certain dispute for land, and the finding of both the lower Courts is that the land is in the possession of the first party, and, in this view of the matter, the Petitioners have been bound down to keep the peace.

The Additional District Magistrate observes, "The Petitioners' contention that sec. 107, Criminal Procedure Code, was inapplicable, as the subject-matter of the dispute was land, is of no weight : no doubt, the matter could have been more satisfactorily settled by proceedings under sec. 145, Criminal Procedure Code, but the lower Court was in no way acting improperly in taking proceedings under sec. 107, Criminal Procedure Code. The only important ground of objection is the question whether the evidence before the lower Court was sufficient to justify the order complained against."

On these facts we think that, if the case cited in the rule, *Balajit Singh* v. *Bhoju Ghose* (1), was correctly decided, the order under sec. 107, Criminal Procedure Code, cannot be sustained. In that case there was a dispute relating to the possession of a *jalkar*, and the Magistrate passed an order directing Balajit Singh and others of the second party to execute bonds to keep the peace. Those persons moved the District Magistrate, but he refused to interfere. Thereupon, a Rule was obtained from this Court, and the matter was argued by learned Counsel on both sides. The learned Judges (Mitra and Fletcher, JJ.) relying upon an earlier decision, in the case of *Dolegobind Chowdhury* v. *Dhanu Khan* (2), set aside the order binding down the second party. They observed as follows :

Looking to the words used in sec. 107 and in sec. 145, we have no doubt that the proper course for the Magistrate in a case like this was to proceed under sec. 145 of the Code. The words in sec. 145 are mandatory. That section says :—"Whenever a Magistrate of the District . . . is satisfied, from a police-report or other information, that a dispute likely to cause a breach of the peace exists concerning

(1) I. L. R. 35 Cal. 117 (1907).

(2) I. L. R. 25 Cal. 559 (1897).

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any land or water . . . he *shall* make an order in writing, etc., etc. Sec. 107 contains words which are discretionary, the Magistrate *may* institute proceedings binding down either of the parties." In that view of the matter, the Court set aside the order under sec. 107, Criminal Procedure Code, and left it to the Magistrate, if he thought it necessary, that is to say, if there was still a likelihood of a breach of the peace, to draw up proceedings under sec. 145 of the Code.

It will be observed that Mitra and Fletcher, JJ., did not refer to any of the other cases cited by the learned Counsel in the course of their arguments. These we proceed to notice.

In *Sheoraj Roy* v. *Chatter Roy* (3), Rampini and Mookerjee, JJ., held that—"Where a dispute relating to possession of land is likely to cause a breach of the peace, a Magistrate has a discretion to proceed either under sec. 107 or under secs. 144 and 145 of the Criminal Procedure Code." A similar view had been adopted in the case of *In the matter of the petition of Ekram Singh* (4). There Mr. Justice Prinsep, in delivering the judgment of the Court, observed—"We find ourselves unable to pass any order on this application because we are not competent to direct proceedings to be taken under sec. 145, and this is the object that the Petitioner has in view." And the learned Judge agreed with the District Magistrate that the case was not a case for sec. 145, Criminal Procedure Code only, and that where both parties contemplate a breach of the peace, it may be necessary to bind them both down. On the other hand, the same learned Judge, sitting with Mr. Justice Wilkins, in the case of *Bejoy Singha Neogi* v. *Empress* (5), set aside an order requiring security from the parties to a dispute for land, and expressed the opinion that the proper course for the Magistrate to have taken was to have instituted proceedings under sec. 145.

In the next case, that relied upon by Mitra and Fletcher, JJ., in the case of *Balajit Singh* v. *Bhoju Ghose* (1), we mean, the case of *Dolegobind Chowdhury* v. *Dhanu Khan* (2), the *ratio decidendi* was that the order under sec. 107 had the evident effect of binding down only one of the parties to the dispute, leaving the other party free without any adjudication upon the question as to which of the parties was in possession. It does not appear whether, in the case of *Balajit Singh* v. *Bhoju Ghose* (1), there had been any adjudication as to the possession of the *jalkar*, and whether that adjudication was in favour of the first party who were *not* bound down under sec. 107. But it would appear that the rights of the respective parties to the *jalkar* had been gone into on the basis of the numerous documents filed. If we are correct in this surmise, the case of *Dolegobind Chowdhury* v. *Dhanu Khan* (1) is not an authority for the proposition enunciated in the case of *Balajit Singh* v. *Bhoju Ghose* (1).

The next case is that of *Bidhu Bhusan Chatterji* v. *Annoda Churn Kanangui* (6) which, also, follows the case of *Dolegobind Chowdhury* v. *Dhanu Khan* (2). But we observe that here also the question of possession was gone into by the Magistrate and was decided against the second party who were accordingly bound down under sec. 107, Criminal Procedure Code.

(1) I. L. R. 35 Cal. 117 (1907).
(2) I. L. R. 25 Cal 559 (1897).
(3) I. L. R. 32 Cal. 966 (1905).
(4) 3 C. W. N. 297 (1899).
(5) 3 C. W. N. 463 (1899).
(6) 6 C. W. N. 883 (1902).

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In *Balai Mahto* v. *Nobin Manjhi* (7), Stevens and Harington, JJ., without referring to any of the authorities, held, on general principles, that when "the apprehension of a breach of the peace was contingent upon the attempt on either side to exercise acts of possession in the disputed land, that would have been very good ground for establishing possession of one party or the other." Consequently, the order binding down both the parties to keep the peace was set aside, though the Magistrate was given liberty to take fresh proceedings according to law.

The next case to which we shall refer is *King-Emperor* v. *Basiruddin Mollah* (8) which was referred to by Mr. Justice Fletcher in the course of the arguments in *Balajit Singh* v. *Bhoju Ghose* (1). There was a difference of opinion between the learned Judges in that case and the judgment of Mr. Justice Banerjee, the third Judge who agreed with Mr. Justice Harington, was to the following effect:—"After going through the papers, I am of opinion that, although the mere fact of a dispute likely to lead to a breach of the peace being a dispute relating to the possession of land may not be sufficient to preclude the Magistrate from taking proceedings under sec. 107 of the Code of Criminal Procedure, and to confine his action to a proceeding under sec. 145, yet having regard to the facts found by the Deputy Magistrate in this case, it cannot be said that a case sufficient for the taking of security under sec. 107 has been established." In the opinion of Mr. Justice Brett, on the point of law with which we are now dealing, the Magistrate is not deprived of jurisdiction under sec. 107, Criminal Procedure Code, in a case in which a dispute is likely to cause a breach of the peace relating to land.

The learned Judges in *Balajit Singh* v. *Bhoju Ghose* (1), relied on the wording of the two secs. 145 and 107; but, with the greatest respect for their opinion, we are unable to appreciate the distinction that they draw. Sec. 145 is so far mandatory that, when a Magistrate is satisfied that a dispute likely to cause a breach of the peace exists concerning any land, he *shall* make an order in writing. That describes the procedure he must invariably adopt; but, in our opinion, it does not lay down any hard and fast rule that, when he is so satisfied, he must take action under the one section and not under the other.

In this conclusion, we are supported by the case of *Sheoraj Roy* v. *Chatter Roy* (3), where the learned Judges (Rampini and Mookerjee, JJ.) pointed out that the case of *King-Emperor* v. *Basiruddin Mollah* (8) had practically overruled the case of *Saroda Prosad Singh* v. *Emperor* (9).

Considerable difficulty would arise if it were held that the proceedings must of necessity be taken under sec. 145 where the dispute concerns land. This may be inferred from the circumstances mentioned in the case of *Makhan Lal Roy* v. *Barada Kanta Roy* (10). It was there said that—"proceedings under sec. 145, Criminal Procedure Code, cannot be instituted with respect to a dispute between two parties having joint rights to the land in dispute, each claiming exclusive possession thereof;" and it was held that,

(1) I. L. R. 35 Cal. 117 (1907).
(7) 7 C. W. N. 29 (1902).
(8) 7 C. W. N. 746 (1903).

(1) I. L. R. 35 Cal. 117 (1907).
(3) I. L. R. 32 Cal. 966 (1905).
(8) 7 C. W. N. 746 (1903).
(9) 7 C. W. N. 142 (1902).
(10) 11 C. W. N. 512 (1906).

ABBAS *v.* THE EMPEROR.

in such a case, the proper procedure was to bind down both the parties under sec. 107, Criminal Procedure Code. But if the decision in *Balajit Singh* v. *Bhoju Ghose* (1) is good law, then the order passed in the case of *Makhan Lal Roy* v. *Barada Kanta Roy* (10) is clearly wrong, because sec. 107, Criminal Procedure Code, has no application where a dispute likely to cause a breach of the peace is likely to arise out of the holding of land.

We do not think that the Legislature intended to deprive a Magistrate of all power to bind down the parties, or one of them, to keep the peace in regard to those numerous land disputes where the parties are likely to fight over possession or the incidents of possession of land in which they have joint interests.

Upon a review of the authorities, we are unable to follow the case of *Balajit Singh* v. *Bhoju Ghose* (1); and, in the conflict of decisions, we think it necessary, and this course will also be very convenient for the guidance of the mofussil officers, to refer the questions involved to a Full Bench of this Court.

The three points upon which we would invite the opinion of the Full Bench are these :—

Firstly, if there is a dispute likely to cause a breach of the peace concerning land, is the Magistrate bound to take action under sec. 145, Criminal Procedure Code, or is he at liberty to proceed under sec. 107, either exclusively, or in addition to proceedings under sec. 145 ?

Secondly, in the circumstances mentioned, is it competent to the Magistrate, in taking action under sec. 107, Criminal Procedure Code only, to bind down the members of that party which, upon a summary adjudication as to possession, he finds are *not* in possession of the subject of dispute ? and

Thirdly, was the case of *Balajit Singh* v. *Bhoju Ghose* (1) correctly decided ?

Notice will be issued to the Opposite Party in this Rule before the hearing of the Reference.

Babu Harendra Narayan Mitter, for the Petitioner, draws attention to the fact that both sections occur in the portion of the Code which deals with the prevention of offences. But sec. 145 occurs in one of the 3 chapters where the method laid down is by suspending people's civil rights. Sec. 145 provides a special jurisdiction with reference to land disputes, traceable so far back as 1793 in Reg. XLIX of that year. The Legislature having prescribed a particular method of terminating a dispute concerning land, the intention should be presumed to have been that this method only should be adopted.

I do not contend that the word "shall" in sec. 145 is actually mandatory, but it undoubtedly imposes a judicial duty. Sec. 107 no doubt is very general in its terms. But in construing the different parts of an Act, when a specific matter is dealt with in a special manner, this special procedure should alone be applied. Sec. 145 prescribes such a special procedure for land disputes. Sec. 107 moreover is limited in its application to wrongful acts and would apparently not cover all cases of land disputes. The word "wrongful" was not in the section as originally framed but was added by reason of the decision in *Kashi Chunder* v. *Hurkishore* (11).

The result of using the provisions of

(1) I. L. R. 35 Cal. 117 (1907).
(10) 11 C. W. N. 512 (1906).

(1) I. L. R. 35 Cal. 117 (1907).
(11) 19 W. R. Cr. 47 (1873).

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sec. 107 in cases of land dispute would ordinarily be very serious to the parties and the Legislature could not have contemplated its application to such disputes. For instance a person who has been ousted only 3 days ago may be bound down. See proviso to cl. (4) to sec. 145. Refers to *Queen* v. *Mohesh* (12), *Dolegobind Chowdhury* v. *Dhanu Khan* (2), *Driver* v. *Queen-Empress* (13), *In the matter of the petition of Ekram Singh* (4), *Bejoy Singha Neogi* v. *Empress* (5), *Bidhu Bhusan Chatterji* v. *Annoda Churn Kanangui* (6), *Balai Mahto* v. *Nobin Manjhi* (7), *Saroda Prosad Singh* v. *Emperor* (9), *King-Emperor* v. *Basiruddin Mollah* (8), *Jafir* v. *Jaribullah* (14), *Emperor* v. *Debendro Nath* (15), *Sheoraj Roy* v. *Chatter Roy* (3), *Baisnab Das* v. *Emperor* (16), *Balajit Singh* v. *Bhoju Ghose* (1). Except in two cases the Court actually set aside the order under sec. 107 and held that sec. 145 proceeding would be more proper. Refers also to *Mahadeo* v. *Bisa* (17), *Emperor* v. *Ram Baron* (18), *Debi Prasad* v. *Sheodat Rai* (19), *Ramacharlu* v. *Emperor* (20).

The practical inconveniences of applying the provisions of sec. 107 are many. A zemindar may replace the gomastha who has been bound down by another.

(1) I. L. R. 35 Cal. 117 (1907).
(2) I. L. R. 25 Cal. 559 (1897).
(3) I. L. R. 32 Cal. 966 (1905).
(4) 3 C. W. N. 297 (1899).
(5) 3 C. W. N. 463 (1899).
(6) 6 C. W. N. 883 (1902).
(7) 7 C. W. N. 29 (1902).
(8) 7 C. W. N. 746 (1903).
(9) 7 C. W. N. 142 (1902).
(12) 24 W. R. Cr. 67 (1875).
(13) I. L. R. 25 Cal. 798 (1898).
(14) 9 C. W. N. 551 (1905).
(15) 1 C. L. J. 632 (1904).
(16) 12 C. W. N. 606 (1908).
(17) I. L. R. 25 All. 537 (1903).
(18) I. L. R. 28 All. 406 (1906).
(19) I. L. R. 30 All. 41 (1907).
(20) I. L. R. 26 Mad. 471 (1902).

The likelihood of breach of the peace is never effectually got rid of except by proceeding under sec. 145, Cr. P. C.

To bind down both parties is bad enough. To bind down one may be worse. Besides the question of possession will have to be gone into in a proceeding under sec. 107. So why not proceed directly under sec. 145? Power of attachment given by sec. 145 would be very useful. By binding down both parties the same object may, to some extent, be attained. But it will surely not promote the ends of justice, to overlook the real cause of dispute and avoid deciding it.

The JUDGMENT OF THE COURT was as follows:—

There is in our opinion no conflict between secs. 107 and 145 of the Criminal Procedure Code, so that the fact that there is a dispute concerning land likely to cause a breach of the peace does not deprive a Magistrate of jurisdiction under sec. 107 of the Criminal Procedure Code, where he is informed that any person is likely to commit a breach of the peace or disturb the public tranquility, or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility.

Whether after proceeding under sec. 107 of the Criminal Procedure Code, it will be proper for a Magistrate to act under sec. 145 of the Criminal Procedure Code must depend on the circumstances of each case as it arises. It may be that after an order under sec. 107 no likelihood of a breach of the peace would continue.

The competence of the Magistrate to proceed under sec. 107 of the Criminal Procedure Code against persons not in possession must depend upon whether as against those persons the conditions specified in the section have been established.

[CIVIL REFERENCE.]

No. 2 OF 1911.

MOOKERJEE, J.
CARNDUFF, J.
1911,
26, June.

LALJI PANDAY, Plaintiff, Petitioner,
v.
BARHAMDEO PANDAY, Respondent, Opposite Party.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8—Failure of tenant to raise crop—Suit by landlord for recovery of value of his share, if lies in Small Cause Court—"Rent."—"Damages for use and occupation."

Where a landlord brought a suit against his tenant claiming damages for wilfully omitting to raise crops whereby the Plaintiff was deprived of his share thereof:

Held—*That inasmuch as the share of the produce to be received by the landlord was ascertained before the commencement of the suit and the term for which the land was let out had not terminated, the claim was in substance one for recovery of rent and the suit would not lie in the Small Cause Court.*

This was a Reference by W. H. Vincent, Esq., District Judge of Zillah Mozufferpur, dated the 1st of May 1911, in Suit No. 13 of 1911 of the Court of the 1st Munsif of Mozufferpur.

The Reference was in the following terms :—

"On 30th January 1911 Lalji Panday and others brought a suit in the Court of 1st Munsif, Mozufferpur, exercising Small Cause Court Jurisdiction, against Defendants for damages for the use and occupation of certain lands. The Munsif on the 22nd March 1911 on the objection of Defendants held that the suit was not triable by Small Cause Court and returned the plaint to Plaintiffs for presentation to the proper Court.

"I have heard learned pleader in this case and examined the plaint. In my opinion this is not a suit for rent but for damages for use and occupation of certain land and if so it is cognisable by a Court of Small Causes [see *Kunjobehary* v. *Madhub Chundra* (1) and *Kali Krishna* v. *Izatonnissa Khatun* (2)].

"In these circumstances I think that the order of the Munsif, dated 22nd March 1911, should be set aside and I forward the records for the order of the High Court. Necessary orders as to the costs of this Reference before this and the High Court may also be passed."

Babu Hira Lal Chuckrabutty for the Plaintiff, Petitioner.

Moulvi Mahomed Mustafa Khan (*amicus curiæ*) for the Defendant, Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

This is a Reference under Rule 7 of Order 46 of the Code of 1908 by the District Judge of Mozufferpur and raises questions of considerable nicety and importance.

It appears that on the 30th January 1911 Lalji Pandey and others as Plaintiffs instituted a suit in the Court of the Small Cause Court Judge of Mozufferpur against the Defendants, Barhamdeo Panday and others, for recovery of what was described as damages for use and occupation of certain lands. The substance of the case for the Plaintiffs was that they were the superior landlords of the disputed lands, that the Defendants were in occupation and were bound to cultivate the lands, that they had omitted wilfully to raise any crops and that consequently during the years 1315 to 1318, the Plaintiffs were deprived of their share of the crops. The Plaintiffs, therefore, sought to recover Rs. 29-10-3 as the money value of what would have been their share

(1) I. L. R. 23 Cal. 884 (1896).
(2) I. L. R. 24 Cal. 557 (1897).

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of the produce which might have been grown on the land. The Defendants entered appearance and on their objection on the 22nd March 1911 the Small Cause Court Judge held that the suit was not triable as a Small Cause Court suit. He, therefore, returned the plaint to the Plaintiffs for presentation to the proper Court. The Plaintiffs thereupon applied to the District Judge for revision of this order on the ground that the nature of the suit had been misunderstood by the Small Cause Court Judge and that it was as a matter of law cognisable by that Court. The learned Judge has made a Reference to this Court, and has expressed an opinion that upon the decisions in *Kunjobehary* v. *Madhub Chundra* (1) and *Kali Krishna* v. *Izatonnissa Khatun* (2), the view taken by the Small Cause Court Judge could not be supported.

At the hearing of the Reference the authorities on the subject have been clearly analysed and placed before us with great care by the learned Vakil for the Plaintiffs while the case for the Defendants (who have not entered appearance) has been presented by Moulvi Mahomed Mustafa Khan who at the request of the Court undertook to argue the case as *amicus curiæ*; and we are indebted to him for the very full and able argument that he has addressed to us.

The question for decision is, whether the suit is excluded from the cognisance of the Small Cause Court by reason of Art. 8 of the Second Schedule of the Provincial Small Cause Courts Act of 1887. That article provides that a Small Cause Court shall not take cognisance of a suit for recovery of rent other than house rent. On behalf of the Plaintiffs it has been contended that the suit is for the recovery of damages and is consequently cognisable in a Court of Small Causes. On behalf of the Defendants the contrary view has been presented that if the Plaintiffs are entitled to recover any sum, that sum is in the nature of rent, and a claim in respect thereof must be enforced in the ordinary Civil Court.

In a case of this description the essential point to be ascertained is the status of the Defendants. If the Defendants are servants or labourers employed by the Plaintiffs, the suit must be treated as one for damages. On the other hand, if the Defendants are tenants, it is conceivable that the claim may be one for rent. This fundamental distinction was pointed out by this Court in *Sreenath Dutt* v. *Dwary Dhalli* (3). In that case, it was ruled that where the cultivator is a mere servant of the landlord, a suit for damages will lie against him in a Small Cause Court, but if the cultivator is a tenant to whom the landlord has sublet the land, a suit for non-fulfilment of the contract by the tenant will lie under the Rent Act. This principle appears to have been recognised in the case of *Kade Mandul* v. *Ahad Ali Molla* (4), and if the distinction is borne in mind it is not difficult to reconcile the cases mentioned in *Shoma Mehta* v. *Rajani Biswas* (5). In this case it was pointed out that a suit for produce rent or its money value is a suit for rent under the Bengal Tenancy Act, and not a suit for damages for breach of contract and is, therefore, not cognisable by a Small Cause Court. The learned Judges observed that this view was in accord with that taken

(1) I. L. R. 23 Cal. 884 (1896).
(2) I. L. R. 24 Cal 557 (1897).
(3) Sutherland's References from Mofussil Small Cause Courts, p. 113 (1865).
(4) 14 C. W. N. 629 (1910).
(5) 1 C. W. N. 55 (1893).

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by a Full Bench of the Allahabad High Court in the case of *Tajuddin Khan* v. *Ram Parshad* (6), and that the previous decisions of this Court in the cases of *Luchmun Pershad* v. *Hoolas Mahtom* (7), *Mullik Amanutali* v. *Ukloo Pasi* (8), *Jumnadoss* v. *Gawsee Miah* (9) did not militate against this view. We, therefore, start with the position that the status of the Defendants has first to be determined, because if they are not tenants the claim against them cannot possibly be for rent, although it does not follow that if they are tenants, the claim must necessarily be for rent.

In the case before us, the plaint taken as a whole indicates, we think, that the Plaintiffs have treated the Defendants as tenants. No doubt, they stated that they called upon the Respondents to quit the land when they found that they omitted to cultivate it in due course and that the Defendants neither quitted the land nor brought it under cultivation. But it is to be observed that the claim has been laid in respect of the crops for four years and it has further been restricted to the one-half share of the whole produce which is explicitly described as the malik's share. These circumstances indicate that the Plaintiffs had treated the Defendants as tenants. If their case was that the tenancy had been terminated, the suit ought to have been brought for recovery of the value of the entire crop on the footing that the Defendants were trespassers in occupation and in that event the claim for any period in excess of three years would at once have been barred by the plea of limitation. If then the Defendants are tenants, the question arises whether the suit is one for rent.

It has been suggested by the learned Vakil for the Plaintiffs that the suit is one for damages for use and occupation. In our opinion, that view cannot be supported. A suit for damages for use and occupation can be maintained against a tenant who has occupied the premises by the permission or sufferance of the landlord, though the terms of the tenancy have not been settled with precision [*Rochester* v. *Pierce* (10), *Kanailal* v. *Nitai Chund* (11)]. In these circumstances, the law implies a contract or promise by the tenant to pay to the landlord a reasonable sum for such use and occupation. [*Hither* v. *Sillcox* (12) and *Churchward* v. *Ford* (13)]. In the case before us, if the allegations of the Plaintiffs are accepted, the terms of the tenancy have been settled with perfect accuracy. Their allegations are that the tenants agreed to cultivate the land and to pay them a half-share of the produce that might be raised by due diligence. Consequently, although in the event of the failure of the tenant to deliver one half-share of the produce, the Court may be called upon to investigate the quantity and the money value of the crops, there is no uncertainty as to the terms of the contract between the parties. It follows, therefore, that the suit cannot be treated as one for damages for use and occupation. This clears the way for determination of the question, whether the suit is one for rent. Now the definition of rent, as given in sec. 3, cl. (5) of the Bengal Tenancy Act is, whatever, is lawfully payable or deliverable in money or kind by a tenant to his landlord on account

(6) I. L. R. 1 All. 217 (1876).
(7) 11 W. R. 151; 2 B. L. R. 27 App. (1869).
(8) 25 W. R. 140 (1876).
(9) 21 W. R. 124 (1873).
(10) 1 Campbell 466 (1808).
(11) 12 C. L. J. 612 (1910).
(12) 19 L. J. Q. B. 295.
(13) 2 H. & N. 446 (1857).

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of the use or occupation of the land held by the tenant. It is clear therefore that the share of the crops which the Defendants are alleged to have undertaken to deliver to the Plaintiffs was rent. They have failed to deliver the crops, and the Plaintiffs seek to recover the money value thereof. Is the nature of the relief which the Plaintiffs seek altered by the failure of the Defendants to perform their part of the contract? In our opinion the answer ought to be in the negative. The learned Vakil for the Plaintiffs did not dispute that if the Defendants had grown the crops in due course and had appropriated them for their own purposes, a suit by the landlords to recover the value of their share of the crops could be treated only as a suit for rent. But he urges that the matter is different when the Defendants fail to raise the crops. We are unable to accept the suggested distinction as well-founded on principle. The position of the landlord is precisely the same whether the failure of the tenants to deliver the crops is due to the fact that they have misappropriated the crops themselves or have failed by reason of want of diligence to raise them at all. In either event, the landlords are entitled to be indemnified and the money which they recover from the tenants represents the compensation paid by the tenants to them on account of the use and occupation of the land held : that is, it is rent. It is not necessary for us to hold that whenever the tenant fails to raise the crops contrary to the terms of his contract, the sole remedy of the landlord is to recover the value of the crops. The landlord may sometimes have an additional remedy ; for instance, if by reason of the failure of the tenant to cultivate the land, the land itself is deteriorated in value or if it relapses into jungle, the landlord may well be entitled to claim damages and such damages may, in the contingency mentioned, very well represent the costs of reclamation. The answer to the question, therefore, whether the suit is one for damages or for rent must depend when the nature of the claim put forward. If what the Plaintiffs claim is the money value of the crops to be delivered by the tenants to the landlords on account of use and occupation of the land held by them, its true nature, in our opinion, is rent. This view is in accord with that taken by this Court in the case of *Panchu* v. *Nagendra* (14) in which it was ruled that the money value of services not performed by the tenant is in the nature of rent and a claim in respect thereof can be enforced only in the ordinary Civil Courts. The learned Vakil for the Plaintiffs has placed much reliance upon the case of *Vira Pillai* v. *Rangasami Pillai* (15). That case, however, is of no assistance to him. There the Defendant had ceased to be a tenant and the suit brought against him was for damages for use and occupation of the land held by him as a trespasser. Suit of that description is obviously cognisable in a Court of Small Causes, and a similar principle appears to have been accepted in *Bhoobun Mohun* v. *Chandernath* (16). In the case before us, as we have already explained, the tenancy has not yet been terminated. The Defendants are still tenants in occupation and consequently the sum claimed by the Plaintiffs, if recoverable at all, is recoverable only as rent and not as damages for use and occupation.

The answer, therefore, which we give to the Reference is that the view taken by

(14) 12 C. L. J. 480 (1910).
(15) I. L. R. 22 Mad. 149 (1898).
(16) 17 W. R. 69 (1871).

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the Small Cause Court Judge is correct and the plaint has been rightly returned for presentation to the proper Court.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 5130 OF 1910.

JENKINS, C. J.
SHARFUDDIN, J.
1911.
14, August.

NANDA LAL CHATTERJEE, Petitioner,
v.
DWARKA NATH DAS and others, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. XXXIII, r. 7—Shebait *personally indigent and not possessed of idol's properties if may apply for leave to sue in* formâ pauperis *to recover idol's property—Idol's property in hands of co-*shebaits *contesting suit.*

A shebait *applied for leave to sue in* formâ pauperis *to recover certain endowed properties which, he alleged, some of the Defendants who were his co-*shebaits *had illegally alienated in favour of the other Defendants. Neither in his personal capacity nor as* shebait *was he possessed of sufficient means to enable him to pay the Court-fees prescribed for the plaint :*

Held—*In revision, that the application could not be rejected merely because the* shebait *Defendants held properties of the idol sufficient to pay the requisite Court-fees.*

This was a Rule granted on the 8th December 1910, against an order of the Subordinate Judge of 24-Pergunnahs, dated the 5th of November 1910, refusing the application of the Petitioner for permission to sue as a pauper.

The Petitioner as one of four *shebaits* of an idol applied for leave to sue in *formâ pauperis* for recovery of endowed properties alleged by him to have been illegally alienated by his co-*shebaits* whom he made Defendants in the suit in favour of some of the other Defendants. The Court in rejecting the application passed the following order :

"The applicant has applied for permission to sue as a pauper. He has made the application as *shebait* of an idol Gopalji. It appears from the deposition of the applicant himself that the idol has properties other than the properties in suit and although he states in his examination-in-chief that these other properties are not in possession of the idol, in cross-examination he admitted that these properties are in possession of persons who are also *shebaits.* In the circumstances it appears to me that the applicant has no right to sue as a pauper as *shebait* of the idol. It is not the applicant's case that these other properties are not of sufficient value to afford means for paying the requisite Court-fee in this case and for that matter the fact of the idol having other properties has not been mentioned in the application. On a consideration of all the circumstances I do not see sufficient grounds for permitting the applicant to sue as pauper as *shebait.* Hence it is refused with costs."

The Petitioner moved the High Court and obtained this Rule.

Babu Bepin Behary Ghosh (Jr.) for the Petitioner.

Babus Mohendra Nath Ray and *Biraj Mohan Majumder* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This is a Rule calling upon the Opposite Party to show cause why an order of the Court below referred to in the petition should not be set aside as prayed. The order in the petition was one rejecting the Plaintiff's application for leave to sue as a

NANDA LAL CHATTERJEE *v.* DWARKA NATH DAS.

pauper. The Plaintiff is a *shebait.* He has brought this suit for recovery of endowed property against one who claims to be the alienee of that property against three of his co-*shebaits* who purport to have aliened that property and a fifth person and whose capacity in this suit is not very clear. The Plaintiff is neither in his personal capacity nor as *shebait* possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint. Therefore he is a pauper within the meaning of Or. XXXIII of the C. P. C. Being a pauper he is entitled to sue as such and is not disentitled by the mere fact that the *shebaits* whom he is compelled to sue may be possessed of sufficient means for payment of the prescribed fee. In my opinion, therefore, the learned Judge failed to exercise the jurisdiction vested in him by law: and the Rule should be made absolute with costs. We assess the hearing-fee at two gold mohurs.

SHARFUDDIN, J.—I agree.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 5035 OF 1911.

CASPERSZ, J.	RANI BRINDARANI CHOUDHRANI,
CHATTERJEE, J.	Claimant, Petitioner,
1911,	*v.*
Heard, 24, November.	ANNODA MOHAN RAY CHOUDRY, Decree-
Judgment, 28, November.	holder, Opposite Party.

Bengal Tenancy Act (VIII of 1885), sec. 170 (3)—Previous purchaser not made Defendant if may deposit.

A person who had purchased a permanent tenure long prior to the institution of the suit in which a decree for rent was obtained by the landlord is not entitled to make a deposit under sec. 170 (3) of the Bengal Tenancy Act.

Such a person was permitted to make the deposit when it appeared that previous deposits made by him were withdrawn by the landlord.

JOTINDRA MOHAN TAGORE *v.* DURGA DABE (1) *approved.*

RADHIKA NATH SARKAR *v.* RAKHAL RAJ GAYEN (2), JUGAL MOHINI DASI *v.* SRINATH CHATTERJEE (3) *distinguished.*

This was a Rule granted on the 1st of September 1911, against an order of the Munsif of Nilphamari, dated the 7th of July 1911, holding that the claimant (Petitioner) had no right to make a deposit under sec. 170, Bengal Tenancy Act, and that the deposit made by her was invalid and of no effect whatever and directing that the sale of the property do take place.

The facts as found by the Munsif were as follows:—

Rani Brindarani, the Petitioner, made an application for deposit of the decreta amount and actually deposited the same on the allegation that she was interested in the *jote* proclaimed for sale in execution of a rent decree obtained by the Opposite Party. The decree holder objected to the deposit on the ground that the Rani had no interest in the property voidable on the sale, within the meaning of sec. 170. The *jote* was described by both parties as a *mourasi jote.* Litigations had taken place with respect to the *jote* up to the High Court and it had been found that the *jote* in question was a permanent tenure and also an entire tenure and not any part of one. According to the allegations of the Rani she purchased the tenure, from

(1) 10 C. W. N. 488 (1905).
(2) 13 C. W. N. 1175 (1909).
(3) 12 C. L. J. 609 (1910).

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the judgment-debtors in 1306, B. S., that she was not affected by the decree passed against the old tenant for rent accrued due subsequently to her purchase." The Munsif held upon these allegations that she was not entitled to make a deposit under sec. 170, Bengal Tenancy Act, relying on *Jotindra Mohan Tagore* v. *Durga Dabe* (1). He further held that the decree-holder was not debarred from raising objections to the deposit now because of his having withdrawn amounts deposited on previous occasions.

In this view he dismissed the application. The Petitioner thereupon moved the High Court and obtained this Rule.

Babus Baidya Nath Dutt and *Hem Chandra Mitter* for the Petitioner.

Babu Dwarka Nath Chuckerbutty for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

The question for determination in this Rule is whether the Petitioner is entitled to make a deposit under the provisions of sec. 170 (3) of the Bengal Tenancy Act. The Petitioner, Rani Brindarani Choudhrani, purchased a permanent tenure of the judgment-debtors in the year 1306, that is, long before the period in respect of which the arrears of rent have now been decreed. In that view, and having regard to the authority of the case of *Jotindra Mohan Tagore* v. *Durga Dabe* (1), the Munsif has directed the tenure to be sold and refused to consider the deposit actually made by the Rani as good and valid deposit.

The Petitioner, manifestly, is not a judgment-debtor within the intent of sec. 170 (3). The arrears of rent have been decreed as due from other persons against whom the landlord brought his suit. The Petitioner, also, does not represent the judgment-debtors because the tenure was transferred before the decree made in the rent suit. For the same reason, the Petitioner cannot be said to have any interest voidable on the sale to be held in execution of the rent decree. That decree does not affect the interest, if any, of persons who were not parties thereto. The tenure is not an encumbrance on itself, it has been transferred in its entirely to the Petitioner. We, therefore, think that the case relied on by the Munsif justifies his order so far as it holds that the Petitioner cannot bring her case within the strict language of sec. 170 (3).

Our attention has been called to two other cases on this point. But in *Radhika Nath Sarkar* v. *Rakhal Raj Gayen* (2), the decision in *Jotindra Mohan Tagore* v. *Durga Dabe* (1) was not cited or considered while in *Jugal Mohini Dasi* v. *Srinath Chatterjee* (3) the learned Judges thought the observations in the earlier case were *obiter*. They, however, adopted the same procedure and permitted the deposit to be made on the ground that, on a previous occasion, the landlord had withdrawn a sum similarly paid in by the claimant under sec. 170 (3) of the Act. We see no reason why the Rani, the Petitioner before us, should not be granted a similar indulgence.

It appears that, on the 9th October 1909, the Petitioner was allowed to make a deposit of the money then due and decreed "at her own risk." That was done and the decree-holder took out the sum deposited. Again, on the 12th March 1910, the same procedure was observed though nothing

(1) 10 C. W. N. 438 (1905).

(2) 13 C. W. N. 1175 (1909).

(3) 12 C. L. J. 609 (1910).

was then said as to the deposit being made subject to all just exceptions. The landlord withdrew the money, as before.

In these circumstances, it seems to us that the decree-holder having accepted previous deposits and there being a contest between the parties as to the composition of the tenure concerned, we are justified in interfering.

The order of the Munsif, dated the 7th July 1911, is set aside. The Petitioner deposited the money but there is an order for refund. If the money has been taken back the Petitioner may make the deposit as prayed. On such deposit being made within a time to be fixed by the Munsif, the sale will not be held, otherwise the proceedings will continue. If no refund has been made, the Munsif will pass the necessary orders for due appropriation of the sum paid in, and stay the sale.

The Rule is made absolute with costs. We assess the hearing-fee at at 2 gold mohurs.

Rule made absolute.

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE
No. 2951 OF 1905.

HOLMWOOD, J. CHATTERJEE, J. Heard, 15, July 1910 & 28, April 1911. Judgment, 9, May 1911.	CHOUDHRY KIRTIBASH DAS and others, Defendants, Appellants, *v.* UMESH CHANDRA DUTT and others, Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1882), sec. 98, cl. 3—Common Manager if representative of proprietors—Suit against Common Manager if properly framed—Owners not all made Defendants within time—Limitation—Limitation Act (XV of 1877), sec. 22.

A Common Manager under sec. 98, cl. 3 of the Bengal Tenancy Act is a representative of the proprietors for the purpose of defending a suit as well as for instituting suits.

Where therefore a suit was brought making the Common Manager as well as some of the proprietors parties, but some of the co-proprietors were made parties after the period of limitation allowed by law,

Held—*That the suit against the Common Manager was rightly brought and that as the suit as against him was in time, it was immaterial whether some of the proprietors were brought on the record out of time.*

This was an appeal preferred on the 23rd of December 1908, against the decree of Babu Sasi Bhusan Sen, Officiating Subordinate Judge of Zillah Cuttack, dated the 29th of July 1908, affirming that of Babu Dina Nath Dey, Munsif of that place, dated the 18th of March 1907.

The facts of the case will appear from the judgment.

Babu Gunoda Charan Sen for the Appellants.

Babus Baranoshibasi Mukherjee and *Satish Chunder Bhar* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This was a suit brought by the Plaintiffs as *shebaits* of a certain Deity for the declaration of title to and recovery of possession of 8 as. of a certain property of which the Defendants Nos. 17—24 were the co-sharers of the Plaintiffs, the other Defendants being the auction-purchasers of 16 annas of the property under a decree on a mortgage made by the said co-sharer Defendants. The Plaintiffs made the Common Manager of the estate of the

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NOTES.

IT GIVES US GREAT PLEASURE TO NOTICE THAT two of the senior Judges of the Calcutta High Court were honoured with the Knighthood at the Coronation Durbar at Delhi. Of the Judges so honoured, Mr. Justice Brett is the senior-most Civilian Judge of the Calcutta High Court, and is also one of the ablest, most experienced and at the same time one of the most industrious occupants of the Bench. Of Mr. Justice Mookerjee, little need be said; for, in the volume and quality of his work and in encyclopædic learning he has hardly any equal. We heartily congratulate both the honourable Judges for the honour that has been so deservedly conferred on them by His Majesty the King-Emperor.

IN WELCOMING THE KING-EMPEROR ON HIS LANDING in Bombay, we expressed a hope that His Majesty's Proclamation at the Durbar of 12th December will be "memorable in the history of India and mark a new era in the constitutional progress of the country, (see *ante*, p. 18) and so it has. We record, therefore, with profound pleasure our most heartfelt gratitude that His Majesty's pronouncement has come up to our most sanguine expectations. Quite apart from the ecstatic joy with which the Re-union of Bengal under its long-deferred status of a Presidency Government, has been hailed throughout the country, we have no less pleasure in pointing out to our fellow subjects throughout India that the Speech from the Throne with which the Durbar was opened is of abiding constitutional importance to the whole of our Indian Empire. We had ventured to suggest in these columns (*ante*, p. 18) that the Great Indian Charter of 1858 should be confirmed at every Coronation Durbar in India. Although Lord Lytton at the first Coronation Durbar at Delhi had in a manner re-affirmed it in his opening speech, yet Lord Curzon thought fit almost to ignore it at the next Coronation Durbar held in celebration of the accession of His late Imperial Majesty Edward VII. We, therefore, attach the utmost constitutional importance to the following closing paragraphs of the King-Emperor's most sympathetic speech which confirm the "rights and privileges" secured to us by the Magna Charta of India which as we have explained before (*ante*, p. 18) takes the place of the Coronation Oath in India:—

Finally, I rejoice to have this opportunity of renewing in my own person those assurances which have been given you by my revered predecessors of the maintenance of your rights and privileges and of my earnest concern for your welfare, peace and contentment.

May the Divine favour of Providence watch over my people and assist me in my utmost endeavour to promote their happiness and prosperity.

WE OBSERVED THIS DAY LAST WEEK THAT His Majesty the King-Emperor has come to this country "on a mission of peace and good-will to the people which will strengthen the bonds of union between the Sovereign and the subject and spread contentment in the land." On the following day, amongst other momentous Durbar boons, His Imperial Majesty in person announced the boon of boons to the Bengalee people that the violent disruption of their province is to be healed and that henceforth the whole of the Bengalee-speaking population are to be placed under one administration and that the Province is to be raised to the status of a Presidency Government. Since the Partition of the Lower Provinces of Bengal was proposed and effected in 1905, we have been foremost in explaining without passion

or prejudice our statutory claims to reunion and our constitutional right to the status of a Presidency Government. It affords us therefore unbounded and unique pleasure to find our claims recognised and our right vindicated by a supreme act of justice, wisdom and statesmanship of a most sympathetic Sovereign with the support of his wise Ministers and on the advice of a just and courageous Pro-consul. The whole of the unrest and half the mischief of the last six years is attributable to the lack of sympathy and want of courage in our administrators to remedy an obvious and admitted wrong. It can serve no good purpose now to rake up the bitter memories of the past. Let us forget and forgive the shortcomings both of the administration and of the people and drown all our differences in the waves of joy and hopes that the Royal message of peace and good-will has aroused in every heart and which has swept away all our sorrows and pangs. There is but one duty before us now and that is to offer to Their Most Gracious Majesties the King-Emperor and the Queen-Empress our profoundest homage, our devoted loyalty and our earnest prayer for their long life and the continuance of their sympathetic concern for the well-being of the teeming millions of this wide and ancient Empire.

WE ARE NOT PREPARED TO CAVIL AT THE present amount at the projected re-transfer of the capital of the Empire from this city to its historic and ancient abode, the Indraprastha of the most pious and powerful of Hindu monarchs and the Delhi of the Great Moghuls. We believe, and we shall briefly indicate below our reasons for our belief, that the trade, commerce and the business activities of this the premier city in India and the second city in the British Empire, will not suffer in the least by the transference of the seat of the Imperial Government to an inland place like Delhi. The growth and expansion of the summer capitals of Simla and Darjeeling within the memory of the present generation have not stood in the way of the enormous expansion of shop-keepers' trade in Calcutta within recent years. The departure of the migratory body of officials who live in this city for four months and rent houses only for the winter season, has not in the past and will not in the future tie the hands of land speculators or people possessed of a building mania in the matter of putting up new mansions and houses.

WE VENTURE TO THINK THAT WITH THE PROSpect of the operations of the Calcutta Improvement Trust in view, building and land speculation would develop, though within more rational and legitimate lines and landlords would henceforth be able to secure more reasonable but steady rent from tenants who would reside in Calcutta all through the year. That the officials would sooner or later have their permanent quarters on lands already acquired has been well-known for a long time. Although landlords are sometimes obliged to charge high rents from their temporary or migratory tenants yet they are not much benefited by it, for after a long vacancy they have to spend a good portion of the rent in making the house tenantable for the next season. Thoughtless building speculators have of late also been disfiguring some of the beautiful suburbs of Calcutta by destroying gardens and trees and setting up in their places plaster and mortar abominations. It will be a distinct gain to the health and joy of this "City of Palaces" if such building craze suffers some check from the transference of the Imperial capital from Calcutta.

THIS TRANSFER WOULD NOT ALSO IN THE SLIGHTest degree disturb any of the other industrial and economic conditions of Calcutta that have made it through a long series of years the commercial capital of India or arrest the normal expansion of commerce in any way. Should the raising of the Province to the status of a Presidency Government secure to us provincial autonomy, as has been assured by the Imperial Government, we may reasonably expect that such autonomy will bring in its train greater economic freedom and promote greater industrial enterprise. Calcutta being also the centre of great education and culture, the occupation of the professional classes will continue to flourish as before and the public opinion of Bengal will lose none of its importance over either the Government of India or people outside Bengal. The representatives of Bengal in the Imperial Council, no matter where the Council may meet, will continue to represent the progressive views of their constituency and thus directly and indirectly influence their colleagues in Council both official and non-official. It would therefore be an utter waste of energy on our part to fret over the transference of the capital and engage in any futile attempt to bring it back especially when the rest of India thoroughly approves of it.

SPEECH FROM THE THRONE
AT THE
CORONATION DURBAR AT DELHI.

It is with genuine feelings of thankfulness and satisfaction that I stand here to-day among you.

This year has been to the Queen-Empress and myself one of many great ceremonies, and of unusual, though happy, burden and toil. But in

spite of time and distance the grateful recollections of our last visit to India have drawn us again to the land which we then learned to love, and we started with bright hopes on our long journey to revisit the country in which we had already met the kindness of a home.

In doing so I have fulfilled the wish expressed in my message of last July, to announce to you in person my Coronation, celebrated on the 22nd of June in Westminister Abbey, when, by the grace of God, the Crown of my forefathers was placed on my head with solemn form and ancient ceremony.

By my presence with the Queen-Empress I am also anxious to show our affection for the loyal Princes and faithful peoples of India, and how dear to our hearts is the welfare and happiness of the Indian Empire. It is moreover my desire that those who could not be present at the solemnity of the Coronation should have the opportunity of taking part in its commemoration at Delhi.

It is a sincere pleasure and gratification to myself and to the Queen-Empress to behold this vast assemblage and in it my Governors and trusty officials, my great Princes, the representatives of the peoples, and deputations from the military forces of my Indian Dominions. I shall receive in person with heartfelt satisfaction the homage and allegiance which they loyally desire to render.

I am deeply impressed with the thought that a spirit of sympathy and affectionate good-will unites the Princes and the people with me on this historic occasion. In token of these sentiments I have decided to commemorate the event of my Coronation by certain marks of my special favour and consideration, and this I will later on to-day cause to be announced by my Governor-General to the assembly.

Finally, I rejoice to have this opportunity of renewing in my own person those assurances which have been given you by my revered predecessors of the maintenance of your rights and privileges, and of my earnest concern for your welfare, peace, and contentment.

May the Divine favour of Providence watch over my people and assist me in my utmost endeavour to promote their happiness and prosperity. To all present, feudatories and subjects, I tender our loving greeting.

THE KING-EMPEROR'S PERSONAL MESSAGE OF THE TRANSFERENCE OF THE CAPITAL TO DELHI AND THE ANNULMENT OF THE PARTITION OF BENGAL AT THE CLOSE OF THE CORONATION DURBAR.

We are pleased to announce to Our people that on the advice of Our Ministers and after consultation with Our Governor-General-in-Council, we have decided upon the transfer of the seat of the Government of India from Calcutta to the ancient capital of Delhi, and simultaneously, and as a consequence of that transfer, the creation at as early a date as possible of a Governorship for the Presidency of Bengal, of a new Lieutenant-Governorship in Council administering the areas of Behar, Chota Nagpur and Orissa, and of a Chief Commissionership of Assam, with such administrative changes and redistribution of boundaries as our Governor-General-in-Council, with the approval of Our Secretary of State for India in Council, may, in due course, determine.

It is our earnest desire that these changes may conduce to the better administration of India and the greater prosperity and happiness of Our beloved people.

DESPATCH RELATING TO THE TRANSFERENCE OF THE CAPITAL TO DELHI AND THE ANNULMENT OF THE PARTITION OF BENGAL.

We publish below only the important reasons for the momentous administrative changes announced at the Coronation Durbar at Delhi.

. . . .

The maintenance of British rule in India depends on the ultimate supremacy of the Governor-General in Council, and the Indian Councils Act of 1909 itself bears testimony to the impossibility of allowing matters of vital concern to be decided by a majority of non-official votes in the Council, and the question will be how this devolution of power can be conceded without impairing the supreme authority of the Governor-General-in-Council. The only possible solution of the difficulty would appear to be gradually to give the Provinces a larger measure of self-government until at last India would consist of a number of administrations autonomous in all provincial affairs, with the Government of India above them all and possessing power to interfere in case of misgovernment, ordinarily restricting their functions to matters of Imperial concern. In order that this consummation may be attained, it is essential that the Supreme Government should not be associated with any particular Provincial Government. The removal of the Government of India from Calcutta is, therefore, a measure which will, in our opinion, materially facilitate the growth of local self-government on sound and safe lines. It is generally recognised that the capital of a great central Government should be separate and independent, and effect has been given to this principle in the United States, Canada and Australia.

. . . .

The administrative advantages of the transfer would be scarcely less valuable than the political. In the first place the development of the Legislative Council has made the withdrawal of the Supreme Council and the Government of India from the influence of local opinion a matter of ever-increasing urgency. Secondly, events in Bengal are apt to re-act on the Viceroy and the Government of India to whom the responsibility for them is often wrongly attributed. The connection is bad for the Government of India, bad for the Bengal Government, and unfair to the other

Provinces, whose representatives view with great and increasing jealousy the predominance of Bengal. Further, public opinion in Calcutta is by no means always the same as that which obtains elsewhere in India, and it is undesirable that the Government of India should be subject exclusively to its influence.

. . . .

The only serious opposition to the transfer which may be anticipated, we think, will come from the European commercial section of Calcutta, who might, we fear, not regard the creation of a Governorship of Bengal as altogether adequate compensation for the withdrawal of Calcutta as the capital of India, but we rely upon their patriotism to reconcile them to a measure which would greatly contribute to the welfare of the Indian Empire. The Bengalis might not, of course, be favourably disposed to the proposal if it stood alone, for it will entail the loss of some of the influence which they now exercise, owing to the fact that Calcutta is the head-quarters of the Government of India. But as we hope presently to show, they should be reconciled to the change by other features of our scheme which are specially designed to give satisfaction to Bengali sentiment. In these circumstances we do not think that they would be so manifestly unreasonable as to oppose it, and, if they did, might confidently expect that their opposition would raise no echo in the rest of India.

. . . .

Various circumstances have forced upon us the conviction that the bitterness of feeling engendered by the Partition of Bengal is very widespread and unyielding, and that we are by no means at an end of the troubles which have followed upon that measure. Eastern Bengal and Assam has no doubt benefited greatly by the partition, and the Mahomedans of the Province, who form a large majority of the population, are loyal and contented; but the resentment amongst the Bengalis in both Provinces of Bengal, who hold most of the land, fill the professions, and exercise a preponderating influence in public affairs, is as strong as ever, though somewhat less vocal.

. . . .

The opposition to the Partition of Bengal was at first based mainly on sentimental grounds, but as we shall show later in discussing the proposed modification of the Partition, since the enlargement of the Legislative Councils, and especially of the representative claim in them, the grievance of the Bengalis has become much more real and tangible, and is likely to increase instead of to diminish. Every one with any true desire for the peace and prosperity of this country must wish to find some manner of appeasement, if it is in any way possible to do so.

. . . .

A settlement to be satisfactory and conclusive must (1) provide convenient administrative units, (2) satisfy the legitimate aspirations of the Bengalis, (3) duly safeguard the interests of the Mahomedans of Eastern Bengal, and generally conciliate Mahomedan sentiment, and (4) be so clearly based upon broad grounds of political and administrative expediency as to negative any presumption that it has been exacted by clamour or agitation.

. . . .

In pre-reform scheme days the non-official element in these Councils was small. The representation of the people has now been carried a long step forward, and in the Legislative Councils of both the provinces of Bengal and Eastern Bengal, the Bengalis find themselves in a minority, being outnumbered in the one by Beharis and Ooriyas and in the other by the Mahomedans of Eastern Bengal and the inhabitants of Assam.

. . . .

As matters now stand the Bengalis can never exercise in either province that influence to which they consider themselves entitled by reason of their numbers, wealth, and culture. This is a substantial grievance, which will be all the more keenly felt in the course of time as the representative character of the Legislative Councils increases and with it the influence which these assemblies exercise upon the conduct of public affairs. There is, therefore, only too much reason to fear that, instead of dying down, the bitterness of feeling will become more and more acute.

. . . .

It is certain, however, that it is in part at any rate responsible for the growing estrangement which has now unfortunately assumed a very serious character in many parts of the country between Mahomedans and Hindus. We are not without hope that a modification of the Partition which we now propose will in some degree, at any rate, alleviate this most regrettable antagonism.

. . . .

The results anticipated from the Partition have not been altogether realized, and the scheme as designed and executed could only be justified by success. Although much good work has been done in Eastern Bengal and Assam and the Mahomedans of that Province have reaped the benefit of a sympathetic administration closely in touch with them, those advantages have been in great measure counterbalanced by the violent hostility which the Partition has aroused amongst the Bengalis for the reasons we have already indicated. We feel bound to admit that the Bengalis are labouring under a sense of real injustice, which we believe it would be sound policy to remove without further delay.

. . . .

It must also be borne in mind that the interests of Mahomedans will be safeguarded by the representation which they enjoy in the Legislative Councils, while as regards representation on local bodies they will be in the same position as at present.

We are also convinced that nothing short of a full Governorship would satisfy the aspirations of the Bengalis and of the Mahomedans of Eastern Bengal. We may add that, as in the case of the Governorships of Madras and Bombay, the appointment would be open to members of the Indian Civil Service, although, no doubt in practice, the Governor will usually be recruited from England. On the other hand, one very grave and obvious objection has been raised in the past to the creation of a Governorship for Bengal, which we should fully share, were if not disposed of by the proposal which constitutes the key-stone of our sheme. Unquestionably a most undesirable situation might, and would quite possibly, arise if a Governor-General of India and a Governor of Bengal, both selected from the ranks of English public men, were to reside in the same capital and be liable to be brought in various ways into regrettable antagonism or rivalry.

SPECIFIC PERFORMANCE—GUARDIANS' CONTRACTS.

The decision of the Judicial Committee in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*, which was reported at p. 74 of the current volume, will have an important bearing on certain recent developments of the Hindu law which were finding expression in judicial decisions in this country. The question actually decided by the Judicial Committee was whether a minor is bound by a contract made on his behalf and for his benefit by his guardian, so that specific performance may be obtained of such contract at his instance when he has attained majority.

Did such a question arise in England, the answer would hardly admit of any doubt, for there

a guardian makes himself personally responsible for all contracts entered into or wrongs done by him in the management of the infant's affairs. The rule is not limited to guardians of infants only but applies to all persons occupying a fiduciary position. The trustee (using that expression to cover all descriptions of fiduciary relationship) has no doubt his remedies in respect of obligations thus incurred towards strangers; he has the right to be indemnified out of the trust estate in regard to damages suffered by him in the reasonable discharge of his functions as trustee. In other words, the trustee alone is directly responsible to strangers for all acts done by him in the management of the trust estate, but he is given the chance of reimbursing himself out of the trust estate whenever he succeeds in establishing that a particular act was done reasonably in the discharge of the duties of his office. English law further allows the stranger in fit cases to proceed against the trust estate by being put in the place of the trustee and availing himself of the trustee's right, where it exists, of indemnity against the trust estate. (See Article, 10 C. W. N. cclxxi).

Thus under English law, neither a trustee, nor an executor, nor a guardian of an infant can impose any personal obligation by their acts on the beneficiaries.

Specially would this be the case with infants who can in no circumstances be made personally liable for the acts of others. To grant specific performance of an agreement against an infant, even though such agreement might have been entered into by a responsible guardian with due regard to the infant's welfare, would in English law be unthinkable. As such an agreement would thus be wanting in mutuality, the infant would necessarily not be allowed to specifically enforce it against the stranger.

Nevertheless, there has been a strong body of authorities in this country laying down in distinct terms that a contract made by a guardian for the benefit of his ward for the sale of immoveable property so far binds the minor that a suit may be instituted against the guardian to compel him to carry out his agreement. [*Khairunnissa* v. *Lokenath*, I. L. R. 27 Cal. 276, *Krishnasami* v. *Sundarappayyar*, I. L. R. 18 Mad. 415, *Jumsetji* v. *Kashinath*, I. L. R. 26 Bom. 326]. This departure from the established principles of English law has been sought to be justified on the ground that unlike the English guardian, the guardian of a minor Hindu or Mahomedan has power to alienate the minor's property in certain circumstances, and it has been urged that given those circumstances there is no reason why in the interest of strangers having dealings with the guardian, the guardian should not be compelled by law to exercise the powers he undoubtedly possesses of alienating his ward's properties.

This argument plausible as it appears at first sight overlooks the fact that the reasoning employed would justify not merely a claim for specific performance of the contract but also for damages, and it would obviously be impossible to limit relief by way of damages to contracts for sale of immoveable property only. In other words a suit for damages would lie for breach of every agreement made by a guardian on behalf of the minor and the damages would be payable out of the minor's estate.

But this by itself may not be a very serious objection, for even according to English law a stranger can avail himself of the guardian's right of indemnity to recover damages from the infant's estate. The real objection to the view laid down in the cases cited above is that the rule of liability based upon the trustee's right to indemnity cannot be worked beyond the recovery of damages out of the trust estate. The guardian agreed to sell not his own property but somebody else's, and not as the latter's agent. The owner of the property is no party to the contract and is incapable of being one, and the Court has obviously no power to make him perform a contract made by another. There is no one against whom specific performance can be decreed. The only thing that remains for the disappointed purchaser is to sue to guardian for damages for breach of contract.

The reasoning whatever may be its application in a case of an agreement by a guardian to sell his ward's property would moreover be wholly inapplicable to the case of a guardian's agreement to buy property from a stranger.

It is clear therefore that the fact that a guardian in India possesses limited powers of alienation does not justify any departure from the English law rules applicable to such cases and the decision of the Privy Council reversing the Full Bench decision of the Calcutta High Court in *Mir Sarwarjan's* case seems to conclusively establish this position.

But it is not merely with reference to agreements by guardians that personal obligations incurred by persons with limited powers of disposition have been sought to be transferred to the estate. In two recent cases the Madras High Court has laid down that a simple money loan taken by a Hindu widow for "legal necessity" would bind the estate in the hands of the reversioners. We have already commented on these decisions in detail (see 15 C. W. N. clxxxvii, cclxxvii), and it is unnecessary to go over the same grounds again. Suffice it to say that in such a case the stranger has nothing to depend upon in the nature of a trustee's right to indemnity available to the widow, for a widow has no such right. The Privy Council has however in *Mir Sarwarjan's* case declined to treat a contract for sale by a guardian even for "legal necessity" as

a contract for sale by the beneficiary. There would seem to be much less warrant for treating a loan by a limited owner such as a Hindu widow for legal necessity as *ipso facto* constituting a charge on the estate or in other words for treating a personal loan by a limited owner for legal necessity as a loan by the reversioners. The right principle which should govern all these cases would seem to be that a person who contracts with another on the basis of the latter's own personal security has ordinarily no right to look beyond such security for recovery, and the mere fact that there were circumstances which would have justified the contractee to transfer or pledge property belonging to another to secure the obligation would not be sufficient to shift the obligation on that other.

Reviews.

THE LAWS OF ENGLAND. Being a Complete Statement of the whole Law of England. *By the Right Honourable the Earl of Halsbury, Lord High Chanceller of Great Britain, 1885—86, 1886—92, and 1895—1905 and other Lawyers. Volume XVIII. Butterworth & Co., Law Publishers, London and Calcutta. 1911.*

The present volume deals with several titles of almost equal interest to India and England. Of these the law of "Libel and Slander" takes the precedence. Lord Justice Vaughan Williams and Mr. A. Romer Macklin are responsible for this title. The treatment of this subject is as a whole masterly but we found the discussion as to the nature of the right or privilege, (as some would have it) of fair comment and the distinction, partly academical and partly real, which has been drawn between a plea of fair comment on the one hand and that of qualified privilege and of justification on the other. Having regard to the differences of judicial opinion prevailing on the point, the authors have had occasionally to express their own opinion—thus going beyond the strict limits of a treatise the object of which is to state the law as it is found. For ourselves we would have gladly welcomed similar departures in other branches of the law also. The law of "Landlord and Tenant" which comes next in importance has also been very ably dealt with by Mr. J. M. Lightwood whose reputation as an author of legal treatises is now well-known. It should be mentioned however that much of the law concerning "Covenants" which usually occupies a large space in treatises on this subject has alreary appeared under the title "Deeds and other Instruments." We have found the distinction drawn between Leases and Licenses highly instructive. The Indian reader will find much instructive matter concerning the time-honoured institution of "Juries" —which is the glory of English legal history—in the title of that name. Much of the law relating to Judgments and Orders discussed under that title is common to India and England, but a great deal of it which is peculiar to the latter country will find parallels in the practice of the original sides of the High Courts in India. The laws of "Intoxicating Liquors," and "Land Improvement and Land Tax" are peculiar to England and do not call for special notice. The original plan as outlined in Lord Halsbury's Introductory remarks has been adhered to. The broad propositions of law appear in the body of the work, the case-law and other minutiæ of the law is discussed in foot-notes which generally exceed in bulk the body. The law in this volume is stated as at 25th September 1911.

THE SUCCESSION CERTIFICATE ACT, 1889 (with the case-law thereon) compiled at the Lawyers' Companion Office, Trichinopoly. *Published by T. A. Venkaswamy Row. Trichinopoly & Madras. Madras, The Law Printing House, Mount Road. 1911.*

This excellent compilation was one of the first which appeared in the Lawyers' Companion Series started by the late Mr. Sanjiva Row and now being continued by his nephew. This is a revised edition of the compilation and brought up to June 1911. It is handy and well got-up.

A GUIDE TO THE STATUTORY LAW OF ADMINISTRATION TO THE ESTATE OF DECEASED PERSONS IN BRITISH INDIA. *By S. N. Subrama Sastri, B. A., B. L. Madras, The Law Printing House. 1911. Price Rs. 2.*

In this work the author gives in a connected form a brief summary of the various statutory enactments concerning the administration of the estates of the deceased in India. The provisions of the Bombay Regulation No. VIII of 1827, the Succession (Property Protection Act) of 1841, the Succession Act of 1865, the Legal Representatives Suits Act of 1855, the Indian Fatal Accidents Act of 1855, the Hindu Wills Act of 1870, the Administrator Generals Act of 1874, the Probate and Administration Act of 1881, the Succession Certificate Act of 1889 and the relevant sections of the Court Fees Act, the Civil Procedure Code and the Limitation Act are summarised in a neatly got-up volume of not more than 75 pages. The book will prove useful to practitioners as a guide to the statutory enactments mentioned above.

Notes of Cases.

ENGLISH LAW COURTS.

HOUSE OF LORDS.—*E. Clemens Horet Coy.* v. *Biddell Brothers.* Before the LORD CHANCELLOR AND LORDS ATKINSON, GORREL AND SHAW. 3rd November 1911.

Contract of sale of goods—Its breach—Delivery of the bill of lading when goods are at sea is delivery of the goods themselves.

This was an appeal from a judgment of the Court of Appeal (LORDS JUSTICES VAUGHAN WILLIAMS, FARWELL and KENNEDY, the latter dissenting) reversing a judgment of Hamilton, J. The Appellants agreed to sell hops to the assignors of the Respondents, assignees; terms, net cash, and the condition was that the sellers might consider entire unfulfilled portion of the contract violated by the buyer's refusal to pay for hops delivered. After some time the Appellants wrote to the Respondents as follows :—

"We are now ready to make shipment to you of the entire 150 bales 1909 crop of the contracted quality and according to the terms of the contract. . . For the invoice price less freight we will value on your good selves at sight with negotiable bills of lading and insurance certificates attached to draft, and if you wish we will also attach certificates of quality of the Merchants' Exchange, San Francisco, or other competent authority to cover the shipments."

In reply the Respondents stated :—"We are prepared to take delivery of the 50 bales of British Columbian Hops, Contract 21st December 1904, and 100 bales of Pacific Coast Hops, Contract 13th October 1904, of the quality contracted for and on the terms of the contracts respectively. . . . It is in accordance with the universal practice of the trade and the custom adopted by you in your dealings with other purchasers of your hops, and it has also been your custom with our assignors to submit samples and the samples having been accepted to give delivery in bulk in accordance with the samples, but if you decline to adopt the usual and undoubtedly most convenient course we can only pay for the hops against delivery and examination of each bale. We cannot fall in with your suggestion of accepting the certificate of quality of the Merchants' Exchange, San Francisco."

The Appellants then refused to deliver any more hops alleging that the Respondents' letter was a breach of the contract. The Respondents sued for damages, and the Appellants counterclaimed. Hamilton, J., held that the Respondents had refused to accept the hops, and gave judgment against them. This was reversed by the majority of the Court below in so far as it related to the Respondents' claim. The counter-claim was dismissed. Hence this appeal. Their Lordships allowed it in respect of the claim. The LORD CHANCELLOR in the course of his judgment said :—

This contract is what is known as a cost, insurance, and freight, or, c.i.f., contract, and under it the buyer was to pay cash. But when? The contract does not say. The Respondents say on the physical delivery and acceptance of the goods when they have come to England. Sec. 28 of the Sale of Goods Act, 1893, says in effect that unless otherwise agreed payment must be made on delivery, that is, on giving possession of the goods. It does not say what is meant by delivery. Accordingly, we have to supply from the general law the answer to that question. The question is when is there delivery of goods on board ship? That may be quite different from delivery of goods on shore. The answer is that delivery of the bill of lading when goods are at sea may be treated as delivery of the goods themselves. That is so old and so well established that it is unnecessary to refer to authorities on the subject.

In my judgment it is wrong to say, upon this contract, that the vendor must defer tendering the bill of lading until the ship has arrived in this country, and still more wrong to say that he must wait until the goods are landed and examination made by the buyer. Upon the counterclaim I am of opinion that the Court of Appeal was right.

Messrs. Atkin, K. C., and Mackinnon for the Appellants.

Messrs. Shearman, K. C, and Hills for the Respondents.

B. D. *Appeal allowed in part.*

HOUSE OF LORDS.—*Colley's Patents, "Ld."* v. *Metropolitan Water Board.* Before the LORD CHANCELLOR AND LORDS ATKINSON, SHAW AND MERSEY. 7th November 1911.

Water tax—Water supplied to a factory for use of lavatories, etc., is for domestic use and not trade purposes.

This was an appeal from a decision of the Court of Appeal shortly noticed in 15 C. W. N, p. clv. The Respondents sued to recover the water rate and the only question for determination was whether water supplied to the Appellants' factory for the use of lavatories, etc., was water supplied for domestic or trade purposes. The Court dismissed the appeal. In the course of his judgment the Lord Chancellor said he thought that the consideration of this case had been overloaded with a good deal of subtlety; for himself, he thought that the point was short and simple. The question was this—whether, when a factory was equipped with lavatories, w.c.'s, and so forth, for the use of the men, as the masters might be required by legislation to provide, was that a

supply of water for trade or for domestic purposes within the meaning of the Act? Now, if there was no statutory definition, he would say it was a supply for domestic purposes. But there was a statutory definition. It was not exhaustive and did not purport to be so. It was couched in barbarous or certainly slovenly language. It stated that certain things—*viz.*, w.c.'s and baths—were included as domestic purposes; but the supply for domestic purposes was not to include a supply for trade purposes.

In his Lordship's opinion, the construction Sir Robert Finlay put upon the section was accurate. He read sec. 25 as meaning that the supply for w.c.'s and baths of the dimensions there mentioned was always to be treated as a supply for domestic purposes. That ended the case. Even if it were not so he did not think it came within the words "trade, manufacture, or business." Those words he took to mean "supply for use in trade, business, or manufacture."

Messrs. Russell, K. C., and McCurdy for the Appellants.

Sir R. Finlay, K. C., and *Messrs. Danckwerts, K. C., and Shaw* for the Respondents.

B. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before STEPHEN and COXE, JJ. APPEAL FROM ORDER No. 424 OF 1909. RAMPAL SING *v.* NANDA LAL MARWARI. The 29th November 1911.

Ackowledgment—Sec. 19, Limitation Act—Application for insolvency, inclusion of debt in.

Nanda Lal obtained a decree for costs against Rampal and applied for execution of the decree. More than three years after the first application was made the second application for execution was filed. In the meantime the judgment-debtor made an application for insolvency and in his schedule he mentioned Nanda Lal as being one of the creditors to whom certain money was due under a decree for costs. The Courts below held that the application for insolvency saved limitation under sec. 19 of the Limitation Act.

On second appeal it was argued on the strength of the English cases, *Exparte Topping*, 34 L. J. Bank 44, *Everette* v. *Robertson*, 28 L. J. Q. B. 23, *Davis* v. *Edwards*, 7 Exch. 22 and *Courtney* v. *Williams*, 13 L. J. Ch. 461, that mere inclusion of a debt in a bankruptcy proceeding was not such an acknowledgment as the law required and would not operate to extend the period of limitation.

Held—That the inclusion of a debt in an insolvency petition was an acknowledgment within the meaning of sec. 19 of the Indian Limitation Act.

Babus Jogesh Chandra Roy and *Kshetra Mohun Sen* for the Appellant.

Babus Sarat Chundra Roy Chowdhury (for *Babu Joy Gopal Ghosha*) and *Monmatha Nath Mukherjee* for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before STEPHEN and COXE, JJ. APPEAL FROM APPELLATE DECREE No. 2205 OF 1908. UJAL SINGH, Defendant, Appellant *v.* DIBYA SINGH (Plaintiff) and THE SECRETARY OF STATE FOR INDIA ADDED AS A PARTY RESPONDENT, Respondents. 29th November 1911.

Central Provinces Act, sec. 83—Settlement, cancellation or amendment of—Government, necessary party—Remand.

The Plaintiff brought a suit for a declaration that he was the maintenance grant-holder of a certain mouzah in perpetuity on payment of a jama of Rs. 15 per year. His grievance was that he had been entered in the settlement record as a ticcadar of a village with a protected status at an annual jama of Rs. 220. In his original plaint he specifically asked that the settlement papers might be amended and he might have a declaration in the sense in which he wished. In an additional plaint he prayed that the request for amending the settlement papers might be excluded from the prayer. In the result he obtained from the first Court an order—a declaration—in the sense in which he wished and an order that the entry in the settlement record should be cancelled. This decision was upheld on appeal. He did not take the precaution of giving notice to Government of his suit which it was his duty to do under sec. 83, Central Provinces Land Revenue Act. The result was that Government was not represented in the case until it came up to High Court in second appeal. The Government applied to have the case sent back for a re-hearing.

Held—The suit was one for the cancellation or amendment of the settlement under sec. 83 of the Central Provinces Act.

Babu Dwarka Nath Chuckerbutty and *Mr. G. Sarkar* for the Appellant.

Babu Jogendra Chunder Ghose for the Respondent.

Babu Ram Chunder Mitra for the Secretary of State.

A. T. M. *Appeal allowed: Case remanded.*

auction-purchaser Defendants a party Defendant and also the auction-purchasers or rather those they supposed to be the auction-purchasers. The suit was brought about two days before the expiry of 12 years from the dispossession and at that time some of the auction-purchaser Defendants were dead and their heirs were brought on the record after the expiry of 12 years. It is contended by the Defendants who have appeared through their Common Manager that the suit is barred by limitation under the provisions of sec. 22 of the Limitation Act. Under sec. 98, cl. 3 of the Bengal Tenancy Act, the Common Manager has for the purposes of management the same powers as the co-owners might have exercised but for his appointment and the co-owners are debarred from exercising such powers. It has been held in the case of *Sibo Sundari Ghose* v. *Raj Mohun Guho* (1) that the Common Manager can bring a suit for declaration of title and recovery of possession of immoveable property on behalf of the co-owners, and if he can bring a suit, there is no reason why he should not represent them for defending a suit. As he was the party actually in possession to the exclusion of the co-owners, the suit against him was rightly brought and as that was done within time it was immaterial whether the heirs of some of the co-owners were brought on the record too late for a suit against them. The question of limitation under sec. 22 does not therefore arise.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 8 C. W. N. 214 (1903).

[PRIVY COUNCIL.]

[APPEAL FROM ALLAHABAD.]

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1911,
2, November.

JAMNA DAS, Plaintiff, Appellant,
v.
PANDIT RAM AUTAR PANDE and ors., Defendants, Respondents.

Transfer of Property Act (IV of 1882), sec. 90—Sale of equity of redemption—Undertaking by purchaser to pay off mortgage, if imports personal liability to pay—"Balance legally recoverable."

The purchaser of the equity of redemption is not personally bound to pay the mortgage-debt.

Where the mortgagor left a portion of the purchase-money with the purchaser for redemption of the mortgage,

Held—*That the mortgagee not having been a party to the sale could not avail himself of the undertaking on the part of the purchaser to pay off the mortgage-debt, and the latter, therefore, was not a person from whom the unrealised balance of the mortgage-debt was legally recoverable within the meaning of sec. 90 of the Transfer of Property Act.*

This was an appeal from a judgment and decree, dated the 20th April 1909, of the High Court of Judicature for the North-Western Provinces at Allahabad, which affirmed a judgment and decree, dated the 16th April 1907, of the Court of the Subordinate Judge of Mirzapur.

The principal question for determination on the present appeal was whether the Appellant was entitled to a decree under sec. 90 of the Transfer of Property Act (IV of 1882) against the principal Respondent, Pandit Ram Autar Pande, under the circumstances hereinafter mentioned.

One Musammat Lakhpati Koer borrow-

ed Rs. 40,000 from the present Appellant and his son and executed a deed of mortgage, dated the 2nd June 1893, in their favour. In addition to her zemindari she hypothecated her mortgagee rights which she held in certain other zemindari.

On the 24th of November 1896, the said mortgagor sold all her immoveable property to the principal Respondent including the equity of redemption in the aforesaid mortgage and the said mortgage rights. Out of the sale price a sum of Rs. 40,000 was left with him in order to redeem the said mortgage but he did not do so.

The said mortgagees who were members of a joint Hindu family separated from one another, and the said mortgage-bond fell to the share of the Appellant. He then brought a suit to recover the mortgage debt with interest against the principal Respondent and the representatives of the mortgagor and others. He claimed three reliefs, namely, (1) a decree for principal and interest against the Defendants; (2) a decree for sale of the entire mortgaged property; and (3) a decree against the person and other property of the Defendants in case the sale-proceeds of the mortgaged property were less than the decretal amount.

The Defendants contested the suit. The principal Defendant pleaded among other things that his person and "other property" were not liable. It was also pleaded on behalf of some of the Defendants that the Court could not pass a decree for sale of the mortgagor's mortgagee rights which had been hypothecated as above stated. These contentions were decided against the Plaintiff (Appellant) by the Court of first instance as well as by the High Court. The result was that a decree *nisi* under sec. 88 of the Transfer of Property Act, 1882, was passed allowing the sale of the mortgaged property with the exception of the said mortgagee rights of the mortgagor. And in due course the said decree was made absolute on the 26th August 1905.

The Appellant decree-holder thereupon caused the mortgaged property to be sold, but the sale-proceeds were insufficient to satisfy the decree. He therefore instituted the present proceedings on the 7th January 1907 against the principal Respondent and the other judgment-debtors for recovery of the balance of the decretal amount. In his petition he stated the facts set forth above, and prayed for a decree under sec. 90 of the Transfer of Property Act, 1882, against the person and property of the principal Respondent. He further prayed that the mortgagee rights of the mortgagor (which, as already stated, the Courts had refused to sell) might also be sold.

The principal Respondent opposed the said petition. He pleaded that a decree under sec. 90 of the Transfer of Property Act could not be legally passed against him and that the petition was barred by the principle of *res judicata*.

After hearing the parties the Subordinate Judge decided in favour of the principal Respondent, and accordingly passed a decree, dated the 16th April 1907, rejecting the petition against him with costs, and allowing it against the remaining judgment-debtors. The said mortgagee rights of the mortgagor were again exempted from sale.

The said decree-holder thereupon appealed against the said decree to the High Court. The Respondents filed objections under sec. 561 of the Civil Procedure Code, 1882. The said High Court (Richards and Griffin, JJ.) delivered its judgment*

* Reported in I. L. R. 31 All. 352 (1909).

JAMNA DAS v. PANDIT RAM AUTAR PANDE.

on the 20th April 1909, and came to the same conclusions as the learned Subordinate Judge. It accordingly made a decree dismissing the appeal, but ordering the parties to bear their own costs in both Courts. Hence this appeal.

Sir E. Richards, K. C., and *Mr. Ross* for the Appellants submitted that the principal Respondent was personally liable and the decretal amount was "legally recoverable" from him. The sale price was expressly left in his hands upon trust to redeem the mortgage. They also submitted that the mortgagee rights were saleable under sec. 90, Transfer of Property Act. Reference was made to *Matadin* v. *Kazim* (1), *Ganga Prosad* v. *Chuni Lal* (2). The matter was not barred by *res judicata*. In any case the principal Respondent was in possession of the sale price which could be sold.

[LORD MACNAGHTEN.—How is it legally recoverable from him?]

Sir E. Richards.—Because he agreed to redeem the mortgage.

[LORD MACNAGHTEN.—But you were no party to the assignment?

Sir E. Richards.—Yes, that is so.

[LORD MACNAGHTEN.—Referred to *Izzutunnissa Begam* v. *Kunwar Pertab Singh* (3)].

Mr. L. DeGruyther, K. C., and *Mr. Bhagwandin Dube* for the Respondent were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—This is a perfectly plain case. The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor. The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay this mortgage debt. Therefore, he is not a person from whom, in the words of the 90th section of the Transfer of Property Act, "the balance is legally recoverable."

Their Lordships will therefore humbly advise His Majesty that this appeal must be dismissed with costs.

Solicitors: *Messrs. Ranken, Ford, Ford & Chester* for the Appellant.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Respondents.

B. D. *Appeal dismissed.*

(1) I. L. R. 13 All 432 (1891).
(2) I. L. R. 18 All. 113 (1895).
(3) L. R. 36 I. A. 206, 208 (1909).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER No. 284 OF 1909.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard, 5, June.
Judgment, 30, June.

CHAMARU SAHU and ors., Appellants,
v.
SONA KOER, Respondent.

Transfer of Property Act (IV of 1882), secs. 10, 11—Hindu Law—Widow, transfer by, to reversioner—Condition that properties should not be transferred during widow's life and maintenance paid out of income—Deed of settlement—Restraint on alienation—Transfer by reversioners valid but subject to widow's right to maintenance—Notice.

Where a Hindu widow by a deed of family settlement transferred properties inherited from her husband to the latter's reversionary heirs subject to the conditions: (1) that a fixed monthly allowance should be paid to her out of the income of the estate transferred, and (2) that the reversionary heirs should have no right to trans-

CHAMARU SAHU v. SONA KOER.

fer any immoveable property belonging to the estate during her life-time,

Held—*That the latter condition was void as imposing a restraint on a transferee of an absolute interest in property as to the manner in which such interest was to be applied or enjoyed by him within the meaning of sec. 11 of the Transfer of Property Act.*

Quære—*Whether the doctrine of English law that a condition or conditional limitation upon alienation, limited in time, is bad when attached to a vested interest is applicable in view of sec. 10 of the Transfer of Property Act.*

Held—*As to the other condition, that persons in whose favour the reversionary heirs executed mortgages must be taken to have had notice of all the covenants in the deed of settlement and that the widow was entitled to a declaration that her right to receive maintenance under that deed was in no way affected by the mortgages.*

This was an appeal from a decision of M. K. Deb, Esq., District Judge of Saran, dated the 10th of June 1909, reversing that of Babu Pryag Nath, Subordinate Judge of Chapra, dated the 12th of November 1908.

The facts of the case will appear from the judgment.

Dr. Rash Behary Ghose, Babu Umakali Mukherjee and *Moulvi Mahomed Mustafa Khan* for the Appellants.

Babus Dwarka Nath Chuckerbutty and *Akhoy Kumar Banerjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—The substantial question of law in this appeal relates to the validity of a clause for restraint upon alienation in a deed of family settlement between two Hindu widows and the reversionary heirs of their husbands who were two brothers. The circumstances under which the question in controversy has arisen are not disputed, and may be briefly narrated. The Plaintiff-Respondent, Sona Koer, is the widow of Matukdhari Lal, and the 8th Defendant, Mahatab Koer, is the widow of Ayodha Prasad. Shortly after the death of their husbands a dispute arose between them as to the title to certain landed properties. The result was that the widows and the reversioners entered into an arrangement for settlement of these disputes. The terms of the compromise were embodied in two instruments executed on the 21st December 1894 and 15th January 1895. It is not necessary for our present purpose to examine in minute detail all the provisions of these deeds. It is sufficient to state that the widows and the reversioners agreed that the properties should become vested in the reversioners; that a portion of the landed property and a sum of Rs. 6,000 should be dedicated for the construction of a temple and other specified religious and charitable purposes: that the widows should each receive annually a sum of Rs. 500 as maintenance out of the income of the estate of her husband vested in the reversionary heirs; and that during the life-time of the widows, the reversionary heirs should have no right to transfer any immoveable property left by their husbands. It appears that shortly after the execution of these documents, the reversionary heirs, on the 26th August 1904, 29th August 1905 and 28th November 1905, successively executed simple and usufructuary mortgages in respect of the properties taken by them under the settlement. On the 4th September 1907, the Plaintiff Sona Koer as the

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widow of Matukdhari Lal commenced the present action for declaration that these alienations were invalid and inoperative in law because made in contravention of the *ekrarnama* of the 21st December 1894 and the subsequent *solenama* of the 10th January 1895. She joined as parties Defendants the transferees (the first four Defendants), the reversioners (the next three Defendants) and the widow of Ayodha Prasad (the eighth Defendant). The claim was resisted by the transferees principally on the ground that the restraint upon alienation was void in law and that the Plaintiff was not entitled to claim any declaration. The Court of the first instance held that as the estate had vested absolutely in the reversionary heirs and as there was no clause for forfeiture upon alienation, the restraint upon alienation was illegal and unenforceable. In this view the Subordinate Judge dimissed the suit. Upon appeal, the learned District Judge has held that the restraint upon alienation was valid in view of the decisions in *Lalit Mohun Singh* v. *Chukkun Lal Roy* (1) and *Kuldip Singh* v. *Khetrain Koer* (2). The District Judge has therefore reversed the decision of the original Court and remanded the case for trial on the merits. The mortgagees Defendants have appealed to this Court, and on their behalf, the decision of the District Judge has been challenged substantially on the ground that the restraint upon alienation is invalid in law, and that the Plaintiff is not entitled to any declaration in the suit as framed. On behalf of the Respondent, it has been argued that, even if the restraint upon alienation be treated as invalid, the Plaintiff is entitled to a declaration that the alienations impeached do not affect her right to receive maintenance out of the estate of her husband whether that estate continues in the hands of the reversioners or a portion thereof has been included in the mortgages.

In so far as the question of the validity of the restraint on alienation is concerned, our attention has been invited to secs. 10 and 11 of the Transfer of Property Act. Sec. 10 provides that where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void except in the two cases of lessees and married women. Sec. 11 provides that where on a transfer of property, an interest therein is created absolutely in favour of any person, and the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction. If the restraint in the case before us is tested with regard to provisions of sec. 10 of the Transfer of Property Act, the question arises whether the transferee has been absolutely restrained within the meaning of that section. It has been argued that as the restraint is limited in point of time it does not fall within the mischief of the rule enunciated in sec. 10. It may be conceded that this view may possibly be supported upon a strict construction of the language used by the Legislature in that section. It is not improbable that the framers of the section had in view the judgment of Sir George Jessel, M. R., in *In re Macleay* (3), in which that learned Judge observed as follows :—"The test is whether the condition takes away the

(1) I. L. R. 24 Cal. 834 (1897).
(2) I. L. R. 25 Cal. 869 (1898).

(3) L. R. 20 Eq. 186 (1875).

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whole power of alienation substantially; it is a question of substance and not of mere form. You may restrict alienation in many ways; you may restrict it by prohibiting it to a particular class of individuals or you may restrict alienation by restricting it to a particular time." This exposition perhaps tends to support the view that a restraint on alienation qualified as to time may be valid. Now it cannot be disputed that a condition or conditional limitation upon alienation of a contingent interest before it vests is good, as first held in *Large's* case (4) and as repeatedly affirmed in subsequent decisions: *Churchill* v. *Marks* (5), and *Barnett* v. *Blake* (6). But it does not necessarily follow that a condition or conditional limitation upon alienation limited in time is good when attached to a vested interest. In *Renaud* v. *Tourangaen* (7), their Lordships of the Judicial Committee held that a restraint upon the devisees of lands from alienating them for a period of twenty years from the testator's death was not valid either by the old law of France which was directly applicable to the case or by the general principles of jurispudence. This view is consistent with that expressly or impliedly held in *Ware* v. *Caun* (8), *Bradley* v. *Peixoto* (9), *Willis* v. *Hiscox* (10), *Rishton* v. *Cobb* (11), *In re Jones's Will* (12) and *In re Manchu* (13). The contrary view, however, has been assumed as correct, without investigation, in some decisions, for instance, *Kiallmark* v. *Kiallmark* (14), *Kearsley* v. *Woodcock* (15), *Churchill* v. *Marks* (5) and *Pearson* v. *Dolmon* (16), which last case is based upon a singular misapprehension of the accurate statement of Turner, V. C., in *Rochford* v. *Hackman* (17), that a life-estate could be determined by an alienation. The prevailing view in England, therefore, undoubtedly is that a condition restraining alienation of an estate in fee is bad even though it is qualified as to time. In support of this proposition, it is sufficient to refer to the elaborate opinion of Mr. Justice Pearson in *In re Rosher* (18), [see also *Dugdale* v. *Dugdale* (19)]. But in a later case [*In re Porter* (20)], Mr. Justice North questioned if there was any distinction in principle, so far as the present matter is concerned, between a contingent interest and an interest which is vested but is liable to be divested. It must be remembered, however, that a provision for forfeiture attached to a contingent estate is a condition precedent, while when attached to an estate vested although liable to be divested, it is a condition subsequent, and consequently the distinction between the two cases is essentially the fundamental distinction between conditions precedent and conditions subsequent. In so far therefore as the English Courts are concerned, the preponderance of judicial opinion is in favour of the view that a condition or conditional limitation upon alienation,

(4) (1587) 2 Leon 83; 3 Leon 182.
(5) (1844) 1 Coll. 441.
(6) 2 Dr. and Sm. 117 (1862).
(7) L. R. 2 P. C. 4 (18); 5 Moo. P. C. N. S. 5. (1867).
(8) 10 B. and C. 433: 34 R. R. 409 (1830).
(9) (1797) 3 Ves. 324: 4 R. R. 7.
(10) (1839) 4 Myl. and Cr. 197; 48 R. R 69.
(11) (1839) 5 Myl. and Cr. 145: 48 R. R. 256.
(12) 23 L. T. N. S. 211.
(13) 21 Ch. D. 888 (1882).

(5) (1844) 1 Coll. 441.
(14) 26 L. J. Ch. 1 (1856).
(15) 3 Hare. 185 (1843).
(16) L. R. 3 Eq. 315 (1866).
(17) 9 Hare. 475 (1852).
(18) 26 Ch. D. 801 (1884).
(19) 38 Ch. D. 176 (1888).
(20) [1892] 3 Ch. 481.

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limited in time, is bad when attached to a vested interest. In the American Courts also, there has been considerable divergence of judicial opinion and it has been often assumed without discussion that a condition against alienation when attached to a vested interest is good if confined to a limited period. But the better view is in the opposite direction. The judgment of Mr. Justice Christiancy in *Mandlebaum* v. *Macdonell* (21) is the fullest argument against the validity of such conditions and conditional limitations to be found in the books and it may now be taken as settled in the American Courts that a restriction on the alienation of a fee simple, though limited in time, is void [see the decision of the Supreme Court of the United States in *Porter* v. *Couch* (22)]. In so far, therefore, as what is described by their Lordships of the Judicial Committee as "the general principles of jurisprudence" is concerned, the position is plain. But a difficulty is apparently created by the language used by the Legislature in sec. 10 of the Transfer of Property Act which is possibly based upon the view of Sir George Jessel, M. R., in *In re Macleay* (3), subsequently, as we have explained, repudiated in England. We, therefore, do not propose to rest our decision on the ground that sec. 10 invalidates the restraint upon alienation in the case before us. We have next to examine the provisions of sec. 11 of the Transfer of Property Act. This section recognises the elementary principle that a transferee of property who takes an absolute interest, as for instance, a donee or purchaser, cannot be restrained in his enjoyment or disposition of it by any condition inserted in the transfer. Such a condition deprives the property of its legal incidents and is inconsistent with or repugnant to the main purpose of the transfer. It is consequently arbitrary and not enforceable in a Court of law [*Krishna* v. *San Manga* (23) and *Anantha Nagamuthu* (24)]. In the first of these cases Mr. Justice Holloway defended the doctrine on the broad ground that every right capable of enforcement must have for its contents some conceivable human interest but not necessarily a pecuniary one. The same view was approved by their Lordships of the Judicial Committee in *McLean* v. *McKay* (25). In our opinion, there is no room for serious controversy that the restraint on alienation in the case before us is bad in view of the principle recognised in sec. 11 of the Transfer of Property Act.

The question which finally arises for consideration is, whether the Plaintiff is entitled to any relief at all in the suit as framed. Now the deeds of family settlement make it reasonably plain that the object of the proposed restraint on alienation by the reversioners was the protection of the right of the widows to receive maintenance from what had been the estate of their husbands. To this extent, the object was perfectly legitimate, and we are of opinion that on the principle recognized in the case of *Ali Hasan* v. *Dherja* (26), the Plaintiff ought to have a declaration that the Appellants who have accepted mortgages contrary to the provisions of the deeds of settlement have acquired rights subject to the right of maintenance possessed by the Plaintiff. In the case just mentioned, it was ruled that a transfer of

(3) L. R. 20 Eq. 186 (1875).
(21) (1874). 29 Michigan 78; 18 Am. Rep. 61.
(22) (1890) 141 N. S. 296.
(23) 6 Mad. H. C. R. 248 (1871).
(24) I. L. R. 4 Mad. 200 (1881).
(25) L. R. 5 P. C. 327 (1873).
(26) I. L. R. 4 All. 518 (1882).

mortgaged property in breach of a condition against alienation is valid, except in so far as it encroaches upon the right of the mortgagee, and that this reservation does not bind the property so as to prevent the acquisition of a valid title by the transferee. A useful analogy is also furnished by the principle recognised in one of the American States, Lousiana, where the Roman Law through Spanish sources is still regarded as the foundation of the jurisprudence, and where it has been held that if there is an agreement in a mortgage that the mortgagor would not alienate the equity of redemption, an alienation in contravention thereof is so far void as against the mortgagee that the latter can carry on his execution proceedings of seizure and sale without making the purchaser a party or taking any notice of a change of ownership (Kent, Commentaries, Vol. IV, 185; Burge, Colonial and Foreign Law, Vol. III, p. 197; *Avegens* v. *Schmidt* (27) and *New Orleance National Banking Association* v. *Le Breton* (28), where the effect of the *pact de non alienando* is explained). The Plaintiff here can have no grievance if her right to receive maintenance is protected and declared unaffected by the mortgage transactions; the Defendants also cannot complain of such declaration, because they must be taken to have notice of all the covenants in the title-deeds of their mortgagors, and if they have taken the mortgages with notice, actual or constructive, of the right of the Plaintiff to receive maintenance, their own rights must be subordinated to that extent. In this view, the decree made by neither of the Courts below can be supported on principle.

(27) (1887) 113 U. S. 293.
(28) (1885) 120 U. S. 765.

The result, therefore, is that this appeal is allowed, and the order of the District Judge discharged. The suit will stand decreed in the manner following, namely, the Plaintiff will have a declaration that her right to receive maintenance under the deeds mentioned has in no way been affected by the transactions under which the Appellants have derived title. Each party will pay his own costs throughout this litigation.

CARNDUFF, J.—I agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2500 OF 1909.

CHATTERJEE, J.
TEUNON, J.
1911,
Heard,
15, August.
Judgment,
30, August.

KALANAND SINGH and another, Appellants,
v.
GUNPUT SINGH, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 66—Ejectment, suit for—Arrears of rent in respect of which decree may be sought—Waiver.

The landlord may institute a suit for ejectment under sec. 66 of the Bengal Tenancy Act at the time of the year mentioned in that section but if he does not exercise his option at once but claims rent for any portion of the year subsequent thereto he treats the tenancy as existing after the specified date and cannot ask for ejectment in respect of arrears due for the year preceding that date.

SITANATAH *v.* BASUBED (1), SHEIKH PEER BUX *v.* MOWZAH ALLY (2), JOGESHURI *v.* EBRAHIM (3) *followed.*

(1) 2 C. L. J. 540 (1900).
(2) Marsh 25 (1862).
(3) I. L. R. 14 Cal. 33 (1886).

KALANAND SINGH *v.* GUNPUT SINGH.

This was an appeal preferred on the 15th of August, 1909, against the decree of Mr. J. C. Twidell, District Judge of Zillah Bhagulpur, dated the 19th of June 1909, modifying the decree of Babu Charu Chander Mukerjee, Subordinate Judge of Monghyr, dated the 25th of January 1909.

The facts of the case material to this report will appear from the judgment.

Dr. Rash Behary Ghose and *Babu Sailendra Nath Palit* for the Appellants.

Babu Jotindra Mohan Sen-Gupta for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for rent and ejectment under sec. 66 of the Bengal Tenancy Act.

The claim was for arrears at the rate of 8 annas per bigha up to 1312 and at the enhanced rate of Rs. 3 per bigha from 1313-1314 under the terms of the kabuliyat, dated the 10th of August 1901 : the Plaintiffs also asked for ejectment for the whole arrears.

The learned Subordinate Judge held that the Plaintiffs were entitled to rent at the enhanced rate of Rs. 2-8 per bigha only for those lands which had been benefited by the irrigation works constructed by the Plaintiffs and gave a decree for ejectment for the whole arrears found due.

The learned District Judge on appeal agreed with the first Court as to the construction of the kabuliyat but modified the decree for ejectment by limiting it to the arrears for the last year in suit.

It is contended in second appeal before us that the decree for ejectment ought not to have been limited and that the enhanced rent should have been decreed for the entire holding.

On the first point it has been contended that the case of *Sitanath* v. *Basudeb* (1) relied upon by the learned Judge was wrongly decided in that it is against the terms of sec. 66 and not supported by the authorities relied on by the Court.

Sec. 66 provides that "when an arrear of rent remains due from a tenant . . . . . at the end of the month of Jeth where the Fasli or Amli year prevails the landlord . . . may institute a suit for ejectment." Sec. 55, cl. (3) defines an arrear of rent as any instalment or part of an instalment not duly paid at or before the time when it falls due. Sec. 67 provides that an arrear shall bear interest from the date it became due. In places where the Fasli year prevails, if an arrear remains unpaid at the end of the month of Jeth, the landlord may institute a suit for ejectment, that is to say, the landlord can treat the tenant as a trespasser if the instalments up to Jeth are in arrear. If he does not exercise that option at once but claims rent up to the end of Vado of the same year he treats the tenancy as existing after Jeth and cannot eject for that year. This was the plea of the Defendant in the Courts below and the same view has been pressed upon us. The Defendant not having appealed against the decree for ejectment for the arrears of 1314 it is not open to them to argue this point, in this appeal, so far as that portion of the decree is concerned. They may, however, rely upon this to contend that the decree given should not be extended so as to include the arrears prior to 1314.

The first case discussed by the learned Vakil for the Appellant is that of *Sheikh Peer Bux* v. *Mowzah Ally* (2) in which it was held that if a landlord receives rent for one year he cannot eject for arrears

(1) 2 C. L. J. 540 (1906).
(2) Marsh 25 (1862).

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due previous to that year. Sir Barnes Peacock, C. J., said: "The receipt of rent for 1268 affirmed the tenancy and conclusively bound the Plaintiff from contending that the Defendant was a trespasser in 1268: whereas the suit for ejectment is founded on the ground that, by reason of non-payment of rent up to the end of 1267, the Defendant's tenancy had expired and that he was liable to be ejected." The next case discussed is that of *Jogeshuri* v. *Ebrahim* (3). That was a suit for the arrears of 1290 and one kist of 1291. Mr. Justice R. Mitter and Mr. Justice Grant, following the principle of the case in Marshall, said: "But forfeiture or determination of tenancy takes place when the tenant defaults to pay the rents due at the end of the year. If the landlord still treats the defaulter as his tenant, the right he has acquired under sec. 22 must be taken to have been waived." This case was followed in *Sitanath* v. *Basudeb* (1) by Mr. Justice Banerjee and Mr. Justice Stevens. There is no material difference between the wordings of sec. 22 of Act VIII of 69 (B. C.) and sec. 66 of the Bengal Tenancy Act and we do not see any reason to dissent from the earlier decisions. In this view of the main question of law argued for the Appellants it is not necessary to decide the point raised by the Respondent.

As regards the construction of the kabuliyat we think the Courts below are right and the Plaintiffs have no just reason to complain.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

(1) 2 C. L. J. 540 (1900).
(3) I. L. R. 14 Cal. 33 (1886).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 432 OF 1911.

COXE, J.
TEUNON, J.
1911,
Heard,
1, August.
Judgment,
18, August.

SRIDHAR CHATTOPADHYA, Defendant, Appellant,
v.
KALIPADA CHUCKERBUTTY, Plaintiff, Respondent.

Hindu Law—Widow, agent appointed by—Profits, realised but not paid, accountability for, to reversioner—Widow's savings.

An agent appointed by a Hindu widow is bound to account to the reversioner for profits realised by him in the widow's lifetime and not paid to her. Such profits cannot be presumed to be the widow's **stridhan** ***but must be treated as her savings which not having been disposed of followed the estate.***

SOORJEEMONEY *v.* DINOBUNDOO (2), REVETT CARNAC *v.* JUSBAI (3), PADDO MONEE *v.* DWARKA NATH (4) *referred to.*

ISRI DUT *v.* HANSBUTTI (1) *followed.*

This was an appeal preferred on the 24th of February 1911, against the decree of Mr. W. H. Delivingne, District Judge of Zillah Hughly, dated the 29th of December 1910, affirming that of Babu Surendra Nath Mitter, Subordinate Judge of that district, dated the 1st of May 1909.

The facts of the case will sufficiently appear from the judgment.

Babus Mohendra Nath Ray and *Biraj Mohan Majumdar* for the Appellant.

Babus Dwarka Nath Chuckerbutty, Bepin Chandra Mullik and *Hari Charan Ganguli* for the Respondent.

(1) I L R. .0 Cal. 324 (1883).
(2) 9 Moo I. A. 123 (1862).
(3) I. L. R. 10 Bom. 428 (1886)
(4) 25 W. R. 335 (1876).

SRIDHAR CHATTOPADHYA *v.* KALIPADA CHUCKERBUTTY.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for accounts. The Defendant admittedly managed the property during the Plaintiff's minority. The property belonged to the Plaintiff's father, Panchanon, and his brother, Bhanu. The latter died before Panchanon and his mother, Matangini, inherited his property. Panchanon died in 1298 and Matangini in 1313. The suit has been decreed and the Defendant appeals.

The first point taken is that the Court below should have come to a finding on the point whether accounts had been rendered and accepted. In the view we take of the case this plea could only have reference to the property of Matangini. But the question whether, as between Matangini and the Defendant, there was in respect of any year an account stated and settled which should not now be disturbed, is a question which may now be dealt with when the accounts are taken and a remand is not necessary. The findings of the Subordinate Judge, which have not been displaced by the District Judge, indicate that no practical advantage would be gained by a remand.

Secondly, it is urged that the learned District Judge should have admitted evidence of a mukhtearnama said to have been executed in 1300 by Plaintiff's mother, to show that the Defendant was the agent of the Plaintiff's mother, and not of the Plaintiff. It is said that it was not put in the first Court because the Defendant did not think it would be denied. But no explanation is given why it was not filed with the appeal. Then the Plaintiff would have been prepared to meet it. A subsequent mukhtearnama of 1307 is believed by the District Judge to have been executed by Khiroda Sundari in ignorance, under the influence of the Defendant. The production of this earlier mukhtearnama therefore at the last moment, when the appeal was being heard, looks very like an attempt to take the Plaintiff by surprise and we think that the learned District Judge rightly refused to admit it.

Finally, it is argued that the Defendant is not bound to account to the present Plaintiff for his management of Matangini's property, because the profit of the property must be regarded as *stridhan*. But this contention also cannot be sustained. It is not raised by anybody who would be the heir of Matangini's *stridhan*. It was decided in the case of *Isri Dut* v. *Hansbutti* (1) that a widow's savings are not her *stridhan*. If she has made no attempt to dispose of them in her lifetime, there is no dispute but that they follow the estate from which they arose. But it is argued that this rule does not apply to profits which have not reached the widow's hands at all, but that in such a case it must be held that she cannot have formed any intention to unite them to the original estate and they must therefore be regarded as *stridhan*. We cannot accept this contention. It would be unreasonable that a widow should be presumed to unite her money to the parent estate when she takes no action with regard to such money while in enjoyment of it, and that she would be presumed to intend to sever it from the parent estate when she takes no action while waiting for it. Reliance is placed on the case of *Soorjeemoney* v. *Denobundoo* (2) and *Revett Carnac* v. *Jusbai* (3). But their Lordships of the Privy Council have,

(1) I. L. R. 10 Cal. 324 (1883).
(2) 9 Moo. I. A. 123 (1862).
(3) I. L. R. 10 Bom. 428 (1886).

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as was pointed out in *Paddo Monee* v. *Dwarka Nath* (4), shown some disposition to recede from the former ruling, in which the point now in question seems not to have been fully argued before them, and in any case the facts of the case were altogether different from those of the present suit. As to the Bombay case, that referred to a comparatively small sum of money which the learned Judges did not regard as savings at all, considering that there were outstanding debts to be paid. Moreover, we are not satisfied that in this case Matangini can properly be said to have been kept out of possession of this mon y. Her agent's possession was her possession. Presumably Matangini obtained enough to live on from him, and we do not see why there should be any difference in character between the money which she received and that which still remained in his hands. Her intentions presumably were the same with regard to both.

We think, therefore, that the decisions of the learned District Judge is right and dismiss the appeal with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 2900 OF 1908

JENKINS, C. J.
CHATTERJEE, J.
1911,
22nd, August.

GOPAL CHANDRA CHAKRABARTY, Defendant No. 1, Appellant,
v.
RADHARAMAN DAS BABAJI, Plaintiff, Respondent.

Shebait, *office of—Succession—Deed of appointment—Construction*—" Shishya shishyanukrame."

Where it was provided by deed that the succession to the office of a shebait *should be* " shishya shishyanukrame," (i.e., *disciple following disciple.*)

Held—*That upon a proper construction of the document there was nothing to prevent one disciple from succeeding a co-disciple in the line of the original* shebait.

(4) 25 W. R. 335 (1876).

This was an appeal preferred on the 19th of December 1908, against the decree of G. C. Banerji, Esq., Additional District Judge of Zillah Dacca, dated the 12th of September 1908, modifying the decree of Babu Mohim Chandra Chakraverty, Munsif, 1st Court at Naraingunj, dated the 30th of July 1906.

The Plaintiff brought this suit for a declaration of his title as the *shebait* of an idol and for recovery of possession of the idol and its properties of which he alleged he had been dispossessed by the Defendant. The Plaintiff's case was that Gopal Sarma who established the idol by a registered deed appointed one Nobin Brojobashi as the first *shebait* and directed that the *shebaitship* should on his death descend from disciple to disciple of the first *shebait* (शिष्य शिष्यानुक्रमे) ; that Nobin was succeeded by Adyaita and on the latter's death Srinibash, another disciple of Nobin, became *shebait* and was in his turn succeeded by his disciple Ramananda and that after Ramananda's death, Plaintiff as his disciple became the *shebait*.

The Defendant set up various pleas in defence of which the one now material was that Plaintiff was not in the line of succession, as Srinibash, the 3rd disciple, was not a disciple of the second disciple Adyaita and had accordingly no title to succeed under the deed.

The Court of Appeal below found that the facts alleged by the Plaintiff were established and he was entitled to recover and that the fact that Srinibash was a co-disciple of Adyaita was immaterial and he

GOPAL CHANDRA CHAKRABARTY *v.* RADHARAMAN DAS BABAJI.

had a good title to succeed Adaitya as *shebait*.

The Defendant preferred this second appeal.

Mr. S. P. Sinha and *Babu Govind Chandra Dey Roy* for the Appellant.

Babu Jogesh Chandra Roy and *Dr. Sarat Chandra Basak* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The decision of this appeal depends upon the proper construction of the document, Ex. I, and of the words *shishya shishyanukrame*, that is to say, disciple following after disciple, in that document. It is contended on behalf of the Appellant that the maker of the endowment intended that one disciple should be succeeded by his own disciple, and not by a brother disciple of the previous *shebait*. That, however, does not seem to be the proper construction of the document. The words should be construed like the the words *puttra pouttradikrame* in other deeds; and, if we do so, it does not matter, so long as one disciple of a *shebait* succeeds another disciple in the line of the original *shebait*. In this case Srinibash was a disciple of Nobin, and he succeeded Adyaita, another disciple of Nobin. Succession, therefore, was in accordance with the intention of the endowment. This being decided, the findings of the lower Appellate Court upon the questions of fact arising in the case dispose of the appeal, and it is, therefore, dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 474 OF 1909.

CASPERSZ, J.
SHARFUDDIN, J.
1911,
Heard,
23, August.
Jugdment,
28, August.

MIDNAPUR ZEMINDARY Co., LD. and others, Judgment-debtors, Appellants,
v.
KUMAR NARESH NARAIN ROY and others, Decree-holders, Respondents.

Civil Procedure Code (Act V of 1908), sec. 50, Or. XXII, r. 10, if applies to execution proceedings—Lis pendens, *if applies to mesne profits—Mesne profits, proceedings for ascertainment of, if continuation of suit—Suit, if can continue for one purpose though finally decided for other purposes.*

A decree for possession of an immoveable property directed that mesne profits be ascertained in the execution department. During the pendency of the suit in which the decree had been passed the property had been sold. On an application in the execution department by the decree-holder for delivery of possession and ascertainment of mesne profits against the purchaser pendente lite :

Held—*That the suit continued after the decree had been passed. Proceedings for the ascertainment of mesne profits are in continuation of the original suit. So the mesne profits must be held to be determinable in the suit itself and not by way of execution.*

RADHAPROSAD *v.* LAL SAHEB (1), MAHOMED UMARJAN *v.* ZINAT BEGUM (2), PURAN CHAND *v.* RADHA KISHEN (3) *referred to.*

That the whole suit continued and not for one purpose, viz., *the ascertainment of*

(1) L. R. 17 I. A. 150 : s. c. I. L. R. 13 All. 53, 65 (1890).
(2) I. L. R 25 All. 385 (1903).
(3) I. L. R. 19 Cal. 132 (1891).

mesne profits only. The purchasers pendente lite *were liable to pay mesne profits for the period during which they were in wrongful possession and their liability could be ascertained in these proceedings and not by a fresh suit.*

Semble—*Or. XXII, r. 10 of the new Code seems to have been made applicable to execution proceeding by Or. XXII, r. 12 by the principle of exclusion.*

HARISH CHANDRA *v.* CHANDPUR CO., LD. (5) *referred to.*

This was an appeal preferred on the 28th of September 1903, against an order of Babu Srish Chandra Mukerjee, Subordinate Judge of Zillah Rajshahye, dated the 31st of July 1909.

The facts of the case were briefly as follows :—

The decree-holders had obtained a decree against Robert Watson & Co. for possession of an immoveable property and for mesne profits which were left to be ascertained in the execution department. During the pendency of the suit the property in dispute was purchased by Mr. C. B. Gregson who in his turn sold it to the Midnapur Zemindary Co., Ld. This appeal arose out of an application for the execution of that decree against Robert Watson & Co., Mr. C. B. Gregson and the Midnapur Zemindary Co. The reliefs claimed in the application were that possession of the land "may be delivered to the decree-holder and mesne profits thereof may be ascertained by a local enquiry and on taking evidence." Mr. C. B. Gregson and the Midnapur Zemindary Co. while admitting the facts objected on the grounds that the execution of the decree could not be had against them and that at any rate they were not liable to pay mesne profits.

(5) I. L. R. 30 Cal. 961 (1903).

The learned Subordinate Judge disallowed the objection on the ground that as purchasers *pendente lite* the objectors were bound by the decree and held that they were liable for mesne profits "for the respective periods during which they were admittedly in possession."

Against this decision the objectors appealed on the grounds *inter alia* that the principle of *lis pendens* did not apply to the portion of the decree which ordered mesne profits to be ascertained in execution, that the proper remedy for the decree-holders was to institute a suit for mesne profits and that the decree for mesne profits being a money decree they could not execute it against the objectors on the principle of *lis pendens.*

Dr. Rash Behary Ghosh (with him *Babus Jogesh Chandra Roy* and *Rajendra Chandra Guha*) for the Appellants contended that though the principle of *lis pendens* might apply to the purchase by Gregson and the Midnapur Zemindary Co., so as to bind them by the decree against their vendor as to possession of the property purchased, it had no application to that for mesne profits. Even if the doctrine of *lis pendens* applied the decree could not be enforced against the purchasers by execution. With reference to the land the objection was technical for the decree-holders might take possession of the land in execution of the decree without making the purchasers parties and then the purchasers could be debarred from making any opposition by Or. XXI, r. 102, C. P. C. But there was no provision of law by which the decree for mesne profits could be executed against the purchasers. Sec. 52 of the Transfer of Property Act says that the purchaser *pendente lite* is bound by the result of the suit, but does not mean that the decree

could be executed against him in just the same manner as against the judgment-debtor. Refers to *Harish Chandra* v. *Chandpur Co., Ld.* (5).

On principle a decree could be executed only against persons who were parties to it or their legal representatives. Sec. 50 and Or. 22, r. 10 were the only provisions under which a decree could possibly be executed against a person not a party to it. Sec. 50 did not apply as Watson & Co. were not dead. Dissolution did not mean death and sec. 50 had no application to corporations. Gregson and the Midnapur Zemindary Co. were not legal representatives of Watson & Co. Or. 22, r. 10 dealt with devolution of interest which could only apply in respect of land. It did not also relate to execution.

[*Babu Dwarka Nath Chuckerbutty* refers to Or. 22, r. 12. That section by implication makes r. 10 applicable to execution proceedings.]

That was a new reading of the Code. On principle the decree for mesne profits could not be executed against the purchasers. For that would be making a new decree and the Court would have to find out for what period Gregson and the Midnapur Zemindary Co. had been in possession and to apportion the liability. The Subordinate Judge had read into the decree what was not contained in it.

The Subordinate Judge had practically applied the doctrine of *lis pendens* to a liability for a tort or wrong. Sec. 52 applied only to immoveable property. Even if that section be regarded as not exhaustive *lis pendens* could not on principle be applied to anything but immoveable property. [*Wigram* v. *Buckley* (6)]. The doctrine could not be applied to a wrong or any liability for any sum of money. Referring to possible argument from hardship he observed that equity was not all on the side of the decree-holder. The purchasers were protected by a covenant of title so that they were entitled to have indemnity ultimately from Watson & Co. They might therefore equitably claim that Watson & Co. should alone be made liable for the amount of the decree.

Babu Dwarka Nath Chuckerbutty (with him *Babus Upendra Lal Roy* and *Nares Chandra Sen-Gupta*) for the Respondents drew attention to the fact that in the first place, the decree against the Appellants was only for the period during which they themselves have been in possession and not for that during which Watson & Co. had possession. *Secondly*, there was no decree for money and his client was not executing any decree for money. The decree only directed the ascertainment of mesne profits in the execution department. In so far the present proceeding was only a continuation of the original suit. It was only when mesne profits were ascertained that there would be a final decree for money. Referred to sec. 47, C. P. C. (1908).

[*Dr. Ghosh.*—That is the new Code. The decree was under the old Code.]

Even under the old Code it had been held that the proceedings for ascertainment of mesne profits were proceedings in the suit and not in execution, the decree only becoming final when the mesne profits had been ascertained [*Puran Chand* v. *Radha Kishen* (3), *Radhaprosad* v. *Lal Saheb* (1)]. These proceedings were not in execution but an

(5) I. L. R. 30 Cal. 961 at p. 963 (1903).
(6) [1894] 3 Ch. 483 at p. 494.

(1) L. R. 17 I. A. 150: s. c. I. L. R. 13 All. 53, 65 (1890).
(3) I. L. R. 19 Cal. 132 at p. 135 (1891).

investigation upon evidence with a view to a decree. Gregson and Midnapur Zemindary Co. had been added as parties to the suit as being representatives in interest.

As purchasers *pendente lite* it was their duty to get themselves added as parties, and in that case there could have been no possible objection to the execution of the decree. It was not the duty of the Respondents and there is nothing to show that they were aware of the purchase.

He further submitted that Or. XXII, r. 10 applied to execution proceedings and the objector had been rightly made parties even if these were execution proceedings. Referred to Or. XXII, r. 12. Where any portion of any order was not applicable to execution proceedings it was expressly excluded. See Or. XXIII, r. 4. See also sec. 141, C. P. C.

Dr. Ghosh in reply.—Under the old Code there was only one final decree and there were no two stages of preliminary and a final decree. Ascertainment of mesne profits under the decree would thus be proceedings in execution. Reads sec. 244, C. P. C. Assuming that the suit is still pending it is not for the possession of land but only for fixing the liability in money. Here there is no *lis pendens*. Where there is a suit for land the representative might be added so long as the suit is pending because in this case the *lis* is the land which is still in dispute and in which the representative has interest. The pendency of the *lis* determines the liability to be added or substituted as a party. Where then, as in the case of ascertainment of a money liability *lis pendens* does not apply there can be no right to add or substitute a party. There is no devolution of that liability and no *lis* pending in which the purchaser has an interest. So far as it was a suit for money, therefore, it could not proceed against the purchasers. Their liability if any is a new liability and gives a new cause of action.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal, by the judgment-debtors, from an order of the Subordinate Judge of Rajshahye holding that they are bound, by the final decree of this Court, to pay mesne profits to the decree-holders for the respective periods during which they were admittedly in possession of the land in suit. That decree, dated the 13th December 1906, awarded possession and mesne profits against Robert Watson & Co., Ld. The litigation having commenced in the year 1899, the judgment-debtors successively purchased the property *pendente lite* on the 29th November 1902 and the 3rd December 1906. Though possession had been taken, in the latter case, on the 1st January 1906, they did not apply to have their names added as Defendants in the pending suit. On the 3rd April 1904 the decree-holders put in a petition for execution of their decree. They mentioned, in the ninth column of the application, the names of Messrs. Robert Watson & Co., Ld., Mr. C. B. Gregson and the Midnapur Zemindary Co., Ld. and they asked for possession of the decretal land, and that mesne profits might be ascertained against the judgment-debtors. The objection of Mr. C. B. Gregson and the Midnapur Zemindary Co. was disallowed. Hence this appeal.

On behalf of the judgment-debtors it has been urged that they cannot be made liable in execution proceedings for the mesne profits decreed against Messrs, Robert Watson Co.

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Now, it admits of no doubt that possession of the land in suit can be given to the decree-holders against Mr. Gregson and the Midnapur Zemindary Co. They could not, being transferees *pendente lite*, resist execution of the decree so far as it relates to immoveable property (Order XXI, r. 102 of the Code of Civil Procedure, 1908). The contentions of the learned Vakil for the judgment-debtors are that they are not the legal representatives of Messrs. Robert Watson & Co., that Or. XXII, r. 10 does not apply to proceedings in execution of a decree ; and that a money decree cannot be passed against persons who are not affected by the doctrine of *lis pendens*, so far as the liability to pay money in the shape of mesne profits is concerned, even if the suit be regarded as not having been terminated by the decree of this Court on the 13th December 1906.

The transferees, Mr. Gregson and the Midnapur Zemindary Co., are certainly not the legal representatives of Messrs. Robert Watson & Co. within the definition in sec. 2 (11) of the Code, but the case is not one under sec. 50 where action is taken on the death of a judgment-debtor. It is a case of devolution of interest by sale during the pendency of the litigation. The questions then arise whether the suit continued after the 13th December 1906 ; if not whether Or. XXI, r. 10 of the Code applies to execution proceedings ; and, if the suit did so continue, whether the claim for mesne profits can be separated from the claim for the land so as to defeat the operation of the rule of *lis pendens* which does not touch property which is not immoveable.

In our opinion, the suit continued after the decree of this Court had been passed. Proceedings for the assessment of mesne profits are in continuation of the original suit. No operative decree can be passed until the mesne profits are ascertained on enquiries made in accordance with the directions given in the interlocutory decree. In support of this position, we may refer to the decision of their Lordships of the Privy Council in *Radhaprosad* v. *Lal Saheb* (1), which was followed in *Mahomed Umarjan* v. *Zinat Begum* (2). The same view was adopted by a Full Bench of this Court in *Puran Chand* v. *Radha Kishen* (3), where reference is made to the earlier cases. That being so, the suit is a simple suit ; mesne profits are determined in the suit itself and not by way of execution for a fixed sum of money. In the present case, no decree for money is asked for nor is any decree for money being executed. No authority has been cited to us for the view that a suit may continue for one purpose only after it has ended for another purpose. The case is stronger than that of *Puran Chand* (1), for, there, possession of the land had been taken before mesne profits had been determined, and, in such circumstances, it might have been contended that the final decree for mesne profits was a separate decree [see Or. XX, r. 12 (2)]. The decree-holders here ask for possession of the land and for the assessment of mesne profits, simultaneously, with a view to a formal and final decree being prepared in respect of both the reliefs in one and the same suit [see *Gopal Chandra* v. *Preonath* (4)]. The question of *lis pendens* cannot arise independently for a part of the subject-matter of the litigation. The true test, as it seems to us, is whether Mr.

(1) L. R. 17 I. A. 150 : s. c. I. L. R. 13 All. 53, 65 (1890).
(2) I. L. R. 25 All. 385 (1903).
(3) I. L. R. 19 Cal. 132, 136, 137 (1891).
(4) I. L. R. 32 Cal. 175 (1904).

Gregson and the Midnapur Zemindary Co. were in wrongful possession of the land ; if they were, and it is admitted that they were, they are liable to pay the profits they actually received or might with ordinary diligence have received therefrom.

The remaining contention is as to the scope of Or. XXII, r. 10 of the Code ; whether that rule applies to execution proceedings need not be decided because the present case is not one in execution of decree. In *Harish Chandra* v. *Chandpur Co., Ld.* (5), doubt was expressed whether sec. 372 of the Code of 1882 applied to execution proceedings. The present Code (Or. XXII, r. 12) seems to imply, by the principle of exclusion, that all the rules of that order, except rr. 3, 4 and 8 are applicable to proceedings in execution of a decree or order, and we are inclined to think that r. 10 is so made applicable.

The appeal is dismissed with costs. We assess the hearing fee at five gold mohurs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2122 OF 1908.

HOLMWOOD, J. CHATTERJEE, J. 1911, Heard, 13, July. Judgment, 20, July.

FUZLUR RAHAMAN, Plaintiff, Appellant, *v.* ANATH BANDHU PAL and ors., Defendants, Respondents.

Mahomedan law—Agreement by Hindu to dedicate property for maintenance of mosque—Validity—Agreement interfering with work of Receiver.

An agreement by a Hindu to dedicate property for maintenance of a mosque is not enforcible according to Mahomedan law.

An agreement which would interfere with the work of a Receiver appointed by a Court should not be enforced as being opposed to public policy.

This was an appeal preferred on the 30th of July 1908, against the decree of Mr. F. Roe, District Judge of Zillah 24-Pergunnahs, dated the 24th of April 1908, affirming that of Babu Jogendra Nath Deb, Subordinate Judge of that district, dated the 28th of January 1907.

The Appellant who was the Plaintiff in the suit out of which this appeal arose was one of a number of co-sharers in a property which was in the hands of a Receiver appointed in a partition suit amongst the co-sharers. The property being heavily encumbered the Receiver entered into negotiations with several parties for a sum of Rs. 26,000 required to pay off the debts and the Respondent offered that amount to the Receiver and further agreed to spend a sum estimated at between Rs. 50 and 100 a year for the up-keep of a mosque belonging to the co-sharers ; and a *kobala* was executed in favour of the Respondent by the Receiver and a co-sharer to give effect to the agreement. The Plaintiff who was the managing co-sharer meanwhile brought this suit for specific performance of a separate agreement alleged by him to have been made by the Respondent to dedicate from 230 to 235 bighas of *lakheraj* and rent-paying land yielding an annual income of about Rs. 500 and some other properties for the maintenance of the mosque. Both the Courts below agreed in dismissing the suit, the lower Appellate Court being of opinion that the contract was immoral.

The Plaintiff preferred this second appeal.

(5) I. L. R. 30 Cal 961 (1903).

FUZLUR RAHAMAN *v.* ANATH BANDHU PAL.

Babu Sarat Chandra Roy Chowdhry for the Appellant.

Babus Mohendra Nath Roy and *Brojo Lall Chuckerburty* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for the specific performance of a contract said to have been made by Defendant No. 1 with the Plaintiff for making an *arpannamah* or dedication of 230—235 bighas of *lakheraj* and rent-paying land yielding an annual income of 500 rupees and some other properties for the maintenance of a mosque. The facts shortly are that a suit for the partition of the estate of Shamsuddin Naskar deceased was pending in the Original Side of the High Court. The Official Receiver was appointed Receiver in respect of the estate and under the order of the Court he made a contract of sale of the whole residue of the estate to Defendant No. 1 who was evidently acting as the *benamdar* of his father Defendant No. 1 for 26,000 rupees, the vendee agreeing to make an allowance of 50 to 100 rupees per annum towards the expenses of the mosque, existing on the property. After the affidavit of the proposed vendee containing these terms had been filed in Court, this agreement or contract is said to have been made unknown to the Receiver and without any intimation to the Court. Although the mosque belonged to all the heirs of Shamsuddin Plaintiff alone brought the suit. The Court of first instance dismissed the suit on the ground of non-joinder as well as on the merits holding that the *ekrarnamah* in suit was not genuine: and that even if it were genuine it could not be enforced as it was illegal in that no Hindu could under the Mahomedan law make a dedication in favour of a mosque and that in any case it was an attempt to secure for the Plaintiff an illegal advantage in his own favour to the exclusion of his co-sharers.

On appeal by the Plaintiff, the District Judge upheld the decree on the ground of non-joinder but did not come to any definite findings on the merits.

On second appeal before us it has been contended that the District Judge is wrong in dismissing the suit and a suit for the specific performance of the contract was maintainable by the Plaintiff who alone was a party to the contract and that if the co-sharers were necessary parties they might have been joined as Defendants. We should have been inclined to make a remand for a decision on the meri s in the presence of all the members of the family but in the view that we take of the legal aspect of the case on the merits, we think it would be quite useless to do so.

The *arpannamah* or dedication that was to be made under the alleged contract was one for the maintenance of a mosque. The validity of such a dedication would depend upon the provisions of the Mahomedan law. Mr. Baillie in his Digest of Mahomedan law, p. 552, says "It is a further condition that there be a nearness, *i.e.*, some relation between the appropriator and the objects of the appropriation * * * If a *zimmi* should appropriate his mansion for a temple, a church or a house of fire it would be void, and in like manner if it were for repairing them or the supply of oil for their lamps." Mr. Ameer Ali in his Tagore Law Lectures for 1884, p. 160, says "any person of whatever creed may create a *wakf*, but the law requires that the object for which the dedication is made must be lawful according to the creed of the dedicator as well as the Islamic doctrines. Divine approba-

FUZLUR RAHAMAN *v.* ANATH BANDHU PAL.

tion being the essential element in the constitution of a *wakf* if the object for which a dedication is made is sinful either according to the laws of Islam or to the creed of the dedicator it would not be valid. Consequently a Moslem cannot make a dedication in favour of an idol, a non-moslem place of worship, or any other object which is recognised as unlawful or sinful in his law nor can a Non-Moslem validly make a dedication for a Moslem place of worship." And again at p. 424 "A Non-Moslem who fulfills the conditions above-mentioned can make *wakf* of the whole or part of his property." The lawmaker but one exception to the liberality of those who do not follow the Islamic faith: it forbids their constituting a mosque as beneficiary of their *wakf*. "It is unlawful for an unbeliever to make a *wakf* in favour of a mosque." See also Wilson's Anglo Mahomedan Law, p. 365.

The object of the agreement was therefore unlawful as the Defendants Nos. 1 and 2 are Hindus and the contract is void.

There is another ground upon which the contract impugned as unlawful. The property was then in the hands of the Court Receiver who had received an order for making a sale. The Receiver was making the contract for the sale. The agreement in dispute would have the effect of making a large deduction from the property sold without the knowledge of the Receiver. The deduction would be in favour of an object to which all the co-sharers might not agree and which would enure to the profit of the Plaintiff alone as he was to be the *mutwalli*, the consideration being that he would refrain from doing an unlawful act by obstructing the purchaser in taking possession. It would be against public policy to allow such an interference with the work of the Receiver. On both the above grounds the agreement even if proved is unlawful.

We think therefore that it would be a lamentable abuse of judicial procedure to allow further proceedings for deciding the questions of fact that would arise if the agreement were lawful. In the result, we dismiss the appeal but without costs in any Court as there are some indications in the record of some sort of secret understanding between the parties.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

L. P. APPEAL NO. 76 OF 1910.

JENKINS, C. J.
CHATTERJEE, J.
1911,
24, August.

UPENDRA NATH GHOSH and anr., Plaintiffs, Appellants,
v.
THE CHAIRMAN OF THE CALCUTTA CORPORATION, Defendant, Respondent.

Evidence Act (I of 1872), secs. 13, 83—Map of khas mehal *land prepared under direction of Government—Admissibility in boundary disputes—Witness, non-attendance of—Process to compel attendance refused without good ground—Second appeal.*

In a dispute relating to the boundary of a holding between the Plaintiff and the Municipal Corporation of Calcutta:

Held—*That a map prepared in 1872 under the direction of the Government acting not in its sovereign capacity but as the landlord of this and neighbouring holdings, was admissible in evidence, if not under sec. 83, under sec. 13 of the Evidence Act.*

A servant of the Municipality was summoned at the Plaintiff's instance to produce certain documents which the Plaintiff maintained would support his case of adverse possession of the land in dispute, but he

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failed or declined to attend, and the Plaintiff's application for a warrant to compel his attendance was rejected without good reason. The suit was dismissed on the ground, amongst others, that Plaintiff was not in possession for 12 years :

Held, *on second appeal, that there should be a re-hearing after compelling the witness to attend and produce the documents.*

This was an appeal under sec. 15 of the Letters Patent, preferred on the 18th of August 1910, against the decree of Mr. Justice Vincent, dated the 28th of July 1910, passed in Second Appeal No. 2242 of 1908.

The facts of the case will appear from the judgment of

VINCENT, J.—This appeal arises out of a dispute regarding a small plot of land 1 cotta, 10 chattaks in area in Bhowanipur.

The Plaintiffs allege that this land is part of a holding of theirs in the Government estate of Panchannagram and that in any case they have been in possession of the same for many years and have acquired a title to it by adverse possession whether the land was originally included in their holding or not. They allege further that the Defendant Municipality relying on certain entries made in a map prepared under the Bengal Survey Act has lately been attempting to take possession of the said land. The Plaintiffs therefore in this suit seek for a declaration of their title and confirmation of their possession and further pray that an injunction may be issued prohibiting the Defendant from, in any way, interfering with their possession.

The Defendant Municipality states that the land in dispute has been measured as part of a public road in certain proceedings under the Survey Act and that as part of a public road the land is Municipal property under the provisions of Act III (B. C.) of 1899. The Plaintiffs' suit has been dismissed in both the lower Courts and hence this appeal is filed.

Now although the memorandum of appeal contains many grounds on which the decree is objected to, yet learned Counsel who appeared for the Appellants stated specifically in Court that he would only press two points, namely, (1) that a certain map called Billon's map had been wrongly admitted in evidence and, if admissible, undue weight had been given to it in deciding the suit and the appeal in the Courts below, and (2) that the Court of first instance had improperly refused to take steps to enforce the attendance of an important witness for the Plaintiffs. An affidavit was filed showing that this latter point was pressed in the lower Appellate Court, although it is not dealt with in the judgment. And reference has been made in detail to the various applications and orders on record regarding the attendance of this witness.

Accepting the affidavit as correct and taking it as a fact that the lower Appellate Court did not deal with this question I think that as all the materials are on the record and the facts have been placed before me in some detail, it would serve no useful purpose to remand the case to the lower Court for a decision as to whether the attendance of this witness was necessary or not and that the point may well be decided in this Court.

I find on a reference to the record that it is true that more than one application was made to summon this witness who is or was apparently a Municipal assessor, and it is also a fact that he did not attend. It is also correct that an application was made to the Court to issue a warrant to enforce his attendance and this application was refused. I am not, however, satis-

fied that the application for the issue of warrant was made in due time or that the Court of first instance ought to have issued a warrant at the stage of the proceedings when the application for such process was made. Up to the 24th of September 1907 there was apparently some hope of settling the suit amicably and on that date also an application was made for further time to compromise. But the application was refused and on the 25th September the hearing commenced. On that date witnesses were examined and the hearing was continued on the 26th and 27th. The trial proceeded again on the 30th and on that day the tenth witness for the Plaintiffs was examined and it was not until the 1st October 1907, that any application was made to enforce the attendance of this witness. The learned Munsif records the following order on that application :—" Plaintiff puts in a petition for warrant of arrest of a witness. No such petition can be allowed at this stage. Application rejected." In my opinion, this order was a proper order, having regard to the facts that the Plaintiffs' case was then nearly completed and that no application had been made when the hearing commenced. I am therefore unable to say that it was incumbent on the Court to enforce the attendance of this witness and this point is decided against the Appellants.

In regard to the second point it is urged and with some force that the map of Mr. Billon upon which reliance has been placed is not a map prepared under the authority of Government as the sovereign power but one prepared by Government as landlord in its own interest and reference has been made in particular to the cases of *Janmajoy Mullik* v. *Dwarka Nath Mayte* (1) and *Ram Chandra Sao* v. *Bunshidhar Naik* (2). But although it is true that Billon's map is not possibly admissible as a public record, it is undoubtedly, in my opinion, admissible under sec. 13 of the Evidence Act, *quantum valeat.* The document is more than 30 years old. It was apparently produced from proper custody and was therefore, in my opinion, admissible in evidence. In any case, even if this map is excluded it appears that the Plaintiffs have on the findings of fact arrived at by the lower Courts entirely failed to adduce satisfactory evidence to discharge the *onus* which lay upon them. On the pleadings it is clearly incumbent on the Plaintiffs to prove either a title by adverse possession or that the land was included within their holding. The finding of the learned District Judge is distinct that the land has not been in the possession of the Plaintiffs for twelve years and the evidence of title adduced by the Plaintiffs was accepted in neither of the Courts below. In fact the learned District Judge goes so far as to say that the Plaintiffs have deliberately suppressed their title-deeds and have produced other deeds containing boundaries which are obviously wrong and he further states that the Appellants have no evidence of title or of possession beyond that afforded by the judgments of Mr. Smart and Mr. Marr in the survey proceedings and these judgments contain a definite finding that the possession of the Appellants is a possession by encroachment only. It appears to me that these findings of fact are conclusive against the Appellants and that they have failed to prove any title which would justify the Court in making a decree in their favour. It follows, therefore, that this appeal must be dismissed with costs and the decision of the lower Courts must be confirmed.

(1) I. L. R. 5 Cal. 287 (1879).

(2) I. L. R. 9 Cal. 741 (1883).

UPENDRA NATH GHOSH *v.* THE CHAIRMAN OF THE CALCUTTA CORPORATION.

Babus Susil Madhub Mullick and *Provash Chandra Mitter* for the Appellants.

Babu Debendra Chandra Mullik for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This is an appeal from a decision of Mr. Justice Vincent affirming the decree of the lower Appellate Court, with the result that the Plaintiff's suit stands dismissed.

Two objections were taken before us on behalf of the Plaintiff; *first*, it was said that there was improper reception of evidence inasmuch as the map prepared by Mr. Billon was admitted. But, in our opinion, that map was admissible, if not under sec. 83, still under sec. 13 of the Evidence Act : The value to be attributed to it, when admitted, was a matter to be determined by the Court of fact : so that had matters rested there, we should not have interfered with the decree of the lower Appellate Court. But there is an incident in the case which entirely calls for interference on the part of this Court, and it is this : The Plaintiffs were desirous of establishing their possession of the land in suit, and it was obviously most material for them to be able to prove that possession. For the purpose of proving that, they desired to call as a witness a servant of the Municipality and to require him to produce certain documents which, they maintained, would go far to show that their contention as to their possession was correct. They made repeated attempts to procure the evidence of that witness : but he absolutely failed or declined to attend. In those circumstances, the Plaintiff not unnaturally asked the Court to take measures to compel his attendance, by arrest if necessary. For some reason, which does not appear satisfactory to me, the Court of first instance refused to take this measure. We have asked the learned pleader who appears on behalf of the Defendant Municipality how it was that a servant of the Municipality should have acted in this way and should have practically set the summons of the Court at defiance. He was unable to give any explanation. I can see nothing to excuse such conduct. If, as has been suggested, it was in any way due to the Municipality itself, I need hardly say that it would be most reprehensible conduct. But we are not in a position to form an opinion as to the responsibility of the Municipality although that is the statement made before us.

In the circumstances of the case, the proper course will be to set aside the decrees of the lower Appellate Court and of the Court of first instance and to send back the case for re-hearing and determination, when the attendance of this witness has been compelled, with the production of the documents that were required from him for the purposes of this case.

The Municipality must pay the Appellants costs up to the present time.

CHATTERJEE, J.—I agree.

Appeal allowed :
Case remanded.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM EXTRAORDINARY ORIGINAL CIVIL JURISDICTION.

No. 61 OF 1911.

JENKINS, C. J.
WOODROFFE, J.
1911,
27, November.

D. WESTON and others,
v.
PEARY MOHAN DAS.

Code of Civil Procedure (Act V of 1908), Or.

D. WESTON *v.* PEARY MOHAN DAS.

41, r. 10—Security for costs of appeal—Discretion of the Court—Inability of Appellants to pay costs—Appeal by Government servant—Interest of the Government—Nature of security—Bond of the Secretary of State for India in Council.

When the Plaintiff-Respondent applies under Or. 41, r. 10 of the Code of Civil Procedure for security for the costs of the appeal and of the original suit in view of the fact that the Defendants-Appellants have no immoveable property and are in impecunious circumstances and that somebody else who is not a party to the suit but has an interest in it have been defraying the costs of the litigation,

Held—*That it was a case where the Court should exercise its discretion in directing security for the costs to be given.*

In November 1909, the Petitioner brought a suit in Midnapur against Mr. Donald Weston, a member of the Indian Civil Service, Moulvi Muzarul Huq, Deputy Superintendent of Police and Lal Mohun Guha, Inspector of Police. The sum and substance of the Plaintiff's case was that these three Defendants in concert and conspiracy tried to extort a confession from the son of the Plaintiff who was then being prosecuted for an offence under the Explosives Substances Act, and that these Defendants in the first instance tried by persuasion and then by compulsion to induce the Plaintiff to make his son confess. The suit was subsequently transferred to the High Court under its Extraordinary Civil Jurisdiction. Mr. Justice Fletcher after a prolonged hearing decreed the suit and awarded Rs. 1,000 by way of damages with costs on Scale II. The entire costs of the Defendants in the lower Court were borne by the Government and the Government intended to bear the Defendants' costs in the appeal. Pecuniarily the Defendants were not in a position to pay the costs of either.

Mr. K. B. Dutt (with him *Mr. H. D. Bose*) contended that as the Defendants were being supplied with funds by somebody else, it was a fit case in which their Lordships should exercise their discretion in awarding the Plaintiff security for costs. Poverty in itself was no ground for asking for such security but when it was established and admitted that it was not the Defendants who were carrying on the litigation but somebody else who was in a position to give security, it was a proper case for the exercise of that discretion. *In re Clough: Bradford Commercial Banking Co.* v. *Cure* (1) and also *Whittaker* v. *Kershaw* (2), it has been held that if the Appellant according to his own statement is a pauper, and it appears that others presumably able to furnish the necessary security were interested in the matter, the case is one where security should be given. [*Jogendra Deb Roykut* v. *Funindro Deb Roykut* (3)]. If security was not given the position of the Plaintiff, in the event of the appeal being decided in his favour, would be that he would be debarred from realising the costs from anybody for it was well-established now that no separate suit lay against the person who was helping the Defendants to carry on this litigation. [*Ram Coomar Kundu* v. *Chandra Kant Mookerjee* (4)]

Mr. W. Garth in opposing the application said no ground had been shown for ordering the security for costs in this case. Weston and the Defendants cannot pay, any more than the Plaintiff can

(1) 35 Ch. D. 7 (1887).
(2) 44 Ch. D. 296 (1890).
(3) 18 W. R. 102 (1872).
(4) I. L. R. 2 Cal. 233 (1876).

THE
Calcutta Weekly Notes.

Vol. XVI.] MONDAY, JANUARY 8, 1912. [Nos. 6 & 7

Contents.

NOTES.

HIS MAJESTY AFTER A STAY OF TEN DAYS IN this city leaves Calcutta to-day *en route* to England. His Majesty by his enlightened policy and large-hearted sympathy for his British Indian subjects and his earnest desire and sincere solicitude for their well-being and progress has won the hearts of the people in a manner unprecedented and unique in the history of British India. Perfect peace, joy and loyalty have prevailed throughout the length and breadth of India since their Majesties set their foot on the shores of this ancient and historic land. All India wishes Their Imperial Majesties *bon voyage* and long life, and hopes for the return of their Majesties to the Indian Empire at their pleasure. A periodic visit of their Majesties to India would be more conducive to the peace, order and good government in this country and to the advancement of its people than anything else that we can conceive of.

WE PUBLISH IN THIS ISSUE A FULL REPORT OF the judgment of Fletcher, J., in *Peary Mohan Das* v. *Weston and others*, otherwise known as the "Midnapur Damage Suit." As an appeal is now pending against this judgment, any comment on this case would obviously be inappropriate in these columns. The case is, however, the first of its kind in India. It raises important legal questions which had never before come up before the Court in this country. In such circumstances, a reasoned pronouncement on the questions of law raised, and a careful analysis of facts which, when they transpired, aroused the profoundest public feeling, have a value all their own.

IT IS BEING SAID THAT THE ESTABLISHMENT OF a Lieutenant-Governorship for Behar, Chota Nagpur and Orissa will necessitate the establishment of a High Court at Bankipur. But we have reasons to believe that the establishment of such a High Court will not meet with the approval of the people of Orissa and Chota Nagpur. In view of this fact and also out of regard for the principle that the judicial and administrative functions should always remain separate, we would make a suggestion which, we expect, would be acceptable to all our friends of the sister Province. Our proposal is that the High Court of Calcutta should continue to be, as it is at present, directly under the Government of India and not that of the Provincial Governments of Bengal and Behar. This would ensure the independence of the High Court. Should this be so, the appeals from Orissa and Chota Nagpur may continue to be disposed of, as at present, by the Judges presiding over the Burdwan Group. But as for appeals from the Patna Group and those from Monghyr, Bhagulpur and Purneah, which are now comprised in the Burdwan Group, as also for criminal appeals and revision cases from the above districts two appellate benches at Bankipur would suffice. The local Government need only provide a suitable Court house with judges' quarters at Bankipur. This arrangement would prove much less expensive and would give satisfaction to Orissa and Chota Nagpur as well.

AN ARRANGEMENT OF THIS KIND WILL ALSO BE to the advantage of Behar in many ways. In the first place the Calcutta High Court has inherited jurisdictions which a new High Court at Bankipur will not possess. *Secondly*, the Court being not under the local executive will not be liable to local influences and would necessarily be more independent and free from prejudice in dispensing justice. *Thirdly*, the people of Behar will have the choice of four or if necessary more judges out of 16, 18 or 20 judges of the Calcutta High Court. The personnel of the Benches at Bankipur may be changed every three months or oftener if necessary. *Fourthly*, in suitable cases the people of Behar will have the right of institution and trial of cases at Calcutta when there is any apprehension that it would be difficult to obtain a fair trial locally. *Fifthly*, it will relieve the new Province of the financial burden of maintaining

a new High Court. *Sixthly*, two or more Benches of the Calcutta High Court sitting at Bankipur all the year round would surely lead to the growth of a strong Bar there under the protection of an independent High Court. The Bar at Bankipur would thus be in a better position to preserve their independence, and would be less subject to executive or other outside interference in respect of admittance and other professional matters and would be less likely to be brought under such arbitrary rules as have recently been promulgated in the Punjab.

LASTLY, IN THE MATTER OF HIGH COURT JUDGESHIPS, the vakils and barristers practising at Bankipur will stand an equal chance in every vacancy that may occur amongst the six or more barrister judges and three or more vakil judges of the Calcutta High Court. Even assuming that a new High Court of six judges be set up at Bankipur for the whole of the new Province, the utmost that the local Bar may expect in the matter of appointments is to have only one vakil judge and one barrister judge from amongst them. This minimum may be assured should Behar continue to be under the jurisdiction of the Calcutta High Court, and should there be men of sterling ability there the chances of a larger number of judgeship going to Behar is quite a reasonable possibility. A judgeship of the Calcutta High Court, moreover, is both better paid and carries greater prestige, and we presume our Behar brethren will prize it more than the judgeship of any local High Court. The educated community all over India are now demanding that all the High Courts should be under the Imperial Government and independent of the local Government. We are confident therefore that our Behar friends would not take any retrograde step in this connection. Bengal, Behar and Orissa have had a common history since ages past and although we are now separating, we part as the best of friends wishing each other every prosperity and progress. We offer these suggestions because we believe that a bond of unity under the jurisdiction of the premier and historic High Court in India will be of mutual advantage to both the Provinces of Bengal and Behar.

THE FIRST STEP TOWARDS THE RE-UNION OF Bengal and Eastern Bengal under a Presidency Government is the settlement of the boundaries of Bengal so re-united. It appears from the Governor-General's and the Secretary of State's despatches that this re-union is founded on the sound principle that the Bengalee-speaking people should be placed under one Government. We are sure that if the boundary of the new Presidency Government is settled having regard to this linguistic principle it would give uniform and universal satisfaction to the entire Bengalee-speaking people.

IN FORMING THE NEW PRESIDENCY OUT OF THE five great Divisions, *viz.*, Chittagong, Dacca, Rajshahye, Presidency and Burdwan, some bordering districts or portions thereof will have to be annexed to each. For instance Sylhet which has a Bengalee-speaking population should be included in Bengal. Sylhet not very long ago formed an integral part of Bengal. Now that the people of Sylhet are eager to join the Bengal Presidency they should be re-united with Bengal. The same may be said of Goalpara in North Assam which is contiguous with the Rajshahye Division and where the people speak the Bengalee language and call themselves Bengalees. Darjeeling District which before partition formed part of the Rajshahye Division would of course revert to it. On the North Western border of the Dinajpur district there are portions of the Purneah district such as the Katihar Munsif's chowki where the people are entirely Bengalee-speaking. The eastern portion of Purneah where Bengalee is spoken should be included in Bengal.

THEN COMING FURTHER SOUTH WEST ALMOST 75 per cent. of the population of the Sonthal Purgunahs are Bengalee-speaking and the area is being rapidly developed by the Bengalee people who have sunk in these parts a very large capital. The Sonthal Purgunahs although included in the Bhagulpur Division have never formed a part of Behar. In any case the Bengalee-speaking areas from Sahebgunj, Rajmehal, Pakur, Sitarampur, Barakar, Jamtara, Madhupur and Deoghur ought to remain with Bengal. These parts are also mostly Bengal's health resorts and both in the interest of the people and of the Bengal officials these parts should form a part of the Bengal Presidency.

IN THE DISTRICT OF MANBHOOM THE PEOPLE ARE almost entirely Bengalee-speaking, and the Court language is also Bengalee. The coal and other mines in this district, as also in the Sonthal Purgunahs and in Singbhoom, are owned by companies and firms who have their head offices in Calcutta. The Dhalbhoom Purgunah of the Singbhoom district and the four permanently settled Purgunahs of Balasore which are adjacent to the Midnapur district are also Bengalee-speaking. These Purgunahs with the town of Balasore ought to remain with Bengal. We have reasons to believe that the people of the areas mentioned above are very anxious that they should remain with Bengal and they would be greatly disappointed amidst the universal rejoicing resulting from the Royal visit

should they be separated from their kinsmen. In determining the boundaries great care should be taken in respecting the wishes and sentiments of the people who are likely to be affected thereby. It should be remembered that what will be done now is not likely to be undone in any near future. So, if necessary, the boundaries of some bordering districts should be re-adjusted on linguistic basis and no hard and fast rule followed that the existing districts are inseverable.

WE GREATLY REGRET TO ANNOUNCE THE SOMEWHAT sudden death of the Hon. Mr. Krishnaswamy Iyer on the 27th ultimo. His loss would be keenly felt not only in his own Presidency but all over the country, in every part of which he was a well-known figure. He had greatly distinguished himself in the profession and was in the very forefront of most public movements of the day before he was elevated to the Bench. His subsequent appointment as a member of the Executive Council of Madras in succession to the Maharaja of Bobbili was the most popular of the several appointments to similar posts under the new Indian Councils Act. The Government of Madras has signally demonstrated their appreciation of his services by ordering public mourning, an honour to the dead of which he was well worthy. All India joins Madras in mourning the loss of one of her most distinguished men who was in the prime of life and had a career of great usefulness before him.

WE GREATLY REGRET TO RECORD THE DEATH of Mr. R. Rutter, the seniormost attorney of the Calcutta High Court. He got enrolled on the very year that the High Court at Calcutta was first established and his career as an attorney, during this long period of close upon half a century, was marked by success and popularity. We convey our sincerest condolence to the bereaved family.

Review.

THE LAWS OF ENGLAND. *Being a Complete Statememt of the Whole Law of England. By the Right Honourable the Earl of Halsbury, Lord High Chancellor of Great-Britain, 1885-86, 1886-92, and 1895-1905, and other lawyers. Volume XIX.*

Of the titles dealt with in this volume the most important from the point of view of the Indian lawyer is the last, *viz.*, "Malicious Prosecution and Procedure." Under this title are dealt with not merely the law relating to malicious prosecutions and abuse of criminal proceedings but also the law relating to malicious abuse of civil proceedings. This latter law as applied by English Courts may be safely taken to be the law which will be applied, should occasion arise, in this country. Such cases have however been practically unknown in this country, the reason no doubt being that the law is not very widely known here. In passing, we note an interesting fact, *viz*, that the Privy Council decision in *Rum Coomar Coodoo* v. *Chander Canto Mookerjee*, 2 App. Cas. 186, figures as one of the authorities for the proposition that apart from the law of champerty and maintenance, an action will lie against one who maliciously and without reasonable and probable cause puts the law in motion in the name of a third person who is unable to pay the taxed costs of the litigation. The next title in order of importance is "Lien" under which are discussed both common law and equitable liens, and general as well as special liens. The law relating "Lunacy" is very highly developed in England, but lawyers in this country will undoubtedly derive light from it when difficulties arise in applying the very meagre local statutory provisions on this subject. The law of "Limitation of Actions" will also be found useful by Indian lawyers in interpretting and applying analogous provisions in the Indian Limitation Act. We have statutes in this country corresponding to the Loan Societies Act of 1840 in the recently enacted Co-operative Credit Societies Act, and to the Literary and Scientific Institutions Act of 1854 in a similar enactment of the Governor-General in Council. The English statutes are no doubt much more elaborate, but the treatment of the titles "Loan Societies" and "Literary and Scientific Institutions" in this volume will commend itself not merely to the lawyer but to the legislator as well. The laws relating to "Local Government" and "Magistrates" are purely English and we need do no more than mention them in this notice. The law in this volume is stated as at 20th October 1911.

We have also to notice the second "Supplement" to the laws of England bringing the law as stated in the first seventeen volumes up to date.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Stephen Smith & Co.* v. *Coleman & Co.*, "*Ld.*" Before the MASTER OF THE ROLLS AND LORDS JUSTICES MOULTON AND FARWELL. 14th November 1911.

Trade-mark—Similar get-up—Evidence of intention to deceive.

This was an appeal from a decision of Swinfen Eady, J. The Respondents sued for an injunction to restrain the Appellants from selling "Carvino" in bottles so got up as to deceive the public that the preparation was "Wincarnis." The Plaintiff's case was that the Defendants had gradually and systematically tried to imitate the get-up of "Wincarnis." In fact the Defendants attempted to register their preparation as "Lemcarnis" although they withdrew their application subse-

quently. The Court below was of opinion that the get-up and the name coupled with previous attempts showed an intention to deceive and was likely to deceive. On appeal the learned Judges reversed that finding. In the course of his judgment the MASTER OF THE ROLLS observed :

The principles of law applying to the present case were known beyond dispute. The Respondents had for years been using different labels for their meat wine, which had been varied more and more in the direction of making "Wincarnis" the distinctive name for their wine; and they had sold this wine in champagne bottles wrapped in pink paper. All makers of this class of goods got them up in champagne bottles with pink paper, and it was immaterial that, apart from the labels, "Wincarnis" and "Carvino," they were identical in appearance. Turning to the label of "Carvino," he asked himself whether it was possible for anybody or ordinary intelligence and possessed of proper eyesight to mistake "Carvino" for "Wincarnis," and he came to the conclusion that it was not, and that it was impossible for the Court in the absence of any evidence of deceit to draw the judicial inference that the two get-ups were so alike as to be calculated to deceive. Moreover it had been decided by the Comptroller, notwithstanding the opposition of the Respondents, that "Carvino" was not a trade-mark calculated to deceive.

He thought the reasons given by the Appellants for their adoption of "Carvino" in place of "Lemco" were perfectly satisfactory, and he failed to follow Mr. Justice Swinfen Eady's view as to this part of the case. He was unwilling to differ from the learned Judge, who had had an opportunity of seeing the witnesses, but he thought the learned Judge had attached too much importance to the fact that the Appellants had at one time applied through a clerk to register "Lemcarnis." This had failed, because its registration was prevented by the Leibig Extract Company on the ground that its registration would be a breach of a contract between them and the Appellants. As regarded the present case, this was entirely irrelevant.

Messrs. Walter, K. C., and Kerly for the Appellants.

Messrs. Buckmaster, K. C., and Sargant for the Respondents.

B. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CIVIL APPELLATE JURISDICTION. Before COXE AND N. R. CHATTERJEE, JJ. APPEAL FROM ORDER No. 312 OF 1910. KRIPALI SING, Appellant *v.* POLA RAUT, Respondent. 12th December 1911.

Civil Procedure Code (Act XIV of 1882), secs. 310A, 311—Case prosecuted under sec. 310A—Case if can be tried under sec. 311—Estoppel.

The properties of the judgment-debtor Respondent were sold on the 10th August 1908 in execution of a rent decree and purchased by the Appellant. The judgment-debtor more than one month after the sale applied under secs. 310A and 244, C. P. C. (1882), to set aside the sale. There were certain allegations of fraud on the said application. The Munsif held that the auction-purchaser had no *locus standi* to oppose the application and directed the judgment-debtor to put in money under sec. 310A which he did on the 22nd September 1908. The auction-purchaser appealed to the District Judge and at the hearing a preliminary objection was taken by the judgment-debtor that no appeal lay as the case was under sec. 310A, C. P. C. The District Judge giving effect to that contention dismissed the appeal The auction-purchaser then moved the High Court and obtained a Rule which was made absolute and the case remanded for trial giving the auction-purchaser an opportunity, of being heard. After remand the Courts below held that the application of the judgment-debtor was in substance under secs. 311 and 244, C. P. C., and as there were material irregularity and fraud on the part of the decree-holder's agent the sale should be set aside. The auction-purchaser then preferred the above appeal to High Court and it was urged on his behalf that the case having been fought out up to High Court on the basis that the application was under sec. 310A and the auction-purchaser's right of appeal having been successfully met by a preliminary objection taken by the judgment-debtor himself he was debarred from proving that the case was under sec. 311, C. P. C., and that he could not simultaneously maintain a plea under secs. 310A and 311 in the same petition, and that the Courts below were wrong in going into the question under secs. 311 and 244.

Held—That the Courts below were wrong in going into the question under sec. 311, C. P. C., and the judgment-debtor could not revive his case under sec. 311, C. P. C., after having elected to proceed under sec. 310A, C. P. C.

Babu Kshetra Mohun Sen for the Appellant.

Babu Upendra Nath Chatterjee for the Respondent.

A. T. M. *Appeal allowed: Sale confirmed.*

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pay. The Plaintiff and the Defendants are all in the same position. If it had appeared that the Defendants had no interest in the case and that somebody else was finding the funds that might be a ground for the Court to pass such an order as is asked for. If by the phrase "Government is carrying on the litigation" is meant that the Government is paying the costs there is no quarrel but he rupudiated the use of that phrase in the sense that the Government has any interest in the matter at all. The three Defendants have got their interests on their own behalf. They are all Government servants and they are charged with a very serious criminal offence. If they are found guilty of the charge they will not be permitted to continue in public service. Therefore the matter in issue is of grave interest to them. There is no law which says that poor men should not be assisted. *Jogendra Deb Roykut* v. *Funindro Deb Roykut* (3) does not apply. Government has no interest in the case. They merely defrayed the costs. Government had power to pay costs of suits in which their officers were concerned. Government have no interest in the result of the suit except for the sake of their good name, that is, to see that their officers are properly protected. They have no interest beyond that. If the Defendants have to pay costs they might be shut out. And the only security they can offer, if they are ordered to furnish any, is a bond of the Secretary of State for India in Council. But that has been held to be neither valid nor binding.

Mr. Dutt in reply.—That the Government was not launching upon this heavy expenditure just for the sake and pleasure of helping these Defendants but the good name of the Government depended on the result of the case. Therefore the Government was interested in the case. The legal objection there was in the Secretary of State's bond in respect of the Dumraon case would not hold good here for the circumstances of the two cases are quite different.

(3) 18 W. R. 102 (1872).

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This is an application to this Appellate Court under Order XLI, Rule 10 of the Code of Civil Procedure which empowers the Court in its discretion to demand from the Appellants security for the costs of the appeal, or of the original suit, or of both. The only materials on which we are entitled to decide this application are the allegations contained in the petition. Those allegations are uncontradicted, and it has been stated before us by Mr. Garth very candidly that they are admitted to be correct. Now, it is stated in that petition that the Respondents' costs which have been ordered to be paid amounted to a very large sum, roughly estimated, of about two lacs and fifty thousand rupees; that the Appellants have no such means as to be able to pay the costs; that the Appellants have no immoveable property from which the costs can be realised, and that the prosecution of the appeal will entail a very heavy expenditure on the part of the Plaintiff-Respondent, and, then it is said that the suit was and the present appeal is being carried on by the Government on behalf of the Appellants at an enormous expense. It appears to me further having regard to the action of the Government, that the Government is really interested in this litigation for reasons which have been indicated in

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the course of the argument. In these circumstances, I think this is eminently a case where we should exercise our discretion in favour of directing security for costs, and there will be an order, as prayed, for such security.

The only question that has arisen as to the nature of the security is a doubt which was suggested by Mr. Garth whether the Respondent would be satisfied with the bond of the Secretary of State for India in Council. The Respondent says that he would be perfectly satisfied with such security, so that if the Appellants are prepared to offer such security, then the security in that form can be taken in the circumstances of the case. In view of the admission of Counsel on behalf of the Appellants and the difference in the circumstances of the case, I do not think we need be concerned with the determination of the Court in another case to which a brief allusion was made.

The costs of this application will be costs in the appeal.

WOODROFFE, J.—I agree.

Mr. J. C. Dutt, Attorney for the Plaintiff-Respondent, Petitioner.

Messrs. Orr, Dignam & Co., Attorneys for the Defendants, Appellants.

A. K. G. *Application granted.*

[PRIVY COUNCIL.]

[APPEAL FROM ALLAHABAD.]

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1911,
1, November.

JIT SINGH, since deceased (now represented by Raghuraj Singh and others), and anr., Defendants, Appellants,
v.
MAHARAJ SINGH, Plaintiff, Respondent.

Appeal to Privy Council—Point taken there for the first time.

Where on the death of a Hindu widow, the son of her daughter's son having sued to recover his share of the reversionary interest the suit was dismissed by the first Court but was decreed on appeal by the High Court, an objection taken for the first time before the Judicial Committee that the Plaintiff was not entitled to sue in the lifetime of another son of the daughter was not entertained.

This was an appeal from a judgment and decree of the High Court at Allahabad, dated the 20th of February 1907, which set aside a decree of the Subordinate Judge of Shahjahanpur, dated the 18th March 1904, which dismissed the claim of the Plaintiff, the present Respondent, with costs. On appeal the High Court decreed his claim for the property in suit, a portion of which was in the possession of the Defendants, the present Appellants.

The question for determination in the appeal was whether the father of the Respondent, named Khangar Singh, died before or after the death of one Ummed Kunwar, a Hindu widow, whose name during her lifetime was recorded in the

JIT SINGH *v.* MAHARAJ SINGH.

Revenue registers in respect of the property in suit.

On the 11th September 1903, the Plaintiff filed the present suit on the following allegations :—

Harhar Singh, Himmat Singh and Bahadur Singh were three full brothers, the sons of Nehchal Singh. They separated in the lifetime of Harhar Singh and a large property fell to his share. After his death his widow, Ummed Kunwar, obtained possession of his property as a Hindu widow. She died on the 15th of March 1892, and the two sons of her daughter, named Khangar Singh and Bishun Singh, became the heirs and owners of the property in equal shares.

Khangar Singh, the father of the Plaintiff, died on the 29th July 1892, and his estate devolved on the Plaintiff, who asked the Defendants to deliver the possession of the property left by the husband of Ummed Kunwar, but they refused to deliver possession.

The Plaintiff further alleged that he was entitled to possession of half of the entire property left by the husband of Ummed Kunwar, and that to meet necessary expenses he had sold half of his said half share to one Musammat Bed Kunwar, under a sale-deed, dated the 4th of September 1903, and thus made her the owner thereof. He therefore prayed for absolute possession of the property.

In addition to the six original Defendants who were, with one exception, Jita Singh, members of the family, the Defendants Nos. 7 and 8, were added as mortgagees of part of the property in suit.

In reply to the plaint, written statements were put in on behalf of the Defendants and the first Defendant pleaded *inter alia* that Khangar Singh, the father of the Plaintiff, predeceased Ummed Kunwar and that, therefore, the Plaintiff had no right to the property in dispute; that Himmat Singh, Bahadur Singh, Harhar Singh and Nirmal Singh were all members of a joint Hindu family; that the name of Musammat Ummed Kunwar had been entered in the papers only for her consolation and satisfaction on account of her being a widow; and that Harhar Singh's daughter died childless and that the father of the Plaintiff was not her son.

The Subordinate Judge framed the following seven issues for trial:—

(1) Is the claim bad for misjoinder of parties?

(2) Is the Plaintiff a grandson of Harhar Singh's daughter?

(3) When did Khangar Singh die?

(4) Were the three brothers separate from one another and whether Harhar Singh was joint or separate from Nirmal Singh?

(5) How was Nirmal Singh in possession of the properties in dispute, and since when has he been in possession of them?

(6) Whether Jita Singh is in possession of any part of the property which belonged to Harhar Singh?

(7) How long has Dharam Kunwar been in possession of the share of Mauza Khera Ruth, Mahal III, and what was the nature of her possession?

Both sides produced oral and documentary evidence. On the 18th of March 1904, the Subordinate Judge delivered his judgment and decree by which he dismissed the suit with costs. He decided the third issue against the Plaintiff by finding that the oral evidence produced by the Plaintiff did not prove that Khangar Singh died after Ummed Kunwar, and, in view of this finding, he held that it was not necessary to decide the remaining issues.

JIT SINGH *v.* MAHARAJ SINGH.

The Plaintiff appealed from the decree of the Subordinate Judge to the High Court at Allahabad. It was numbered 170 of 1904, and was heard with some other "connected appeals."

The learned Judges (Banerji and Aikman, JJ.) of the High Court pointed out that the same Subordinate Judge, on the third issue, came to the conclusion in the suit of Bed Kunwar, Plaintiff's alienee, that "Khangar Singh survived his grandmother, a conclusion opposed to his finding in the present suit."

The learned Judges then referred to evidence not in the record of the present suit and concluded their judgment in the connected appeal as follows: "Under these circumstances we are unable to say that the latter conclusion arrived at by the learned Subordinate Judge as to the time of Khangar's death is wrong. Upon the findings at which we have arrived in concurrence with the Court below, that Court was justified in decreeing one half of the claim of Bishun Singh and the suit of Bed Kunwar, and the appeals filed against the decrees in these suits must fail. That Court should have decreed the claim of Maharaj Singh and his appeal must prevail." They accordingly allowed the Plaintiff's appeal.

Mr. G. E. A. Ross for the Appellant submitted that the Plaintiff was not entitled to bring the suit during the lifetime of his uncle, Bishun Singh. The Courts below had not dealt with that point, but as the objection related to the cause of action and the jurisdiction of the Court it was open to the Appellant to raise it.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—It is not usual to allow a point to be raised here on appeal which has not been discussed in the Court below, and upon which their Lordships have not got the assistance of the Court below.

On this ground their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Appellants.

B. D. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 217 OF 1910.

MOOKERJEE, J.
TEUNON, J.
1911.
17, February.

DEOKI NANDAN SINGH,
Judgment-debtor,
Appellant,
v.
BANSI SINGH,
Decree-holder,
Respondent.

Civil Procedure Code (Act V of 1908) secs. 2, 47, Or. XXI, r. 66—Interlocutory order in execution when appealable as decree—Order determining value of property to be sold in execution.

Every order passed in execution proceeding is not appealable. The order to be appealable as a decree must conclusively determine the rights of the parties.

BEHARY LAL PUNDIT *v.* KEDAR NATH MULLICK (5) *applied.*

No appeal lies against an order by which the value of property directed to be sold under a decree has been assessed at a certain figure according to the statement of the decree-holder.

SIVAGAMI ACHI *v.* SUBRAHMANIA AYYAR (1) *approved.*

SIVASAMI NAICKAR *v.* RATNASAMI NAICKAR (2), GANGA PROSAD *v.* RAJ COO-

(1) I. L. R. 27 Mad. 259 (1903).
(2) I. L. R. 23 Mad. 568 (1900).
(5) I. L. R. 18 Cal. 469 (1891).

DEOKI NANDAN SINGH *v.* BANSI SINGH.

MAR SINGH (4), KASHI PERSAD SINGH *v.* JAMUNA PERSHAD SAHU (6), SAURENDRA MOHAN TAGORE *v.* HURRUK CHAND (7) *referred to.*

This was an appeal preferred on the 16th of May 1910, against the order of Babu Sashi Bhusan Sen, Subordinate Judge of Zillah Gaya, dated the 10th of May 1910.

The facts of the case material to this report will appear from the judgment.

Babu Kulwant Sahay for the Appellant.

Babus Joy Gopal Ghosha and *Hari Bhusan Mukherjee* for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This appeal is directed against an order made by the Court below by which the value of the property directed to be sold under the decree has been assessed at a certain figure according to the statement of the decree-holder.

A preliminary objection has been taken to the hearing of the appeal on the ground that the order is not one under sec. 47 of the Code of 1908, that it is not a decree within the meaning of sec. 2 of the Code and is consequently not appealable as such. In support of this view, reliance has been placed upon the decision of the Madras High Court in the case of *Sivagami Achi* v. *Subrahmania Ayyar* (1).

In support of the appeal, reliance has been placed, on the other hand, upon the case of *Sivasami Naickar* v. *Ratnasami Naickar* (2), *Ramessur Proshad Singh* v. *Rai Sham Krissen* (3) and *Ganga Prosad* v. *Raj Coomar Singh* (4).

(1) I. L. R. 27 Mad. 259 (1903).
(2) I. L. R. 23 Mad. 568 (1900).
(3) 8 C. W. N. 257 (1901).
(4) I. L. R. 30 Cal. 617 (1903).
(6) I. L. R. 31 Cal. 922 (1904).
(7) 12 C. W. N. 542 (1907).

In our opinion the decision of the question whether the order in controversy is a decree within the meaning of sec. 2 of the Code must depend upon its nature and contents. The learned Vakil for the Appellant has contended that every judicial order made in the course of execution proceedings is an order under sec. 47 of the Code and is consequently appealable as a decree. In view of the decision of this Court in the case of *Behary Lal Pundit* v. *Kedar Nath Mullick* (5) this position cannot possibly be maintained. It was there pointed out that an interlocutory order in the course of the execution proceedings which decides, for instance, a point of law arising incidentally or otherwise, is not a decree within the meaning of sec. 2 of the Code of 1882. It is reasonably plain from the terms of sec. 2 that an order to be a decree must conclusively determine the rights of the parties. If any other view were adopted, the result would be that an appeal would be preferred against every order in the course of execution proceedings; in other words, proceedings in execution could be arrested at every stage by an appeal on behalf of the judgment-debtor. This could hardly have been contemplated by the framers of the Code. It has also been suggested by the learned Vakil for the Appellant that if this order is not now set aside, he may be prejudiced later on, in the event of an application to set aside the execution sale on the ground of material irregularity and substantial injury. In our opinion, this apprehension is entirely groundless. The order does not involve a judicial adjudication of the value of the properties which would be binding upon the parties in any subsequent proceeding. The application of the judgment-debtor for time was re-

(5) I. L. R. 18 Cal. 469 (1891).

fused and the Court proceeded to assess the value of the property according to the statement of the decree-holder. The decree-holder with full notice of the assertion of the judgment-debtor that the true value of the property is very much higher than what has been mentioned in the sale-proclamation, proceeds to sell it at his risk, and if after the sale any question arises as to the true value of the property it must be determined in the proceedings under r. 90, Or. 21 of the Code. We may observe that the decision of the Madras High Court in the case of *Sivasami Naickar* v. *Ratnasami Naickar* (2), which was followed by this Court in the case of *Ramessur Proshad Singh* v. *Rai Sham Krissen* (3), has been overruled in the case of *Sivagami Achi* v. *Subrahmania Ayyar* (1), where the learned Judges of a Full Bench of the Madras High Court also dissented from the decision of this Court in *Ganga Prosad* v. *Raj Coomar Singh* (4). We are inclined to hold that the view taken in *Sivagami Achi* v. *Subrahmania Ayyar* (1) gives effect to the true intention of the Legislature. In this view, it is not necessary to consider the question raised in the cases of *Kashi Persad Singh* v. *Jamuna Pershad Singh* (6) and *Saurendra Mohan Tagore* v. *Hurruk Chand* (7), namely, to what extent is it obligatory upon the executing Court to hold an investigation into the value of the property sought to be sold by the decree-holder. But it may be observed that the observations of the Judicial Committee in the case of *Saadatmand Khan* v. *Phul Kuar* (8) indicate that an elaborate investigation is not necessary. The decree-holder runs a risk if he puts in a valuation which is manifestly erroneous; if it is established later on, that the judgment-debtor has suffered substantial injury by reason of such under-valuation, the sale is liable to be set aside under the provisions of the Code.

We may further point out that if the contention of the Appellant prevails, whereas there would be only one appeal under the Code from a decision upon the question of valuation in the course of proceedings for reversal of the sale under Rule 90 of Or. 21, there would be a first and a second appeal against an order for assessment of valuation antecedent to the sale. This could hardly have been intended by the Legislature.

The result, therefore, is that the preliminary objection is allowed and the appeal is dismissed with costs. We assess the hearing-fee at three gold mohurs.

Let the record be sent down at once.

Appeal dismissed.

(1) I. L. R. 27 Mad. 259 (1903).
(2) I. L. R. 23 Mad. 568 (1900).
(3) 8 C. W. N. 257 (1901).
(4) I. L. R. 30 Cal. 617 (1903).
(6) I. L. R. 31 Cal. 922 (1904).
(7) 12 C. W. N. 542 (1907).
(8) I. L. R. 20 All. 412 (1898).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 377 OF 1911.

MOOKERJEE, J.
CARNDUFF, J.
1911,
23, August.

MUSSTT KHUBSURAT KUER and ors., Judgment-debtor, Appellant,
v.
SARODA CHARAN GUHA, Decree-holder, Respondent.

Receiver—Mortgage suit, Receiver if may be appointed in, after appointment of Receiver in partition suit amongst mortgagors—Foreclosure suit, Receiver if and when may be appointed in.

The appointment of a Receiver in a partition suit amongst the mortgagors, is no bar

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to the appointment of a Receiver in a subsequent suit by the mortgagee on his mortgage, as any possible conflict between the two Receivers, where the same Receiver has not been appointed in both suits, may easily be avoided.

A mortgagee who has obtained a preliminary decree for foreclosure cannot at that stage ask for a Receiver of the property under mortgage, since he has no title to the profits until at least he obtains an order absolute for foreclosure and is then kept out of possession by the action of the judgment-debtors.

This was an appeal preferred on the 4th of August 1911, against the order of Babu Biraj Gopal Basu, Subordinate Judge, 3rd Court of Zillah Patna, dated the 28th of July 1911.

The material facts will appear from the judgment.

Babus Umakali Mukherjee and *Ganesh Dutt Singh* for the Appellant.

Mr. A. Chaudhuri and *Babu Nagendra Nath Mitter* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal is directed against an order by which a Receiver has been appointed in a mortgage suit under Or. 40, r. 1 of the Code of 1908. The mortgagee commenced a suit to enforce his security, on the 10th January 1910. An *ex parte* decree was made on the 22nd February 1911. On the 2nd March following, the mortgagee applied for the appointment of a Receiver. That application has been granted and Mr. G. M. Dey, Barrister-at-Law, has been appointed Receiver. On behalf of the Defendant in the mortgage suit, the order has been questioned before us on two grounds; namely, *first*, that a Receiver is unnecessary for the purposes of the mortgage suit because a Receiver has already been appointed in a partition suit amongst the owners of the properties; and, *secondly*, that the appointment of the Receiver is premature, because under the mortgage decree the mortgagee is not entitled to appropriate the profits of the properties given as security. In our opinion there is no substance in the first contention, but the second must prevail.

In so far as the first contention is concerned, it has been stated to us that in 1901 a partition suit was commenced amongst the owners of the properties in which a consent decree was made on the 31st May 1902. With a view to give effect to that decree, a Receiver was appointed. The properties given by way of mortgage include, however, not merely the properties under the charge of the Receiver in the partition suit, but also two other properties. In so far as the latter properties are concerned, the appointment of the Receiver in the partition suit clearly does not operate as a bar. But we are of opinion that even in respect of the other properties, a Receiver may very well be appointed in the mortgage suit, although a Receiver has been appointed in the partition suit. The Receiver in the partition suit acts under the direction of the Court in which that suit is pending and the sums collected by him are bound to be applied for the benefit of the parties to that litigation, under the direction of the Judge. In other words, the Receiver is bound to pay the money either into the hands of the proprietors or to their creditors and other porsons entitled to the proceeds of the properties. On the other hand, if a Receiver is appointed in the mortgage suit he is bound to apply the proceeds for the benefit of the mortgagee. It has

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been suggested, however, that if different persons are appointed Receivers in the partition suit and the mortgage suit, there may possibly be a conflict between them, because undoubtedly the two Receivers could not simultaneously collect the proceeds of the same properties. [*Searle* v. *Choat* (1). Beach on Receivers, sec. 233]. We are of opinion that there is no substance in this contention. The difficulty my be avoided either by the appointment of the same person as Receiver in the two suits, or if different persons are appointed as Receivers, the collection may be made by one of the Receivers only, (for instance, by the Receiver in the partition suit), but the sums collected by him and payable to the mortgagors placed in the hands of the Receiver in the mortgage suit to be applied for the benefit of the mortgagee under the direction of the Judge. [Cf. *Madaneswer Singh* v. *Mahamaya Prosad Singh* (2)]. We are of opinion, therefore, that the first ground urged by the learned Vakil for the Appellant cannot be sustained.

In so far as the second contention is concerned, it has been urged that the object of the appointment of a Receiver in a mortgage-suit is to secure the application of the profits of the mortgaged properties for the benefit of the mortgagee. If the decree is for sale, and if it is established that the security is not sufficient to satisfy the judgment-debt, a Receiver will be appointed almost as a matter of course, specially if there has been default in the payment of interest. [*Weatherall* v. *Eastern Mortgage Agency Co.* (3), *Hopkins* v. *Worcester Canal Co.* (4), *Herbert* v. *Greene* (5), *Hacket* v. *Snow* (6)]. But here the position is different. The mortgagee has obtained a decree for foreclosure, which does not entitle him to recover even the costs of the litigation from the mortgagors personally. Whether the decree has in this respect been properly drawn up or not, we are not called upon to consider. But under the decree as it now stands, the only right of the mortgagee is to foreclose the mortgagors and to take the property in lieu of his dues on his security; he is not entitled to the profits of the property. Consequently, a Receiver need not be appointed at this stage, because even if a Receiver were appointed, he could not apply the profits of the property for the benefit of the mortgagee. There is no suggestion that the properties are liable to be sold away in satisfaction of paramount charges. The position may be compared to that of a mortgagee who has the legal estate and can recover possession by ejectment. [*Silver* v. *Bishop of Norwich* (7), *Berney* v. *Sewell* (8), *Sturch* v. *Young* (9), *Ackland* v. *Gravener* (10)]. From this point of view, the second objection of the Appellant must be sustained.

The result is that this appeal is allowed and the order of the Court below discharged on the ground that the application for the appointment of a Receiver is premature.

We may add that a contingency may very possibly arise which may necessitate the appointment of a Receiver in these proceedings. The time allowed by the decree for the payment of the judgment-

(1) 25 Ch. D. 723 (1884).
(2) 13 C. L. J. 487 (1911).
(3) 13 C. L. J. 495 (1911).
(4) L. R. 6 Eq. 447 (1868).
(5) 3 Ir. Ch. 273 (1854).
(6) 10 Ir. Eq. 220.
(7) 3 Swanston 115n. (1816).
(8) 1 J. & W. 647 (1820).
(9) 5 Beav. 557 (1842).
(10) 31 Beav. 482 (1862).

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debt by the mortgagors has just expired, and, as we have been informed, the amount has not yet been paid. Consequently, under Or. 34, r. 3, of the Code of 1908, if the mortgagee applies for the final decree in the foreclosure suit, he is entitled to have the final decree drawn up as a matter of course, unless indeed the mortgagors can establish good cause for an extension of time which can be granted only on terms. As soon as the final decree is made in his favour, the mortgagee is entitled to apply for execution and delivery of possession; such possession may be delivered under r. 3 of Or. 34 or upon an application under sec. 51 of the Code. But it has been suggested that if an application of this character is made, the judgment-debtors are likely to apply for an adjournment of the proceedings, inasmuch as some of them have applied to have the *ex parte* decree vacated, while an appeal has also been preferred against that decree to this Court. If such an application is made, the successful decree-holder is entitled to contend that as now he has become the full owner of the property, he is entitled to possession and to receive the profits thereof. If the judgment-debtors seek to keep him out of possession of the property he may reasonably demand either security for the profits or the appointment of a Receiver under clause (d) of sec. 51 of the Code. It will, therefore, be open to the decree-holder to apply at once to the Subordinate Judge for a final decree under r. 3 of Or. 34; and unless it is proved that the mortgage-debt has been satisfied, or that there are good grounds for extension of time, (upon terms as to security or appointment of Receivers), it would be incumbent upon the Subordinate Judge to make the final decree. As soon as he makes the decree, the decree-holder will be entitled to be placed in possession. If at this stage the judgment-debtors apply that they may be allowed to continue in possession, occasion may arise for the appointment of a Receiver or the demand of security from the judgment-debtors. With these observations, we allow the appeal, but without costs.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1209 OF 1909.

CHATTERJEE, J.
TEUNON, J.
1911,
Heard, 9 and 10, August.
Judgment, 14, August.

JATI KAR, Plaintiff, Appellant,
v.
MUKUNDA BASHI and ors., Defendants, Respondents.

Transfer of Property Act (IV of 1882), sec. 59—Turn of worship, mortgage of—Registration.

A turn of worship in a temple is not immoveable property and a usufructuary mortgage thereof does not require registration under sec. 59, Transfer of Property Act.

This was an appeal preferred on the 14th of June 1909, against the decree of Babu S. C. Ganguli, Subordinate Judge of Zillah Cuttack, dated the 27th of February 1909, reversing a decree of Babu Behary Lal Banerjee, Munsif of Puri, dated the 28th of January 1908.

The Plaintiff prayed for a declaration that he was entitled to perform the *sheba* of the Thakur Surja Narayan from the 13th to the 20th of every month by virtue of a usufructuary mortgage-deed executed by the original owner of the *pala* on the 14th July 1879, that Plaintiff's right had been recognised by the Puri Raja and that he had been performing

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the *sheba* regularly for a period of 25 years or so, until Defendant No. 2 interfered by allowing Defendant No. 1 to perform the *sheba* during Plaintiff's turn.

The Defendants Nos. 1 and 2 in defence urged that the turn of worship was not transferable either by law or custom or usage, that the transfer had not been recognised by the Puri Raja; they also objected that the usufructuary mortgage-bond was not properly attested and they denied that the Plaintiff had performed the worship of the Thakur as alleged. Defendant No. 1 claimed to be owner of the *pala* under a deed of gift from the original *shebaits.*

The first Court decreed the suit, but on appeal the Subordinate Judge held that the Puri Raja had not recognised the right of the Plaintiff to act as *shebait* and that such recognition was necessary to complete the title of the Plaintiff, that although Plaintiff appeared to have been allowed to perform the *sheba* from 13th to 20th of every month for a period of upwards of 20 years without a hitch, he was not satisfied that he was performing the *sheba* in the capacity of a *shebait*, that the usufructuary mortgage-bond on which the Plaintiff rested his title was not properly proved as required by secs. 68, 69 of the Evidence Act. In this view he did not enter into the question whether the turn of worship was validly alienable and dismissed the suit.

The Plaintiff preferred this second appeal.

Babu Lalit Mohun Mukherjee for the Appellant.

Babu Jotindra Narain Chowdhury for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff brought this suit for the recovery of possession of a turn of worship in a certain temple for 8 days in the month from the 13th to the 20th by virtue of a usufructuary mortgage from the mother and guardian of Defendants Nos. 3 and 4 on the allegation that he had been dispossessed from the same by the Manager of the Defendant No. 2 the Raja of Puri who is supporting the claim of Defendant No. 1. The Defendant No. 1 admits that the grandfather of Defendants Nos. 3 and 4 was the original *shebak*, but says that he had in 1865 made a gift of this turn of worship in favour of his (Defendant No. 1's) father and that during his minority, Plaintiff had been employed as a *khatnihar* or paid servant on his behalf and used to pay him a certain amount of money every year.

Defendants Nos. 3 and 4 did not contest the Plaintiff's claim but both Defendants Nos. 1 and 2 did on various grounds. The Court of first instance decreed the suit for recovery of possession but the learned Subordinate Judge has dismissed the same. It is contended in second appeal that the learned Subordinate Judge is wrong.

In the first place the learned Subordinate Judge finds that the usufructuary mortgage-bond is not proved because the evidence is not in conformity with the requirements of sec. 59 of the Transfer of Property Act and sec. 69 of the Evidence Act.

A turn of worship is not an interest in immoveable property. See *Ishan Chandra Roy* v. *Monmohini Dassi* (1): sec. 59 of the Transfer of Property Act, which is applicable to mortgages of immoveable property only, has therefore no application. Then again the document in question was executed in 1879 three years before the

(1) I. L. R. 4 Cal. 683 (1878).

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Transfer of Property Act came into force and under sec. 2, cl. (c) the Act had no application. There is no other law which required that a document like the one in question should have been attested by witnesses.

Then the learned Subordinate Judge says: "No doubt the Plaintiff was allowed to perform the *deb-sheba* from 13th to 20th of every month without a hitch but that in my opinion does not create any right in Plaintiff's favour since the Plaintiff has not been able to prove satisfactorily that he was doing the *sheba* from 13th to 20th of every month as a *shebait*," we are unable to follow the reasoning of the learned Subordinate Judge. The Plaintiff claims as the mortgagee of a *shebak* and not as a *shebak*, if he had possession as such mortgagee that would be quite sufficient to make out a *primâ facie* title as such mortgagee. In the case of *Jagannath* v. *Birbhadra* (2), it was held that the Plaintiff who had acted as *shebait* for 10 years had acquired a complete title against Defendants who had not sued to oust him within 6 years under Art. 120 of the Second Schedule to the Limitation Act. Although the learned Subordinate Judge finds that he had no doubt the Plaintiff had held possession for over 20 years he distinguishes this case because the period was not 10 years.

Then the learned Subordinate Judge says, "it does not lie in the mouth of the Defendant No. 2 to set up the right and possession of No. 1 Defendant's father Kangala since the Raja's predecessor admitted Plaintiff's possession by Ex. 2" and in the next sentence "Ex. 2 does not show that Plaintiff's possession or his right was ever admitted since it distinctly mentioned that Plaintiff was in possession on behalf of Defendants Nos. 3 and 4." As the Plaintiff claims as mortgagee only the possession claimed by him in 1880 must have been as mortgagee only and if that possession was recognised, that possession could not now be impeached by Defendant No. 2 or his manager.

The Plaintiff is himself one of the recognized *sebaks* on other days, and if in the case of such a *shebak*, on the acquisition of an additional turn of worship the ceremony of *sharatir* be at all necessary it is difficult to see how after undisputed possession for 20 years, and express recognition by or on behalf of Defendant No. 2, the question can be raised in the present case. Then again although the learned Subordinate Judge finds in the early part of his judgment that Plaintiff was undoubtedly in possession of the *sheba* from the 13th to 20th of every month, in a later part he says it was for the Plaintiff to prove that the turn of worship of Defendants Nos. 3 and 4 was from the 13th to 20th and in conclusion finds the second issue against the Plaintiff.

The judgment of the learned Subordinate Judge is a curious combination of bad law and worse reasoning and we have no hesitation in setting aside the same.

As the judgment is full of contradiction it is difficult to make out what has been found for and what found against the Plaintiff. The case must, therefore, be remanded to the District Judge to try it himself. Costs to abide the result.

Case remanded.

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(2) I. L. R. 19 Cal. 776 (1892).

[CIVIL APPELLATE JURISDICTION]

APPEALS FROM ORIGINAL ORDERS NOS. 503 AND 504 OF 1909.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard, 3 and 4, August.
Judgment, 8, August.

LALDHARI SINGH and others, Appellants,
v.
MANAGER, COURT OF WARDS, BHABATPURA ESTATE, Respondent.

Civil Procedure Code (Act XIV of 1882), sec. 232—Mortgage decree, assignment to one of several judgment-debtors—Execution by assignee, if lies—Discharge of debt by one judgment-debtor—Right if only to contribution.

The expression "a decree for money against several persons" in sec. 232 of the Civil Procedure Code of 1882 means a personal decree for payment of money against two or more Defendants jointly.

A mortgage decree, even though it may direct the judgment-debtor to pay the decretal amount, is not a "decree for money" within the meaning of that section, and one of the judgment-debtors having obtained an assignment of such a decree may proceed to execute the decree by putting the mortgaged property to sale.

Where, however, one of the judgment-debtors had paid off the decree before taking an assignment, although the payments were not certified, there was nothing to pass under the assignment, and the only remedy of the judgment-debtor against his co-judgment-debtor was by a suit for contribution.

These were appeals preferred on the 15th of November 1909, against the order of Babu Durga Das Bose, Subordinate Judge, 1st Court of Zillah Patna, dated the 10th of July 1909.

The facts of the case are fully set out in the judgment.

Babus Mohendra Nath Roy, Ganesh Dutt Singh and *Sajani Kanta Sinha* for the Appellants.

Babus Ram Charan Mitra and *Srish Chandra Chowdhury* for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

These appeals are directed against an order by which the Court below has allowed execution to proceed on the basis of a mortgage decree at the instance of an assignee thereof. The circumstances under which the application for execution was made have not formed the subject of serious controversy in this Court, and may be briefly recited for our present purpose. On the 22nd November 1895, two brothers, Dhanukdhari Sing and Harihardhari Singh, executed a mortgage in favour of Saligram Singh. On the 6th February 1902, the mortgagee sued to enforce the security against the mortgagors and sixty-four other persons who had acquired an interest in the equity of redemption. On 2nd July 1902, an *ex parte* decree was made in favour of the Plaintiff mortgagee under sec. 88 of the Transfer of Property Act in the following terms.

"That an *ex parte* modified decree be passed in favour of the Plaintiff for Rs. 33,530-9-10 and proportionate costs, and interest on Rs. 25,000 principal at the rate of one rupee per cent. per mensem from the date of the institution of the suit, *i.e.*, from the 6th February 1902 up to the date of realization, if the money be paid within six months of the date on which the decree is signed, otherwise the interest will run at the above rate till six months after the date on which the decree is signed, and thereafter interest will be calculated at the rate of six per cent. per annum on the whole amount of the decree until that of realisation. It is further ordered that Defendants, excepting the Defendants Nos. 25 to 27, do pay the decretal money with costs and interest within six months from the date the de-

cree is signed, and in case of non-payment within the time fixed by the Court, the mortgaged properties will be sold by auction, and the sale consideration, after deducting the expenses of realisation and sale, be credited against the decretal money, costs and interest."

It is admitted that up to the 22nd May 1905, a sum of Rs. 23,118 had been deposited by the judgment-debtors to the credit of the decree-holder: it is alleged that out of this sum Rs. 14,746 was contributed by Dhanukdhari and the balance Rs. 8,332 by Harihardhari. On the 17th November 1905, Harihardhari was declared a disqualified proprietor and his estate passed into the custody of the Court of Wards. On the 21st November and 13th December 1905, the Court of Wards paid to the representatives of the decree-holder who had meanwhile died Rs. 16,000 and on the 18th December another payment was made to the extent of Rs. 4,940-12. It is necessary to state here that the representatives of the decree-holder had taken out execution for Rs. 20,940-12 and the 18th December 1905 had been advertised as the date of the sale. The result of the payments was that the decree-holders put in an application to the effect that for the present, the execution case be "struck off". The execution case was thereupon dismissed. On the 6th July 1908, the representatives of the decree-holder executed a deed of assignment of their rights under the decree to the representatives of Harihardhari, and on the 28th November 1908 the Court of Wards on their behalf applied for execution of the decree. The application did not set out the specific sum for the realisation of which execution was taken out: but it was stated that the effect of the assignment was to extinguish the mortgage lien only in so far as the share of the assignee judgment-debtor was concerned. It was further alleged that execution was claimed in respect of the half share of the mortgaged premises owned by Dhanukdhari. Objection was preferred separately by several of the judgment-debtor on the two-fold ground that the nature of the decree was such as to extinguish the judgment-debt on assignment to one of the judgment-debtors, and that, as a matter of fact, the decree had been satisfied by the payments made on the 21st November and 13th and 18th December 1905, so that the assignor had no subsisting interest to convey to the assignee on the 6th July 1908. The Subordinate Judge overruled these objections, and allowed execution to proceed. The objectors, judgment-debtors, have preferred separate appeals to this Court, and the order of the Subordinate Judge has been assailed substantially on two grounds, namely, *first*, that the decree was one for money within the meaning of sec. 232 of the Civil Procedure Code of 1882, and that, consequently, upon transfer by the decree-holders to one of the judgment-debtors it became incapable of execution under cl. (*b*) of the proviso to that section; and, *secondly*, that the effect of the payments admittedly made to the decree-holders in November and December 1905 was to extinguish the judgment-debt. In support of the first of these grounds, it has been urged that as the decree called upon the judgment-debtors to pay the decretal money within a specified period it was a decree for money within the meaning of sec. 232 of the Code of 1882. In our opinion, this contention is not sustainable. Sec. 232, after providing that when a decree has been transferred by assignment in writing or by operation of law it may

be executed by the assignee, lays down that where a decree for money against several persons has been transferred to one of them, it shall not be executed against the others. The question which requires consideration is, whether the decree in the case before us is a decree for money within the meaning of this proviso. The plain meaning of the proviso is that it is applicable only to the case of a decree for payment of money personally by several persons jointly: in other words, the expression "a decree for money against several persons" signifies a personal decree for the the payment of money against two or more Defendants jointly. This is manifest from an examination of the principle which underlies the rule, as explained by Sir Barnes Peacock, C. J., in the case of *Deegumbare Dabee* v. *Eshan Chandra Sein* (1). That principle is that if one debtor satisfies the judgment-debt and takes an assignment of it, he cannot enforce it by execution or in any way against his co-debtors: his only remedy is to sue them for contribution and to compel them to pay him their share of the amount for which the decree was purchased, having regard to the proportion in which they were bound *inter se* to satisfy the original decree; the position is different, if there is collateral security to which recourse may be had. [*Reed* v. *Norris* (2), *Dowbiggen* v. *Bourne* (3) as to which, see Cooper Pr. Ca. 645 and *Armitage* v. *Baldwin* (4). See also *Copis* v. *Middleton* (5), *Hodgson* v. *Shaw* (6), *Holmes* v. *Day* (7); Story on Equity Jurisprudence, secs. 499B, 499C].

The learned Vakil for the Appellants did not seriously dispute this proposition, and in view of the decisions in *Panachand* v. *Sundarbai* (8) and *Lala Bhagun Prosad* v. *Holloway* (9) the position, indeed, could not be seriously challenged. The learned Vakil, therefore, directed his efforts to distinguish the case before us from those to be found in the reports, on the ground that in those cases the decrees merely directed the sale of the mortgaged properties, and did not, as here, call upon the judgment-debtors to pay the decretal amount. In our opinion, the distinction suggested is entirely unsubstantial. In a matter of this description, we must look to the substance rather than to the form. It is immaterial whether or not the decree formally calls upon the judgment-debtors to pay the decretal amount, if, upon failure to make the payment, the only relief granted to the decree-holder is the sale of the mortgaged properties. A decree of this character is in its essence a decree for sale and can by no stretch of language be deemed a decree for payment of money. In the case before us, as we have already stated, besides the two mortgagors Defendants, there were sixty-four other persons who were joined as Defendants, because they had acquired an interest in the equity of redemption. These latter persons, it is not disputed, were not personally liable for payment of the mortgage money, though, no doubt, the mortgage property in their hands was liable to be sold for the satisfaction of the judgment-debt. But the decree calls upon all the judgment-debtors without distinction to pay up the decretal amount, and directs that upon their failure to do so the mortgage properties be sold. There can, therefore, be no room for even

(1) 9 W. R. 230 (1868).
(2) 2 My. and Cr. 361; 45 R. R. 88 (1837).
(3) 2 Y. & C. Ex. Eq. 462 (1837).
(4) 5 Beav. 278 (1842).
(5) T. & R. 224.
(6) 3 M. & K. 183 (1834).
(7) 108 Mass. 563.
(8) I. L. R. 31 Bom. 308 (1907).
(9) I. L. R. 11 Cal. 398 (1885).

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any plausible contention that the decree was intended to be a personal decree. It may be observed that the expression "decree for money" or an equivalent expression occurs, not merely in sec. 232 of the Code of 1882, but also in other parts of the Statute (see for instance, secs. 230, 258 and 295). In so far as sec. 230 is concerned, with regard to the question whether a mortgage decree is a decree which directs the payment of money, the view has sometimes been maintained that a decree which not only directs the sale of the hypothecated property, but also provides that if the sale-proceeds are insufficient to satisfy the judgment-debt, the decree may be executed against the Defendant personally is a mortgage decree [*Fazil Hawaladar* v. *Krishna Bandhoo* (10), *Kartick Nath* v. *Jaggernath* (11), *Ram Charan* v. *Sheobarat* (12), *Jadu Nath* v. *Jagmohan* (13). See also *Pahalwan* v. *Narain* (14)]. We are, however, not now concerned with the true nature of a composite decree of this character, which, as pointed out in *Chandi Charan* v. *Ambika Charan* (15) and *Abbakki* v. *Krishnaya* (16), is contrary to the procedure prescribed by secs. 88 and 90 of the Transfer of Property Act. [See also *Gopal Dass* v. *Ali Muhammad* (17)]. For an illustration of a case of a composite decree, reference may be made to *Hart* v. *Tara Prosanna Mukherji* (18), where the question arose with reference to sec. 295 of the Code of 1882. The learned Judge held that every decree by virtue of which money is payable is to that extent a decree for money within the meaning of sec. 295, even though another relief, namely, sale of the mortgaged premises, may be granted by that very decree. The decree in the case mentioned was made before the Transfer of Property Act, and entitled the decree-holder to realise a specified sum from the mortgage property and from the Defendants personally; [see also *Abdulla* v. *Oosman* (19), *Vaidhinadasamy* v. *Soma Sundram* (20), where also the decree contained an order for the sale of the mortgage property and for the recovery personally from the judgment-debtor of what may remain undischarged by the sale-proceeds of the mortgage property]. The case before us is, therefore, clearly distinguishable from the cases upon which reliance is placed by the learned Vakil for the Appellants. The decree is in substance for sale of the mortgage property, and it cannot rightly be deemed a decree for money within the meaning of sec. 232 of the Code of 1882, *Nuffer Chandra* v. *Baikunt Nath* (21). The first contention of the Appellants must, therefore, be overruled.

In so far as the second contention of the Appellants is concerned our attention has been drawn to the circumstance that the payments on behalf of Harihardhari to the decree-holders were made in November and December 1905. But the deed of assignment was not executed till the 6th July 1908: meanwhile, Harihardhari had died on the 2nd March 1907. The learned Vakil for the Appellants has contended that the money paid in 1905 was for satisfaction of the decree and not

(10) I. L. R. 25 Cal. 580 (1897).
(11) I. L. R. 27 Cal. 285 (1899).
(12) I. L. R. 16 All. 4 8 (1894).
(13) I. L. R. 25 All. 541 (1903).
(14) I. L. R. 22 All. 401 (1900).
(15) I. L. R. 31 Cal. 792 (1904).
(16) I. L. R. 32 Mad. 534 (1909).
(17) I. L. R. 10 All. 632 (1888).
(18) I. L. R. 11 Cal. 718 (1885).
(19) I. L. R. 28 Mad. 224 (1904).
(20) I. L. R. 28 Mad. 473 (1905).
(21) 4 C. L. R. 156 (1879).

for any intended assignment thereof. On behalf of the Respondent it has been argued, on the other hand, that the assignment effected by the deed of the 6th July 1908 was in contemplation in 1905. We are unable, after careful consideration of all the surrounding circumstances, to accept the contention of the Respondents as established by the evidence on the record. It will be observed that the long delay in the execution of the deed of assignment is not satisfactorily explained, and the solitary witness examined on behalf of the assignees completely gives away his case when he admits that he cannot say whether the payments recited in the assignment deed were made in satisfaction of the decree. It must further be observed that in 1905 when these sums were paid, if the payments were made with a view to purchase the decree, the sanction of the superior officers of the Court of Wards in ordinary course would be taken. No contemporaneous documentary evidence has, however, been produced. It is also a matter of legitimate comment that the assignors have not been, though they easily might have been, examined. We are not unmindful that the somewhat laconic and ambiguous expression used by the decree-holders in their petition of the 18th December 1905, namely, "for the present, the execution be struck off" may tend to some extent to support the theory of an assignment. But it is equally consistent with the case that the decree-holders may have reserved room for consideration whether the whole sum realisable under the decree which carried interest had been paid. We do not also overlook the circumstance that the payments were not certified to the Court. But this is equally consistent with the case of the Appellants, as it merely indicates that the Court of Wards relied implicitly upon the good faith of the decree-holders; whether the intention was that the decree should be satisfied or should merely be assigned, the judgment-debtor who made the payment took it for granted that the decree-holders would deal honestly with him. On the other hand, we have the significant circumstance that no mention was made in the application by the decree-holders on the 18th December 1905, that they had arranged to divest themselves of all their rights under the decree in favour of one of the judgment-debtors. This taken along with the circumstance that the first tangible evidence of the assignment is the deed of the 6th July 1908, executed nearly three years after the payment of the consideration money, lends strong support to the theory of the Appellants that the assignment, if not absolutely an afterthought, was at any rate not finally and definitely settled in 1905; as, indeed, the witness for the decree-holders admits, it was the result of subsequent negotiations, probably suggested by the necessity of a contribution suit which must otherwise inevitably result. On the whole, we are of opinion that the Respondents have failed to establish conclusively that there was in 1905, when the payments were made, any concluded agreement for assignment, and we are inclined to adopt the view that it was subsequently decided to have recourse to a deed of assignment to avoid the necessity for a contribution suit. This latter aspect of the case is rendered more than probable by the allegation of the Appellants that the sums paid towards the satisfaction of the decree before the 21st November 1905 had not been contributed by the mortgagors in equal proportion, and that the representatives of

Harihardhari have taken recourse to a deed of assignment, because otherwise as Plaintiffs in a contribution suit they would have to meet any equitable defence that might be taken by Dhanukdhari. The second contention of the Appellants must consequently prevail.

The result, therefore, is that these appeals are allowed, and the order of the Court below discharged. The Appellants are entitled to their costs both here and in the Court below. We assess the hearing-fee in this Court at three gold mohurs in each appeal.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1906 OF 1909.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard,
30, June.
Judgment,
21, July.

RAMAVATAR SINGH and others, Defendants, Appellants,
v.
TULSI PROSAD SINGH, Plaintiff, Respondent.

Mortgage, usufructuary—Suit for redemption—Accountability of mortgagee for illegal realisation f cess from tenants—Transfer of Property Act IV of 1882), sec. 76—Stipulation by mortgagee to pay a portion of profits to mortgagor—Subsequent arrangement regarding mode of payment, if may be proved by parol evidence—Evidence Act, (I of 1872), sec. 92.

Under a usufructuary mortgage of 1877 the mortgagee undertook to pay to the mortgagor an annual sum of Rs. 10 odd and apply the balance of the profits to payment of revenue charges and interest on the mortgage debt:

Held—*That oral evidence to prove a subsequent arrangement under which the mortgagee allowed the mortgagor to possess and enjoy a portion of the property in lieu of the payment was admissible in evidence inasmuch as it did not supersede or vary the stipulation regarding the payment but merely concerned the mode of payment.*

Held, further—*That in a suit for redemption by the mortgagor the mortgagee was bound to account for the amounts they realised from the tenants as cesses subsequently imposed by the Cess Act of 1880, and payable by the tenants to the mortgagor.*

The mortgagee's accountability is not limited to items within the contemplation of the mortgage contract but may extend to amounts which the mortgagee was enabled to realise out of the mortgaged property by taking advantage of his position as mortgagee.

This was an appeal preferred on the 2nd of September 1909, against the decree of Mr. M. K. Dey, District Judge of Zillah Saran, dated the 25th of May 1909, reversing that of Babu Shyama Kanta Nag, Subordinate Judge of that place, dated the 22nd of December 1908.

The facts of the case will appear from the judgment.

Babu Umakali Mukherjee and *Moulvi Mahomed Mustafa Khan* for the Appellants.

Babus Mohenda Nath Roy and *Sailendra Nath Palit* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal on behalf of the Defendants in an action commenced by the Plaintiff-Respondent for redemption of a usufructuary mortgage. The case for the Plaintiff is that, on the 23rd June 1877, his father executed a usufructuary mortgage for nine years in favour of the Defendants or their predecessors for a sum of Rs. 1,400. Under the terms of

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of the mortgage deed, the mortgagees were to take possession of the premises, and apply the profits in the manner following, that is, pay Rs. 19-4-0 as the Government revenue and Rs. 10-1-3 as profit to the mortgagor, and take the balance, which was assumed to be Rs. 58-8-0, in lieu of interest on the mortgage money at the rate of Rs. 3-12-0 per cent. per annum. It was further stipulated that if as a matter of fact the total income exceeded the assumed amount, namely, Rs. 81-13-3, the mortgagees would be entitled to appropriate the excess on account of their labour and exertion. The substance of the transaction, therefore, was that the mortgagees would pay to the mortgagor an annual sum of Rs. 10-1-3, and apply the balance in payment of revenue charges and interest on the mortgage debt. The Plaintiff alleges that the mortgagees never paid the annual profit, and had, on the other hand, appropriated the sum annually collected by them from the tenants on account of cesses payable under the Bengal Cess Act, 1880. The Plaintiff, therefore, seeks for an account, and prays that he may be allowed to redeem upon payment of whatever sum is found due to the mortgagees. The Defendants contend that they are entitled to the whole of the mortgage money before redemption can be allowed, because they have uniformly paid the profit to the mortgagor and have never collected any sum from the tenants on account of cesses. In so far as the payment of the profit to the mortgagor is concerned, however, the Defendants do not assert that the sums were paid in cash, but they allege that in October or November 1877 the mortgagor was placed in possession of a portion of the mortgaged properties, and it was agreed between the parties that, as the consideration for this transaction, the mortgagor would pay the mortgagees the sum of Rs. 10-1-3 annually, in other words, according to the mortgagees, the sum in question has not been paid in cash to the mortgagor, but the latter has been placed in possession of a part of the mortgaged premises, the income whereof is sufficient to wipe out the annual debt. The Court of first instance found upon both the points in favour of the Defendants. The Subordinate Judge held that the subsequent transaction alleged by the mortgagees had been established on the evidence, and that the Defendants had not collected cesses, or indeed, any sum in excess of the rent from the tenants. In this view, the Subordinate Judge made a decree for redemption in favour of the Plaintiff, on the footing that Rs. 1,400, that is, the entire consideration money for the mortgage, had to be paid for the redemption thereof. Upon appeal the learned District Judge has modified this decision. Upon the first question he has held that the Defendants are not entitled to adduce oral evidence to prove the transaction alleged by them, and in support of this view he has placed reliance upon the cases of *Khoda Buksh* v. *Alimunissa* (1) and *Maharaj Singh* v. *Balwant Singh* (2). With regard to the second point the District Judge has held that the Defendants mortgagees have collected cesses from the tenants and have retained them; in this view, he has held that the Plaintiff is entitled to redeem the mortgage upon payment of only Rs. 317-15-1. The Defendants have now appealed to this Court and, on their behalf, the decision of the District Judge has been challenged on two grounds, namely,

(1) I. L. R. 27 All. 313 (1904).
(2) I. L. R. 28 All. 508 (1906).

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first, that the Defendants were entitled to prove by oral evidence the arrangement alleged to have been made between the parties for the payment of the annual profit of Rs. 10-1-3 to the mortgagor, and, *secondly*, that, even on the assumption that the Defendants have realised cesses from the tenants, the Plaintiff is not entitled to claim these sums in the course of the accounts in a redemption suit, because if the Plaintiff were now to institute a suit for recovery of the money alleged to have been improperly appropriated by the mortgagees, his claim would be successfully met by the plea of limitation, except with regard to the cesses for the three years immediately preceding the suit. In our opinion, the first contention of the Defendants-Appellants must prevail while the second must be overruled.

In support of the first ground taken by the Appellants, it has been urged that the arrangement alleged by them was not in variation of the terms of the original usufructuary mortgage, and that, in substance, it was only a mode of payment adopted by the parties with regard to the annual profit of Rs. 10-1-3. In our opinion, this contention is well-founded. The Defendants have never repudiated the terms of the mortgage, they have never denied that they were bound, under its terms, to pay to the Plaintiff the sum fixed as annual profits. Their contention is that they have made the payment, not in cash, but by placing at the disposal of the mortgagor the profits of a portion of the mortgaged premises. The arrangement, therefore, was not in supersession or even variation of the mortgage: it was made on the assumption that the mortgage was a valid transaction in its entirety. The decisions upon which the District Judge has placed reliance are clearly distinguishable. In *Khoda Buksh* v. *Alimunissa* (1), the Court was called upon to consider the validity of a lease granted by a usufructuary mortgagee to the mortgagor. It was ruled that the two transactions were separate. This principle, if it has any application to the case before us, plainly does not assist the contention of the Plaintiff-Respondent. The case of *Maharaj Singh* v. *Balwant Singh* (2) merely shows that after a mortgage has been granted its terms cannot be varied by a parol agreement between the parties. In that case the effect of the oral agreement alleged was to modify the terms of the mortgage contract in essential particulars, as it purported to reduce the amount recoverable under the deed, take away the right of sale, and provide for the payment of the reduced debt by a sale of property not included in the mortgage transaction. The case before us is manifestly of an entirely different description and falls within the principle of the decision in *Gopal Singh* v. *Laloo Lall* (3). The essence of the matter is as pointed out by the Judicial Committee in *Sah Lal Chand* v. *Indrajit* (4) that the Indian Evidence Act does not say that no statement of facts in a written instrument may be contradicted, but only that the terms of the contract may not be varied, added to, subtracted from, or contradicted [see also *Ram Baksh* v. *Durjan* (5)]. Here the Defendants do not seek by parol evidence to contradict or vary the terms of the mortgage contract; they merely seek to show that the sum, payable as profit to the mortgagor, has been paid in

(1) I. L. R. 27 All. 313 (1904).
(2) I. L R. 28 All. 508 at p. 514 (1906).
(3) 10 C. L. J. 27 (1909).
(4) I. L. R. 22 All. 370: s. c. 4 C. W. N 485 (1900).
(5) I. L. R. 9 All. 392 (1887).

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a particular mode. This, in our opinion, it is perfectly competent for them to do. The judgment of the District Judge upon this point cannot, therefore, be supported, and the case must be remanded for further consideration, because, although the District Judge has indicated that he was not quite satisfied with the evidence as to the alleged agreement, he has not reversed the clear and definite finding of the original Court that the agreement has been satisfactorily established. The first ground urged on behalf of the Appellants must therefore prevail.

In support of the second ground taken by the Appellants, it has been argued that they are not liable to account for the sums, found by the District Judge to have been collected by them on account of cesses from the tenants in occupation of the mortgaged premises. It has been contended in substance that such sums have been collected by them not as mortgagees, but as trespassers, and cannot be included in the mortgage account; in other words, that the mortgagor ought to bring a separate suit for recovery of those sums, and if he should do so, he would be successfully met by the plea of limitation with regard to a considerable portion of the claim. Before we examine the soundness of this position, it is necessary to observe that at the time of the mortgage contract in 1877 cesses were not payable by the tenants to their landlord, the liability was first imposed by the Bengal Cess Act, 1880. When, therefore, the proprietor granted the mortgage, he did not and could not anticipate that the mortgagees would be in a position to realise from the tenants any sums in excess of the actual rents. It appears that after the statutory liability had been imposed on the tenants the usufructuary mortgagees in possession collected from them, not merely the rents, but also the cesses. The result, therefore, has been that, while the mortgagor as proprietor had paid the cesses to the Collector, the sums recoverable by them from the tenants in that behalf have been intercepted by the mortgagees in possession. The question arises whether under these circumstances the mortgagees are not bound in the mortgage account to credit the mortgagor with the sums thus improperly realised by them. Upon an examination of the mortgage contract, it is, we think, fairly clear that the parties did not intend that any accounts should be taken at the time of redemption. They arbitrarily fixed the income of the property, and settled the amount to be paid therefrom on account of Government demands and interest on the security. The remainder, which was a fixed sum of Rs. 10-1-3, was to be annually paid to the mortgagor as surplus profits. The arrangement, therefore, in substance was that if the contract was faithfully performed by both sides, the mortgagor, upon payment of the principal sum alone, would become entitled to redeem the property. The contingency, however, which has happened, is that the mortgagees have collected from the tenants sums which were realisable under a subsequent Statute only by the proprietor mortgagor. Are they not in equity bound to account for such sums? Sec. 76 of the Transfer of Property Act provides in cls. (*g*) and (*h*) that the mortgagee in possession is to account for all sums received by him as mortgagee, in other words, if a mortgagee in possession has received profits from the mortgaged property in an altogether different character, he cannot be called upon to account for them. Instances of possession by a

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person who is a mortgagee, but receives the profits in a different character, may be found in the books. [*Blennerhassett* v. *Day* (6) where a mortgagee took possession under a forfeiture, and *Page* v. *Linwood* (7) where a mortgagee entered into possession as lessee. See also *Karamal* v. *Imdad* (8) and *Khadim* v. *Sheo Manraj* (9)]. In the case before us, the mortgagees had no other character in which they could claim to be in possession. The principle, therefore, applies that the mortgagor is entitled to credit for every sum realised by the mortgagees out of a mortgaged property. This principle is based as was pointed out by Mr. Justice Story in *Gordon* v. *Lewis* (10) on the doctrine that a mortgagee shall not get any advantage out of the mortgage fund beyond principal and interest. [*Goubbins* v. *Creed* (11)]: in other words, in the view of a Court of Equity, the rents and profits are incidents *de jure* to the ownership of the equity of redemption, and the mortgagee in possession is bound to apply whatever profits he actually receives towards the satisfaction of the mortgage-debt. An instructive illustration of the application of this doctrine is to be found in the case of *Dexter* v. *Arnold* (12). There a mortgagee in possession had transferred a portion of the mortgaged premises as if he were the absolute owner thereof, and received a large sum of money. When the mortgagor sought redemption, he claimed the benefit of the sum obtained by the mortgagee by the sale. The mortgagee contended that he had received the sum by a wrongful act, and was not bound to include it in the mortgage accounts. Mr. Justice Story overruled this contention, and held that as the mortgagor was prepared to adopt the transactions if it had been made with his consent, he was entitled to the benefit of the sum wrongfully received by the mortgagee. In the case before us the mortgagees have improperly collected the cesses from the tenants. The mortgagor has not repudiated these transactions, he has not sought to make the tenants liable on the ground that the payments had been made to a person not authorised to collect them on his behalf as proprietor. Under these circumstances, it is, in our opinion, but just that the mortgagor should be allowed credit for these sums. The view we take is not opposed to the decisions in *Nawal Kisore* v. *Inait Ali* (13) and *Sujat Ali* v. *Dut Ram* (14). In the first of these cases, the mortgagee in possession had collected from the tenants sums not legally payable by them because they were in the nature of illegal cesses. The Court held that, as a general rule, it was equitable to give the mortgagor credit for every sum entered in the account rendered by the mortgagees as realised and not to allow the latter to repudiate any of these items on the plea that they were illegal cesses. In the second case, the Court held that, under similar circumstances, as the mortgagees had not entered the illegal cesses in the accounts kept by them, the mortgagee was not entitled to claim them. This distinction obviously cannot be supported on principle. If it were recognised, the result would be that the mortgagee who honestly admitted that he had recovered

(6) 2 Ba. & Be. 104 at p. 125 (1811).
(7) 4 Cl. & F. 399 (1837).
(8) 7 Agra S. D. (1852).
(9) 9 Agra S. D. 164 (1854).
(10) 2 Sumner 143; 10 Fed. Cas. 807 (1835).
(11) 2 Sch. & Lef. 218 (1804).
(12) 2 Sumner 108; 7 Fed. Cas. 597 (1834).
(13) 7 Agra S. D. 248 (1852).
(14) 8 Agra S. D. 178 (1853).

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the illegal cesses would be liable, whereas the mortgagee who was unscrupulous enough to deny that he had realised them would escape liability. The liability, in our opinion, ought to depend upon the nature of the sums collected and the character in which they were realised. Tested from these points of view, the case before us is reasonably free from difficulty. In the first place, the Defendants were in possession as mortgagees: no other character could be attributed to them. While they were entitled to intercept the rents payable by the tenants, they also realised, no doubt improperly and without the assent of the mortgagor, the sums payable as cesses. But they found themselves able to do so only because they had been placed in possession as mortgagees. But for their character as mortgagees, they would have had no access to the tenants, and would not have been able to collect any sums at all from them. In the second place, the sums realised were payable by the tenants by reason of their occupation of the land; it was a statutory liability imposed upon them, calculated upon the annual value of the lands. The essence of the matter, therefore, is that the mortgagees who had as such got into possession and who were entitled under the mortgage contract to collect the rents took advantage of their position as mortgagees to collect other sums from the tenants payable by the latter in their character as tenants not to the mortgagees but to the mortgagor. In our opinion, there can be no doubt, under these circumstances, that the mortgagees are liable to account for the profits received. Some analogy is furnished by a very different class of cases in which it has been held that a trespasser who has been unlawfully in occupation of land is bound to account not merely for the rents and profits but also for whatever sums he may have collected even by any wrongful means; [see, for instance, *Chunder Coomar* v. *Kashee Nath* (15) where a trespasser was made liable, not only for the ordinary rents and profits, but also for what he had collected from the tenants by wrongful extortion, and *Buneead Singh* v. *Sudaseeb Dutt* (16) where a trespasser was made liable for value of trees cut down and appropriated by himself; see also *Moyi* v. *Avuthramar* (17). But in the case of *In re Radha Mohan Ghosh* (18) a different view was taken and it was ruled that illegal collections cannot be taken into account in the adjustment of mesne profits]. No doubt these cases are much simpler, because the wrong-doer receives wrongfully whatever he realises, whereas in the case before us the receipt of the rent by the mortgagees is lawful, but the realisation of the cesses is unlawful. For the reasons stated, however, we are of opinion that the realisation of the rents as well as the cesses stands on the same footing, and the mortgagees are not entitled to set up as a defence that they have collected the cesses as trespassers and are not bound to include them in the mortgage accounts. [*Narsingh* v. *Lukputty* (19), *Ramnath* v. *Brahmamoyi* (20); see also *Nogendrabala* v. *Gurudoyal* (21), which shows that the agent of a landlord is bound to account for illegal cesses collected from tenants, though the contrary view may possibly

(15) 5 W. R. Mis. 37 (1866).
(16) 2 W R. Mis 50 (1865).
(17) I. L. R. 22 Mad. 197, 200; 8 Mad. L. J. 273 (1898).
(18) 1 Beng. S. D. Sum. Cas. 75 (1846).
(19) I. L. R. 5 Cal 383 (1879).
(20) 1 C. L. J. 531 (1905).
(21) I. L. R. 30 Cal. 101: s. c. 7 C. W. N. 535 (1903).

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be supported by *Nobin Chunder* v. *Gooroo Gobind* (22), [explained in *Nobin* v. *Gooroo* (23)]. The second objection taken by the Appellants must consequently be overruled..

The result, therefore, is that this appeal is allowed and the decree of the District Judge discharged. The case is remanded to him in order that he may rehear the appeal. He will first consider whether the arrangement alleged by the Defendants for payment of the annual profit of Rs. 10-1-3 has been established on the evidence; if it has been proved, the mortgagor is not entitled to claim any credit on this amount; if it has not been proved, the mortgagor is entitled to have the amount with interest thereon at six per cent. per annum set off against the principal sum. In so far as the cesses are concerned, we affirm the finding of the District Judge that the Defendants have realised them, and the Plaintiff is entitled to credit to that extent with similar interest on the sums realised when the mortgage accounts are taken. The costs of this appeal will abide the result.

Case remanded.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 766 OF 1911.

HOLMWOOD, J. N. R. CHATTERJEA, J. 1911. 3, August.	DR. H. P. SANDYAL, Complainant, Petitioner, *v.* KUNJESWAR MISRA, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 202 and 203—Complaint, dismissal of, without giving opportunity to the complainant to prove his case.

After the examination of the complainant the Magistrate should dismiss the complaint at once or elect to hold inquiry under sec. 202, Cr. P. C., before issuing process.

Where the Magistrate examined the complainant on the 28th April and without dismissing the complaint then and there adjourned the case to the 26th May, and then on that date after making certain enquiries from the solicitor of the accused and looking into papers which had been filed by the defence before the police, dismissed the complaint:

Held—*That the procedure adopted by the Magistrate was irregular, and that having virtually elected to hold an enquiry under sec. 202, Cr. P. C., he should not have dismissed the complaint without giving an opportunity to the complainant to adduce evidence in support of his case, and if, upon such opportunity being given, he still failed to produce his witnesses, then his case might have been dismissed upon that ground.*

This was a Rule issued on the 7th of July 1911, against the order passed by Mr. J. Thornhill, Chief Presidency Magistrate of Calcutta, on the 26th of May 1911, refusing the Petitioner's application for the issue of process against the Opposite Party under sec. 471 of the Indian Penal Code.

The facts of the case material to the report as disclosed in the petition were as follows:—

"On the 28th February 1911, the Petitioner lodged a complaint before the Chief Presidency Magistrate alleging that the Petitioner used to reside in No. 1, Akhil Mistry's Lane, and that on the 13th October 1910 he left for Balasore with his family and took his Bank of Bengal cheque-book with him, that on the 2nd November 1910 he came to Calcutta on business and stayed for 2 or 3 days but

(22) 14 W. R. 447 (1870).
(23) 25 W. R. 8 (1875).

was obliged to leave Calcutta abruptly in consequence of an attack of fever and forgot to take his cheque-book, that he finally returned to Calcutta from Balasore on the 27th January 1911 and stopped with his family at 95, Cornwallis Street, and that on the 28th January 1911 he came to No. 1, Akhil Mistry's Lane, to take away his things and to vacate the house once for all when he found his cheque-book missing. That directly on his return home at about 10 o'clock in the evening, he sent intimation by post to the Bank of Bengal as regards the loss of the book and that on the 11th February 1911 the Bank informed him that a cheque out of the missing book for Rs. 207 purporting to have been drawn by him in favour of Kunjeswar Misra was presented by the latter personally for payment, that thereupon the Petitioner went to the Bank, saw the cheque and told the Chief Accountant that his signature had been forged and that the Petitioner accordingly prayed that processes might be issued against the Opposite Party under sec. 471 of the Indian Penal Code.

After three or four adjournments the learned Chief Presidency Magistrate took up the case on the 26th of May and after having put some questions to the Petitioner examined the accused at length and without taking the evidence of the Petitioner's witnesses Dhirendra Nath Bose, Bibhuti Bhushan Bhattacharjya and the Chief Accountant of the Bank of Bengal who were present in Court passed an order to the effect: "application refused."

The Petitioner submitted that the witnesses would have proved that the signature on the cheque No. I. C. C. 88899 was not the Petitioner's signature and that the accused attempted to cash the cheque knowing the same to be forged.

Babu Atulya Charan Bose for the Petitioner.

Mr. K. N. Chaudhuri and *Babu Monmatha Nath Mukherjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

It is clear that there have been great irregularities in the conduct of this case. The complaint was made on the 28th February 1911 by one Dr. Sandyal against one Kunjeswar Misra for having fradulently used a forged cheque in his name. The case was adjourned from time to time, for what reason we know not, but the complainant was not examined until the 28th April 1911, and according to law after the examination of the complainant on oath the Magistrate was bound to dismiss the complaint at once, or to elect to hold enquiry under sec. 202, Cr. P. C., before issuing process.

It appears from the fact that he adjourned the case till the 26th May 1911 that he elected to do the latter and it was therefore his duty to impress upon the complainant that he was bound to produce his witnesses on the 26th May and he should then, if no witnesses were produced, have dismissed the complaint upon his disbelief of the complainant's statement. But he does nothing of the kind. He proceeds to make a detailed investigation and to hear the accused who entirely without process and apparently without any reason had appeared in Court by a solicitor; he made enquiry from his solicitor and looked into the papers which had been filed by the defence before the Police; and as the result of this *ex parte* enquiry he dismissed the complaint, not on the ground that the complainant was unable to produce any witness.

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We, therefore, think that the case must go back to the Chief Presidency Magistrate to give Dr. Sandyal an opportunity to prove his case and produce his witnesses, and if he does not produce any witnesses then this case may be dismissed upon that ground.

The Rule is accordingly made absolute. The records will be returned to the lower Court.

B. C. *Rule made absolute.*

[EXTRAORDINARY ORIGINAL CIVIL JURISDICTION.]

EXTR. NO. 5 OF 1910.

FLETCHER, J. 1911, 7, August. — PEARY MOHAN DAS v. D. WESTON and others.

Conspiracy, suit for damages for—Conspiracy provision relating to, in the Indian Penal Code, if excludes civil action for other conspiracies—Common unlawful object—Arrest of father by Magistrate and Police officers to induce son to confess to a crime—Motive, difference in, amongst persons so conspiring not material—Special damage, to what extent to be proved, in suit for damages from conspiracy—Malicious prosecution by joint tort-feasors and conspiracy, different causes of action for—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 23, 36, 120—Standard of proof for actionable conspiracy, if same as for criminal offence—Assessment of damages—Civil Procedure Code (Act V of 1908), sec. 80—Notice of suit to Government officer acting in bad faith if necessary—Professional ethics—Counsel, retained by party, if may be examined as witness—Criminal Procedure Code (Act V of 1898), secs. 154, 172—First information, proper recording of, by Police—"Case diaries," proper recording of, by investigating officer—Evidence Act (I of 1872), secs. 157, 158—First information report, use of, to corroborate or impeach informant—Explosive Substances Act (VI of 1908), sec. 5—Bomb found in joint family residence, who may be held responsible for, possession whose—Jail Code, rules in, operation of.

The law does not permit of a man being arrested in order to put pressure on his son to confess even if the person causing the arrest believed that by so doing he will get evidence that will lead to the conviction of persons engaged in a huge conspiracy.

Where three persons were found to have acted in concert in having a man arrested with that object, the fact that two of them did not believe the story upon which the charge against the son was based to be true whilst the third believed in its truth was no ground for the exemption of the latter from liability for damages resulting to the father from the conspiracy, for the motive of one conspirator may be different from that of the others.

The standard of proof of a conspiracy in a suit for damages resulting therefrom is not in India the same as if the Defendants were being tried on a criminal charge.

IN THE GOODS OF GOPESSUR DUTT (6) *relied on.*

A suit for damages resulting from a conspiracy which would be indictable at Common Law lies in British India according to the principles of justice, equity and good conscience, and the Indian Penal Code by providing for only one form of criminal conspiracy, viz., to wage war against the King, cannot be considered to have taken away this civil remedy either expressly or by necessary implication.

QUINN v. LEATHEM (7) *followed.*

A suit brought on a conspiracy must be kept strictly to the cause of action that has been set out in the plaint.

If a conspiracy is, as in this case, indictable at Common Law, it gives rise to civil liability if damage has been occasioned by it to the Plaintiff.

(6) Unreported.
(7) [1901] A. C. 495.

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The present suit being based on two causes of action, viz., *(1) to recover the damage occasioned to the Plaintiff as the result of an actionable conspiracy ; and (2) to recover damages for malicious prosecution against the Defendants as joint tort-feasors,*

Held—*That the suit though instituted beyond the period of limitation provided for suits for compensation for malicious prosecution was, in regard to the first mentioned cause of action, not barred by limitation, as it was brought within the period provided by Art. 36 or Art. 120 of the Limitation Act, the former article being applicable to the matter, and if it did not apply the latter being applicable.*

Damage to a substantial amount should be proved by the Plaintiff in order to establish a cause of action for conspiracy, though if substantial damage is proved the damages awarded need not be limited to the precise amount proved.

Held—*That the Plaintiff should recover the amount he had to spend owing to his arrest, such damage not being too remote.*

A public officer sued in respect of an act done in bad faith is not entitled to notice under sec. 80, Civil Procedure Code.

SHAHUNSHAH BEGUM *v.* FERGUSSON (9), RAGHUBANS *v.* PHOOL KUMARI (10), MUHAMMAD *v.* PANNA (11) *relied on.*

It is a rule of professional ethics of almost universal application that having taken up the position of an advocate, a counsel should refrain from testifying on a trial which is being conducted by him.

It is not the law that every person in a joint Hindu family should, merely on the ground that a bomb is found in the joint family residence, be liable to be imprisoned and tried for an offence under the Explosive Substances Act (sec. 5). If the article is found in a portion of the house of which one member of the family has the exclusive use, such member must primâ facie *be held responsible for anything that is found there. But if the article is found in a portion of the house of which all the members of the family have use then* primâ facie *the* karta *of the family is responsible. But in either case it is only a presumption which may be rebutted and if the Police act on the information, which they believe, showing that the article found in a house is in the exclusive possession of one member of the family and the article is found in a portion of the joint family residence of which all the members of the family have the use, then the head of the family is not liable to arrest merely on the ground that the article is found in a portion of the house to which all the family can resort.*

QUEEN EMPRESS *v.* SANGAM LAL (5) *relied on.*

The Rules contained in what is known as the Jail Code are rules framed by the Local Government under the powers contained in the Prisons Act and subsequently sanctioned by the Governor-General in Council. Rules when so framed and approved have the same force as the Statute and it is not open to any person to set aside the provisions of such Rules.

A careful and accurate record of the first information has always been considered as a matter of the highest importance by the Courts in India, the object of the first information being to show what was the manner in which the occurrence was related when the case was first started.

EMPEROR *v.* KAMPU KUKI (3) *referred to.*

(9) I. L. R. 7 Cal. 499 (1881).
(10) I. L. R. 32 Cal. 1130 (1905).
(11) I. L. R. 26 All. 220 (1903).

(3) 11 C. W. N. 554 (1902).
(5) I. L. R. 15 All. 129 (1893).

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As the first information can be used in evidence under secs. 157 and 158 of the Evidence Act to corroborate or impeach the testimony of the person lodging the first information such a document becomes valueless if drawn up by some person other than the proper informant.

As the first information in this case which related to a charge of criminal conspiracy at Midnapore was drawn up by a police-officer employed in the Criminal Investigation Department in Calcutta and settled by an attorney, held, *that it was of no value.*

The object of recording "case diaries" under sec. 172, Cr. P. C., is to enable Courts to check the method of investigation by the Police, and this object was defeated in this case as the provisions of the law for recording "case diaries" from day to day had been deliberately disobeyed by the Police during the most important period of the investigation.

QUEEN-EMPRESS v. MANNU (4) *referred to.*

This suit was originally instituted in the Court of the Subordinate Judge at Midnapore, but was removed for trial by the High Court in its Extraordinary Original Civil Jurisdiction. The hearing of the suit commenced on the 17th August 1910 and lasted till 21st July 1911 occupying in all 188 days.

The facts and arguments in the case will fully appear from the judgment.

***Messrs. K. B. Dutt, H. D. Bose, B. C. Mitter, A. N. Chaudhuri, S. C. Roy, B. L. Mitter, P. K. Sen, A. C. Dutt* and *Dr. A. Suhrawordy* and *Mr. A. Dutt* for the Plaintiff.**

For the Defendants :

(At the opening) *The Advocate-General (Mr. G. H. B. Kenrick, K. C.)* and *Messrs.* *Eardley Norton* and *Gregory* for Mr. Weston.

Messrs. Garth, Ali Imam, P. N. Dutt and *Ahmed Sharfuddin* for the other Defendants.

(Afterwards for some time) *The Advocate-General* and *Messrs. Eardley Norton* and *Gregory* for Mr. Weston.

Messrs. Garth, P. N. Dutt and *Ahmed Sharfuddin* for the other Defendants.

(At the closing) *The Advocate-General* and *Mr. Gregory* for Mr. Weston.

Messrs. Eardley Norton, P. N. Dutt and *Ahmed Sharfuddin* for the other Defendants.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This is a suit to recover damages resulting from an alleged conspiracy.

The present suit is one of five analogous suits brought against the present Defendants arising out of a criminal case which was commonly known as the Midnapore Bomb Conspiracy Case. [*The Emperor* v. *Santosh Chunder Dass and others* (1)].

The Plaintiff, Peary Mohan Das, is about 68 years of age. He appeared to me to be older. He was formerly in Government service as a Sub-Registrar of deeds—but in the year 1884 his services were dispensed with owing to his having returned to the person presenting the same a deed which was believed to be forged.

Since the year 1884 the Plaintiff has lived in Midnapore where he appears to be held in respect and esteem.

The first Defendant, Mr. Donald Weston, is a member of the Indian Civil Service and was formerly District Magistrate and Collector of Midnapore. The second De-

(4) I. L. R. 19 All. 390 (1897).

(1) 13 C. W. N. 861 (1909).

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fendant, Moulvi Mozaharul Huq, is a Deputy Superintendent in the Bengal Police. Having been employed for some time in the Criminal Investigation Department, towards the end of 1907, he was appointed as Deputy Superintendent of Police at Midnapore. The third Defendant, Babu Lal Mohun Guha, is an Inspector in the Bengal Police, and in the year 1908 was Inspector of Police at Midnapore.

The Plaintiff's wife is Basanta Kumari. Basanta, who is old and infirm, is mother's sister (*mashi*) to Dr. Rash Behari Ghose, C. S. I., one of the leading Vakils of this Court.

The Plaintiff has three sons Ashutosh, Santosh Chandra and Paritosh.

In the early part of the year 1908, his household consisted of himself, his wife his three sons, a grandson (daughter's son) Jotindra Nath Sen, a cook, a maid servant and a boy servant Bonomali Das. In addition to these there were the young ladies in the zenana. On the 14th January 1908, Santosh who had obtained the appointment of a probationary Sub-Inspector in the Bengal Police went to the Police Training College at Ranchi.

On the 3rd May the Plaintiff's house and six other houses at Midnapore were searched by the Police but nothing incriminatory was found. What the reason for this search was or from whom the information emanated which led to the search we do not know, but apparently it had been intended by the authorities that these searches should take place simultaneously with the searches in Calcutta in connection with the Alipore Conspiracy.*

On the night of the 13th of June Santosh returned to his father's house owing to the vacation at Ranchi. On the 3rd July the Plaintiff's son Ashutosh who was a mail clerk in the Midnapore Post Office was transferred on six hours' notice from Midnapore to Mozufferpore.

On the night of the 7th July, the Moulvi applied for search warrants to search the Plaintiff's house and Hanumanjee's temple of which one Surendra Nath Mookherjee was the *pujari*.

The application for the search warrants was made to Mr. Nelson, late at night. On the morning of the 8th July, the search of the Plaintiff's house was conducted by the Moulvi and Lal Mohun, assisted by others of the Police—the house being surrounded by the Military Police Almost at the end of the search a bomb was discovered in the Plaintiff's *baitakhannah* and Santosh was arrested. The search party was in charge of Mr. Brett, the Assistant Superintendent of Police.

The bomb was subsequently taken to Mr. Weston and afterwards opened by Captain (now Major) Weinman, I. M. S, then Civil Surgeon at Midnapore. Upon the bomb being opened by Major Weinman, it was found to contain a large number of shots and brownish yellowish powder which on examination by the Chemical Examiner proved to be a mixture of sulphide of arsenic and chlorate of potash. This mixture is used in what are commonly known as "throw-down" bombs much in use in this country. The bomb however contained almost one ounce of the powder. The evidence of the Chemical Examiner proves that the bomb was a dangerous article if thrown down at close quarters.

The bomb however apparently was not an article requiring much skill in its manufacture. The powder and shot were contained in a leather covering over which

* *Emperor v Barindra Kumar Ghose*, 14 C. W. N. 1114 (1910

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was wrapped some cloth—the bomb being encased in a jute wrapping. It is said by the Plaintiff that the bomb was placed in his *baitakhannah* at the instigation of the Defendant the Moulvi by the boy Bonomali.

On the 9th July, Santosh was produced before Mr. Nelson, Joint-Magistrate of Midnapore, and after the Magistrate had recorded a statement of Santosh's he was remanded to jail until the 23rd July. On the 23rd of July, Santosh was again produced before Mr. Nelson and on the same day either in the Court room or in the Court premises the Plaintiff was arrested. The Plaintiff alleges that between the 9th and 23rd July interviews took place between him and the Defendants, at which threats were held out to him that unless he induced Santosh to confess he himself would be arrested and that it was owing to his failure to induce Santosh to confess that he the Plaintiff was arrested on the 23rd July.

On 29th July, Santosh made a confession at the Defendant Weston's house, the confession being recorded by Mr. Nelson. Mr. Weston was present at the recording of the confession. It is said that this confession was not a genuine confession but was made by Santosh after being tutored by the Moulvi and Lal Mohun with a view to obtain his father's release. On the 26th July another bomb is said to have been found by a *methrani* in a drain near the Moulvi's house. On the 31st July further searches took place and in the record room of Baroda and Saroda Dutt a bomb was discovered by Lal Mohun.

This bomb is alleged to have been placed there by the Police. The bombs found in the drain and in the record room were despatched to the Chemical Examiner and found on examination to be similar in composition to the bomb found in the Plaintiff's *baitakhannah*.

On the 31st July, the following persons were arrested—Baroda Prosad Dutt, Saroda Prosad Dutt, Jotindra Mohun Banerjee, Nirapada Mookerjee, Madhu Sudan Dutt, Sham Lal Shaha, Nikunja Maiti and Surendra Nath Mookherjee.

Further arrests were made on the 28th and 29th of August, the net result being that including one or two persons who subsequently surrendered thirty persons in all were arrested in connection with an alleged conspiracy. Amongst the persons who were arrested on the 28th of August were Babu Abinash Chandra Mitter, Babu Upendra Nath Maiti, the Rajah of Narajole and other persons who are persons of position and wealth in Midnapore. Surendra Nath Mookherjee on the 7th August was remanded to Police custody for seven days. On the 13th August, Santosh was taken out of jail into Police custody for three days.

On the 15th August, Surendra made a confession which was recorded by Babu Surendra Nath Chakravarti in the house and presence of Mr. Nelson, the Joint-Magistrate at Midnapore. This confession is said to have been made by Surendra after being tutored by the Police whilst he was in Police custody. On the 16th August, Mr. K. B. Dutt telegraphed to the Government of Bengal complaining of the methods adopted by the Police in connection with the case and on the 27th August he wrote to the Government enclosing statements of Ashutosh (the Plaintiff's son), Jotindra Nath Sen (the Plaintiff's grandson) and Upendra Nath Mookerjee (brother of Surendra Nath Mookherjee). On the 21st August, some of the accused who were then under arrest were produced before Mr. Nelson not in Court but in a

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room at the Court premises. Sanction to prosecute twenty-seven of the accused was procured from the Local Government on the 31st August and on the same day the accused that had been arrested earlier than the 28th August were produced before Mr. Nelson.

On that occasion the Plaintiffs, Nirapada Mookerjee and Jotindra Nath Banerjee, were discharged. According to Plaintiff's case on that occasion Santosh and Surendra both presented petitions to the Court which amounted to retractation of their confessions.

On the 4th September, the Plaintiff's son Ashutosh Dass was arrested and produced before the Joint-Magistrate who remanded him to jail until the 7th September. On the 7th September the accused were produced in Court and then it is agreed that Santosh and Surendra presented petitions to the Court alleging that their confessions had been extorted from them.

On the 7th September the first information report was filed in connection with the case.

This report implicated 154 persons in the conspiracy.

No evidence having been offered against the accused the Vacation Bench of the High Court admitted most of the accused to bail between the 18th September and 2nd October.

On the 4th November Mr. Sinha, then Advocate-General, appeared for the Crown before the Magistrate. On that day and the next day the informer, Rakhal Chandra Laha, was examined and stated that the story he was alleged to have given to the Police was wholly untrue and that the story had in fact been invented by the Police.

On the 9th November Mr. Sinha withdrew the prosecution against all the accused except Santosh Chandra Dass, Surendra Nath Mookherjee and Jogjiban Ghosh.

The Magistrate subsequently committed these three accused for trial.

Mr. Smither, the Additional Sessions Judge of Midnapore, convicted all three on 30th January 1909. Santosh, Surendra and Jogjiban all presented appeals to the High Court. The appeals were heard by a Bench consisting of the Chief Justice and Mookerjee, J.

On the 1st of June 1909 the High Court set aside the convictions against Santosh, Surendra and Jogjiban. Within a few days after the acquittal of Santosh, Surendra and Jogjiban, the Lieutenant-Governor directed Mr. Macpherson, the Commissioner of Burdwan, to hold a departmental inquiry into matters relating to the case. The report of that inquiry has not been produced.

But portions of the evidence given before that inquiry have been produced and have been used by the Defendants' Counsel for the purpose of endeavouring to contradict the witnesses for the Plaintiff. The foregoing remarks give in brief outline the principal events in the Midnapore Conspiracy Case.

This suit was instituted by the Plaintiff on the 15th November 1909.

The substance of the Plaintiff's case is that his arrest and the other events that followed thereon were done in furtherance of a conspiracy to injure or cause damage to him and not in the *bonâ fide* belief or with a reasonable suspicion that the Plaintiff was connected with the alleged Midnapore Bomb Conspiracy Case or with the bomb found in his house. The object of the conspiracy is alleged to have been that unless the Plaintiff induced his son Santosh to make a confession the

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Defendants would cause the Plaintiff to be arrested. The Plaintiff also alleges that in furtherance of such conspiracy he was arrested and that damage as such has resulted to him. This is the sum and substance of the Plaintiff's cause of action as set out in the plaint.

Each of the Defendants filed separate written statements.

The reason for the arrest of the Plaintiff is stated in the same terms in the written statements of the Defendants Weston and Moulvi and is in the following terms :—

"That on the 23rd July 1908 an information was laid by the Defendant, Moulvi Mazaharul Huq, before the Joint-Magistrate of Midnapore, a Judicial Officer, of there being reasonable grounds for the belief that the Plaintiff had been accessory to the commission of an offence under the Explosive Substances Act in connection with the said bomb which was found in his house and an application was made for the issue of a warrant for the arrest of the Plaintiff. The said information was laid and the said application for the issue of a warrant made by the said Defendant, Moulvi Mazaharul Huq, in good faith lawfully and in discharge of his duty and this Defendant (*i.e.*, the Defendant Weston) and other superior officers of the Defendant Moulvi Mazaharul Huq in good faith approved of the said information being laid and of the application for the issue of a warrant of arrest being made."

The Defendant, Lal Mohun, in his written statement states that he had nothing to do with the application for the issue of the warrant to arrest the Plaintiff but that he arrested the Plaintiff under instructions from the Moulvi.

The Defendants also admit in their written statements that the application of the 7th July for the warrant to search the Plaintiff's house was made with the approval of the Defendant Weston. On this suit being called on for hearing an application was made by counsel to amend the written statements by striking out this admission.

The other defences raised in the written statements, except as to the service of notices on the Defendants with which I will deal later, may be summarised shortly, *viz.*, that the Defendants acted with reasonable and probable cause and in good faith.

And, at the Bar, the learned Advocate-General has stated that the Defendants say that the story as told by the informer in the Midnapore Bomb Conspiracy case was not only believed by them to be true but that the same was in fact true.

Issues were settled between the parties as follows :—

1. Did the Defendants or any two of them in concert or in conspiracy with each other conspire to injure or cause damage to the Plaintiff or did they or any two of them in furtherance of such conspiracy cause injury or damage to the Plaintiff?

2. Did the Defendants or any two of them in furtherance of such conspiracy maliciously wrongfully or illegally

(*a*) Search or cause a search to be made in Plaintiff's house on the 8th of July,

(*b*) Trespass or cause a trespass to be made upon the premises of the Plaintiff,

(*c*) Arrest or cause the Plaintiff to be arrested,

(*d*) Imprison or cause the Plaintiff to be imprisoned,

(*e*) Institute or continue a prosecution against the Plaintiff?

3. Are the Defendants entitled to notice under sec. 80, C. P. C.?

4. If so, have the provisions of sec. 80, C. P. C., been complied with or have the

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Defendants or any of them waived the right under sec. 80, C. P. C., or are they estopped from raising the plea that notice in accordance with the terms of the statute has not been duly served?

5. Is the suit barred by limitation?

6. What damages the Plaintiff is entitled to?

The Defendants carry the story back to the Partition of Bengal in the year 1905 in order to show what was their knowledge of the state of the District when they say that information of the Midnapore Bomb Conspiracy come to their knowledge.

Following on the Partition of Bengal it cannot be doubted that there was in Midnapore and other parts of Bengal great political agitation.

Speeches were delivered against the Partition, the Swadeshi movement came into being, *Akras* and *Samities* were formed or extended and in some cases attempts were made to enforce the Swadeshi movement by criminal intimidation, force and violence, volunteers were enrolled originally for the purpose of keeping order at meetings and of performing similar duties but whose duties were subsequently extended to picketting the bazars in order to enforce the Swadeshi boycott. There also came into being literature samples of which have been exhibited in this case. This literature included periodicals and books which preached revolutionary doctrines and destruction of Europeans.

Amongst this literature was the *Medini Bandhub* published by one Deb Das Karan at Midnapore and two books known as *Bartaman Rananiti* (The Art of Modern Warfare) and *Mukte-kon-Pathe* (The Way of Salvation lies), the two latter being published in Calcutta. The *Medini Bandhub* was a newspaper appearing regularly at Midnapore.

The *Bartaman Rananiti* and the *Mukte-kon-Pathe* were not published in secret but bear the imprint of the publishers and the price, 12 annas.

There can be no doubt that this class of literature preached to the youth of the country must have had a grave effect. The Defendants also rely upon the prosecution of Khudiram for sedition and his being dragged through the town subsequently to the withdrawal of the prosecution in a carriage said to belong to Mr. K. B. Dutt as part of the information in their possession prior to the relation of the informer's reports. That the article which Khudiram was said to have been distributing was highly seditious there can be no doubt. But the prosecution appears to have been in a difficulty to prove that Khudiram distributed the leaflet. Too much reliance has I think been attempted to be placed by the Defendants on this incident. On the 6th December 1907 an attempt was made to blow up the train of the Lieutenant-Governor at Naraingarh not far from Midnapore. The two Defendants, the Moulvi and Lal Mohun, and one Rai Ram Saday Mookerjee Bahadur of the C. I. D. were deputed amongst others to inquire into this case.

The Moulvi says Mr. Weston gave him instructions in writing particularly asking him to ascertain whether any person had come back from abroad after learning mining. Those instructions have not been produced. Certain coolies engaged as plate-layers on the railway were arrested. One of these, Sibu, having first confessed became an informer. The others also confessed but one of them Nepal not until he had been handed over to the custody of the Defendant, Lal Mohun.

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The confessions went to show that those coolies placed gun-powder under a pot-sleeper on the line, the motive for the crime being that the coolies wished to injure one of the head coolies by blowing up one of the pot-sleepers for which he was responsible. The Police also produced from the hut of one of the coolies some gun-powder in a piece of newspaper. The expert evidence however showed that the explosive used was picric acid. It may be noticed that this was the first anarchist outrage in India in which picric acid was the explosive used. The accused when brought before the Court immediately retracted their confessions.

The evidence as to the commission of the offence, apart from the retracted confessions, consisted of the evidence of the informer that the explosion was caused by the gun-powder placed under the pot-sleeper and the expert evidence that the explosion was caused by picric acid.

The coolies were convicted both in the Sessions Court and by this Court on appeal.

Subsequently, the appeal in the *Alipore Bomb Case* (2) came on to be heard in this Court before the Chief Justice and Carnduff, J. I take the following extract from their judgment :—"Indeed it may be a question whether such a confession has not come to light in the course of these proceedings as it has been stated before us by Mr. Norton that for one of the attempted outrages on the late Lieutenant-Governor disclosed by the confessions in this case certain coolies have been tried and convicted and are still in prison, part of the evidence against them being their own confessions. If the confessions in this case are true then as Mr. Norton has remarked there may be reason to apprehend that those coolies have been improperly convicted. Mr. Norton who appeared for the Crown in that case as well as this has submitted that the Government should be moved by us to release those coolies. It is however outside our province to investigate this matter but no doubt it will be made the subject of careful inquiry by the Government if this has not already been done and the representation of Counsel for the Crown will be brought to the notice of the Government."

Mr. Norton now says that he made no such statement. The Chief Justice and Carnduff, J., tell me that they are positive that he did.

There can be little doubt that the recollection of the learned Judges supported by their judgment written at the time ought to be preferred.

The case against the coolies is, I think, open to suspicion and the evidence that has been given in this case leaves me unconvinced as to its being a genuine case.

In the Midnapore case it is alleged in the first information that "In course of the investigation of the Naraingarh train-wrecking case, Midnapore, which occurred on the morning of the 6th December last, a clue was obtained of a conspiracy by a secret society working at various places at Midnapore and elsewhere and having as one of its objects the assassination of the District Magistrate by means of bombs, explosives or fire-arms."

Nothing has been disclosed in this case to suggest that such a statement has any foundation. The discovery of the Midnapore Bomb case depended if true solely on the evidence of an informer, Rakhal Chandra Laha, who was appointed informer in the middle of May 1908.

It may be mentioned that the coolies who were convicted in the Naraingarh

(2) 14 C. W. N. 1114 (1910).

case were, after the determination of the appeal in the Alipore case, released by order of the Government.

On the 7th and 8th December 1907 was held at Midnapore what is called a District Conference in connection with the Indian National Congress.

Mr. K. B. Dutt who appears as leading Counsel for the Plaintiff in this case was Chairman of the Conference. Amongst those who attended were Mr. Surendra Nath Banerjee and Mr. Arabinda Ghose.

Mr. Dutt appeared at the Conference dressed in European style and declined to allow a discussion on the question of Swaraj as being inopportune at that time.

This produced a split in the Conference, the result being that Mr. Arabinda Ghose and the majority calling themselves "Extremists" left the Conference and held a separate meeting, whilst Mr. Dutt, Mr. Surendra Nath Banerjee and a few others who have been called "The moderates" were the remnant of the original Conference. The evidence shows that Mr. Surendra Nath Banerjee on this occasion as on other occasions was during his stay at Midnapore a guest in Mr. Dutt's house. With regard to the volunteers whose duty it was to welcome and see to the comforts of the delegates it appears that Mr. Dutt had ordered that none of them were to appear with lathies. This apparently offended Satyendra Nath Bose who was then the captain of the volunteers. This Satyendra is same Satyendra who was subsequently hanged for the murder of the informer in the Alipore Conspiracy case.

Satyendra handed over the captaincy of the volunteers to Santosh one of the Plaintiff's sons.

In this manner Santosh, I think, became possessed of the lists of volunteers badges, &c., which were found at the search of the Plaintiff's house on the 8th July 1908.

Santosh very quickly however resigned the captaincy of the volunteers, his father the Plaintiff having warned him that it would be unwise for him to have anything to do with them as he (Santosh) was then a candidate for appointment as a Probationary Sub-Inspector in the Bengal Police.

On the 14th January 1908, Santosh having been appointed a Probationary Sub-Inspector in the Bengal Police went to Ranchi Police Training School. Now, that Santosh at this time was known to the local authorities as an "Extremist" I do not believe. The papers relating to his appointment as a Probationary Sub-Inspector were sent by the Inspector-General of Police through the local authorities at Midnapore. It is hardly conceivable that if the local authorities knew that Santosh was an unfit person for appointment they would not have called the Inspector-General's attention to the fact.

In the year 1906 when the Moulvi had for some time been stationed at Midnapore he had lodged in the house of Abdur Rahman who has been called as a witness in this case.

Some time, early in January 1908, relations between the Moulvi and Abdur Rahman were renewed which ultimately led to Abdur Rahman being appointed a paid informer. The Moulvi fixes the date of the conditional employment of Abdur Rahman as early in January.

On the 19th January according to the Moulvi's evidence Abdur Rahman who, it had been arranged, should proceed to Naraingarh came and informed him that Khudiram Bose and Sarat Chandra De were missing from Midnapore with Jogjiban's revolver and that he feared that

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they had gone to shoot Mr. Weston who was then at Jhargram.

On the next day the 20th January the Moulvi went and informed Mr. Cornish who went that day to Jhargram by the Bombay Mail having the train specially stopped at Jhargram. The Exs. LXIV, LXXII, 7A and CLXXVIII show conclusively that Mr. Weston was in Jhargram at that time and that Mr. Cornish went there to him.

That the Moulvi reported this to Mr. Cornish and that he proceeded to Jhargram is clear. But whether Rahman did in fact obtain that information is another matter. No reliance in my opinion can be placed upon any statements made by Rahman or the Moulvi unless they receive independent corroboration. On the 21st January, Rahman was definitely appointed as a paid informer and he is said almost immediately to have produced to the Moulvi the revolver, Ex. XXI, which he says he got from Satyendra Nath Bose on the pretext that he wished to kill Mr. Cornish for having stopped some Mahomedan religious ceremony. Satyendra, it is said, told Rahman that Mr. Weston was responsible as Cornish acted under his orders and suggested that Rahman should shoot Mr. Weston. Rahman says he feigned assent and Satyendra lent him this revolver, Ex. XXI. The Moulvi says he produced this revolver to Mr. Cornish.

Mr. Cornish made the sketch Ex. 78.

By some extraordinary oversight no date or description of the revolver appears on Ex. 78.

This revolver was subsequently found upon Khudiram when he was arrested after the Mozufferpore murder. The evidence, I think, establishes that at some time this revolver found on Khudiram was produced to Mr. Cornish. The different dates that have been given of the date when the revolver was produced make it difficult to state with certainty when this revolver was produced to Mr. Cornish; but on the whole I think that the balance of the evidence is in favour of the date given by the Moulvi. How Rahman got hold of the revolver is another matter. I do not think that he was anything like as much in the confidence of Satyendra, Sarat and Khudiram as he wishes to make out, although there is no doubt he knew them as being instructor at the *Akra* in which they played.

Rahman, on 28th January, was taken to Calcutta and subsequently produced before Mr. Plowden, Deputy Inspector-General of Police, at the Railway Police Office at Howrah. At the interview there were also present Mr. Weston, the Moulvi and Mr. Cornish. It is said, at that interview Rahman gave information which led to the discovery of the bomb factory at Manicktollah. Mr. Plowden says, he rather thinks that Rahman did say something about a bomb but denies that Rahman gave him information as to the bomb factory. I think from the other evidence that Mr. Plowden is mistaken in his recollection that Rahman may have said anything about a bomb. I am satisfied that Mr. Plowden is correct that Rahman did not tell him about the bomb factory. That would indeed have been a piece of information so important that Mr. Plowden would not have forgotten the time, place and source from which he obtained it. The fact of production of two other revolvers to Mr. Cornish is I think well established. But from what source did they come? I am not prepared to accept without corroboration the statement of Rahman as to where these revolvers come from or the dates of their production. For

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instance in the lower Court he said he was at Mourbhunj when Jogjiban was arrested, *i.e.*, on the 3rd May. If that be so he could not be in Midnapore on the 2nd May when he says he obtained the revolver "Young America." Moreover the second revolver is stated to have been shown to Ram Saday Mookerjee on the 26th January who made a sketch of it. Ram Saday has not been called as a witness in this case. Then with regard to the "Message to the Punjabis" which Rahman says he stole from Satyendra, the document as printed in the paper-book looks all right but if one looks at the original it appears that is is a corrected printer's proof. When a bundle of the "Message to the Punjabis" is sent to Satyendra for distribution why should the corrected printer's proof be sent? Moreover the document apparently was for distribution amongst Punjabis.

There can be but few Punjabis in Midnapore to whom to distribute this document. Rahman's statement how he obtained this document is far from satisfactory. Similar remarks apply to the pamphlet "India Arise" and the book *Bartaman Rananiti.*

The next incident in Rahman's evidence is the alleged obtaining, from Satyendra, a letter to Calcutta so that Rahman might obtain a bomb.

The letter is Ex. 57 and was said to have been written by Satyendra in Abdur Rahman's pocket-book.

According to Rahman he took his pocket-book to Calcutta, showed it to the addressee of the letter and returned with the letter still in his pocket-book to Midnapore; Moulvi tore the letter out and took charge of it.

Abdur Rahman was however unable to get a bomb, one of the reasons given why he could not get a bomb being a shortage of ice in Calcutta. This story is to my mind wholly untrue. A man of Satyendra's education would not write a letter to a friend in a note-book of Rahman's nor would the friend having read the letter leave it in the note-book to be taken back by Rahman to Midnapore.

No doubt the Moulvi's travelling allowance bill shows that he the Moulvi was in Calcutta from the 23rd to 26th February, but as I consider neither the Moulvi nor Rahman to be reliable witnesses and the probabilities of the story being untrue are so great that I reject it. I wholly disbelieve Rahman's story of the visit to the Annushilan Samity or to Bose's Circus on the *maidan*.

The next document alleged to have been produced by Rahman is the bomb recipe, Ex. IX. This document is alleged to have been dictated to Rahman while Jogjiban was out on bail during the pendency of the charge against him under the Arms Act. Jogjiban was let out on bail twice during the pendency of that case once on the 20th June and again on the 18th July. Rahman says that he was asked to lend his house for the purpose of preparing bombs but before agreeing to do so he consulted the Moulvi who in turn consulted Mr. Weston. Mr. Weston says he advised that Rahman should not do so but told Moulvi to get Rahman to obtain the formula for making bombs.

This story is again highly improbable. If Rahman's story be accepted then Jogjiban who had been released on bail on 18th July was so intent on making bombs that on the very next day he was trying to find a place to manufacture them.

Moreover, I think that the Moulvi in his evidence in the Sessions Court clearly intended to fix the date of this document

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at about the 20th June when Jogjiban was out on bail for the first time.

The endorsement now on the document giving its date as the 20th July with the impossible Hindu name of Pattopadhya is I am satisfied not genuine. Mr. Hadril says he cannot say if the pencil writing containing the date was on the document when he had it with him in the lower Court. There can be little doubt but that Mr. Dundas, D. I. G. of Police (Ranchi Range), took a correct view of this document when it was shown to him. He said "That appeared in the *Juganter*" and took no further notice of it. The probabilities are that the Moulvi would also know of this recipe having appeared in the *Juganter* more especially owing to his close touch with the officers in the C. I. D. I reject Ex. IX as a genuine document prepared as mentioned by Abdur Rahman. Nor am I inclined to accept the statements of Rahman and the Moulvi as to the advance by Rahman of Rs. 50 to Satyendra on a note of hand. Their statements are highly improbable and are not supported by Mr. Cornish. Moreover if this document had been in fact given by Satyendra it is quite certain that the authorities would never have allowed it to pass out of their possession without taking a photograph of it so as to establish the fact that Rahman had close relations with Satyendra. Then on the 2nd of May evening, according to Rahman, a dark man came to Satyendra's house speaking "in mixed English and Bengali," said the factories had been raided in Calcutta and that all had been arrested except Khirode and Noresh. As Rahman according to his evidence in the Sessions Court was in Mourbhunj on the 3rd May it is hardly possible that he could be in Midnapore on the 2nd May evening. Abdur Rahman appeared to me to be a witness who had learnt his lesson before coming to Court. When being examined in chief by Counsel for the Defendants he gave his evidence with surprising alacrity and readiness, but when he was cross-examined there were long pauses, hesitation and confusion. He is a witness on whose testimony, unless corroborated by good and independent testimony, I decline to place the slightest reliance. The only thing that one can say for certainty is that Rahman by reason of having been the instructor at the *Akra* where Satyendra played was acquainted with Satyendra, when Satyendra disappears from the scene Rahman ceases to supply any information true or false except Ex. IX which I have already found not to be a genuine document. Nor is he able to give any connecting link between Satyendra's conspiracy and the alleged conspiracy known as the Midnapore Bomb Conspiracy. This is more especially to be noticed as Jogjiban with whom Rahman says he was on terms of intimacy is alleged to have been a conspirator in both Satyendra's conspiracy and the Midnapore Bomb Conspiracy and was one of the accused in that case who were ultimately acquitted by the High Court on appeal.

Neither do I accept the statement of Rahman as to Satyendra having told him that they had sent a bomb through the post to Mr. Kingsford.

One other point as to the position in life of Rahman. That he is a man of no social position cannot be doubted. The statement of the Moulvi that Mahomedan gentlemen of position used to sit down with him whilst he read to them passages from a sacred book and afterwards gave his guests light refreshments is, I am satisfied, absolutely untrue.

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Syed Zia Uddin who has been called as a witness for the defence in this case and is a Zemindar and Honorary Magistrate says quite clearly that the Mahomedan gentry would not sit down with Abdur Rahman. This evidence is, I am convinced, correct. Rahman appears to be the son of a butcher and was a petty trader in a very small way until he became an informer.

One other matter before parting with Rahaman. It appears from Ex. V (Extracts from the proof of Rahman in the Crown brief used at the Sessions Court Trial) that Rahman was to be examined as to a statement that Santosh had made to him that arms were being collected at Purulia. Rahman said in his evidence here that he never made such a statement to anybody. How then did this statement find its way into the proof in the Crown brief? Rahman's statement for the Crown brief was recorded by the Defendant, Lal Mohun. Nor do I think that the statements of Rahman as to his reasons for visiting Mourbhunj and Mahisadal satisfactory.

Abdur Rahman now goes out of the story altogether.

Mr. Weston for some time prior to this had been receiving anonymous threatening letters and letters as to arms being concealed. It is also a fact that Hem Chandra Das and some of the others charged in the Alipore Conspiracy came from Midnapore. Much stress has been placed on the fact that the Zemindars' Samiti at Midnapore made a grant of Rs. 200 to Hem Chandra Das to assist him in studying *silpa* (mechanical arts) abroad.

Doubtless, it is unfortunate that the zemindars have made this grant as events have proved. The mechanical arts which Hem Chandra was studying abroad have subsequently been proved to be the manufacture of explosives.

But on the other hand we have the statement of Inspector, Nagesh Chunder Mookherjee, who was Inspector in charge of Midnapore from 1904 to 1908 that the Zemindars' Samiti was not a seditious body. The Rs. 200 was forwarded to Hem Chandra through the Society for promoting Scientific and Industrial education amongst Indians.

Moreover, this is not the only case in which a Midnapore gentleman has assisted financially a youngman from the town who has gone abroad to advance his studies. For the evidence shows that Abinash Chandra Mitter, the Plaintiff in one of the other suits, assisted Mr. Birendra Nath De with a sum of Rs. 8,000 to enable him to proceed to Cambridge where Mr. De graduated amongst the Wranglers and subsequently passed into the Indian Civil Service and is now an Assistant Magistrate in the Central Provinces.

Mr. De's house is alleged to be one of the places where the conspirators in the Midnapare Bomb Conspiracy Case used to meet and conspire together.

On the 30th April 1908, Mrs. and Miss Kennedy were assassinated at Mozufferpore by Khudiram by means of a bomb.

Following on this, on the 2nd May, a cypher telegram came to Mr. Cornish from the C. I. D., Calcutta. Mr. Cornish was unable to decipher the telegram and sent Moulvi up to see Mr. Plowden.

It had been the intention of Mr Plowden to have a simultaneous searches made at Calcutta and Midnapore but owing to the failure of Mr. Cornish to decipher the telegram this intention was frustrated.

On that day the Alipore Gang were arrested in Calcutta and the garden at

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Manicktollah raided. The Moulvi returned to Midnapore late on the night of 2nd May or early on the morning of the 3rd May.

On the 3rd May seven houses were searched in Midnapore. It is only material to give the names of two of the owners of the houses, namely, the Plaintiff and Satyendra.

The Plaintiff refused to open his door to the Police and kept them waiting 15 or 20 minutes. Ultimately the Police sent for Mr. Nelson, the Joint-Magistrate, and the Plaintiff permitted the Police to come in and make the search. The Plaintiff strictly was entitled to refuse the Police admission into his house to search it as no warrant to search the Plaintiff's house had been obtained.

Nothing was found in the Plaintiff's house on that occasion.

Certain *Bande Mataram* flags and badges which were taken possession of by the Police at the search of 8th July are said by the Plaintiff to have been in the house on 3rd May. The Defendants deny this.

Mr. Norton suggested that during the delay in opening the door these articles had been taken to the house of Jogendra Mullick. That suggestion had however to be abandoned as it is admitted that the Police when about to search a house first of all surrounded it to prevent anything from being taken from the house.

At the same time it is to be noted that the search of the Plaintiff's house was under the orders of the Criminal Investigation Department in Calcutta so that the Plaintiff or his family must have been under some suspicion at the time. On the other hand when you find a system of espionage so complete as has been spoken to by the Defendant, Lal Mohun, in this case, *viz.*, that every police-officer has his spy who is paid out of the secret service fund one must not assume that every information given to the Police is true or well-founded.

Pausing here for one moment, it seems to me very obvious that on the information then in the possession of the authorities Mr. Weston was bound to be very watchful over the District of which he had charge. It is not denied that at this time in fact there existed a criminal conspiracy at Midnapore which included Satyendra and Khudiram both of whom were subsequently hanged. They had also the fact that on the searches of the 3rd of May were found Swadeshi documents (some of them violent), copies of the *Bartaman Rananiti* and *Mukte-kon-Pathe*, swords, a bayonet and some other articles of a doubtful nature.

About the middle of May 1908, one Rakhal Chunder Laha was appointed by the Moulvi with the consent of Mr. Weston to be a paid informer.

There is a contest on the evidence as to whether the informer was a man of bad character or not. It is admitted that there are two men each called Rakhal Chunder Laha and that one of them is a man of bad character. In fact the Moulvi says that the Rakhal Chunder Laha of bad character was "a desperate character." The evidence is clear that the informer was the man of bad character. Mr. Cornish says the Moulvi told him that the informer was a drunkard and 'a bad lot.' Mr. Plowden says also that he was informed that the informer was a drunkard.

In Rakhal's proof for the Crown brief for use in the Sessions Court (Ex. S. S.) drawn up by Lal Mohun it is stated that Asadulla, Head Constable, took him to the house of Moulvi. The reason Mr.

Weston approved of the appointment of Rakhal as an informer he states was because he was a friend of Jamini Mullick's and also a relative of Baroda and Saroda Dutt. Whether Rakhal was at that time on terms of friendship with Jamini may be doubted for I find at p. 14 of Ex. S. S. the following statement. "For this I had a quarrel with him (that is Jamini Mullick) and I gave up going there and did not mix with them."

This is in accordance with the vernacular statement but Lal Mohun altered this in the translation as follows :—"For this I had the quarrel with him and I gave up going to the Akra and discontinued my visits to him." Doubtless two pages further in Ex. S. S. the informer says "I frequently go to his house" but this hardly seems to be consistent with the previous statement. The informer was, as I have said, appointed according to his own statement on the 20th May and on the 23rd May he is said to have commenced giving informations to the Moulvi. Up to the 31st May the Moulvi says that Rakhal used to come to his house and give his reports which the Moulvi wrote out in his confidential diary. From the end of May, the Moulvi says, fearing that the fact of Rakhal's coming to his house might become public he directed Rakhal to go in future to Asadulla, Head Constable, who would record his statement. Why Rakhal who is a man of education was not permitted to write his own reports has not been satisfactorily explained. The explanation that they were written by Asadulla because he could write more quickly than Rakhal hardly seems to be satisfactory.

When the Moulvi says that Rakhal was appointed because he was known to be one of the leading "Extremists" may be doubted because in the proof of Rakhal (Ex. S. S.) prepared by Lal Mohun I find the following speech said to have been addressed by Moulvi or Asadulla to Rakhal on the 20th May at the Moulvi's house (Ex. S. S., p. 16) "you work on the side of the Government. It is a great sin to work against Government and it is an ill omen to the country. You mix with the Swadeshi agitators and let me know their doings." This coupled with the statement on p. 14 of Ex. S. S. that after the quarrel with Jamini Mullick the informer "did not mix with them" raises doubts as to the Moulvi believing that the informer was a conspirator deep in the confidence of his fellow conspirators. There is moreover a remarkable fact that the reports said to have been given by the informer open on the 23rd May with the reports of meetings of a fully organised conspiracy. One can hardly imagine that an officer with the experience of the Moulvi in criminal investigation would not have questioned the informer as to the origin and growth of such a formidable conspiracy. Before the Committing Magistrate the informer stated that he never gave the reports at all but they were drawn out by the Police and signed by him at one and the same time. We have two records of the reports said to have been given by the informer, Rakhal.

One is Ex. 56 which is said to contain the reports made from day to day. These reports commence from the 1st June. The other document Ex. G is said to have been written in October 1908 by Asadulla to assist the informer to give his evidence. It is said Ex. G was dictated by Rakhal the informer to Asadulla from four note-books in Rakhal's possession and that Asadulla added the marginal notes in red ink. Why if Rakhal had four note-books containing contemporaneous records of

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events and which he might use in Court to refresh his memory Asadulla should draw him up a document which he could not so use is not apparent. Moreover, if Asadulla's story is correct, it would appear that Asadulla was so anxious to save the informer's trouble that he signed Ex. G for him but the name he signed was "Ram Saran Laha" instead of Rakhal Chandra Laha. The word "Ram Saran" have been attempted to be erased from Ex. G but the words are still distinctly visible. Ex. G was subsequently handed over to the defence by the informer and Ex. 56 was disclosed by Mr. Sinha before the Committing Magistrate after the informer had failed the prosecution.

I must now glance shortly—for space will not permit more than a hurried glance—at the reports given by the informer, Rakhal.

In order, however, to get an introduction to the reports it is necessary to go to the informer's proof drawn up by Lal Mohun (Ex. S. S.).

There we find, on the 23rd May, the first information given by Rakhal after his appointment as an informer on the 20th May.

From Ex. S. S. we find that on that day the informer went to the house of Jamini Mullick. He states:—"I saw some strips of jute, sulphur and shots scattered there. Surendra said we shall prepare a bomb. The Police have arrested Satyendra, Jogjiban and Sarat Dey for nothing. If we can kill Lal Mohun, Moulvi and Mr. Weston, all obstacles will be removed." This is how the document reads in the original translation and the vernacular but Lal Mohun in the translation has struck out the last sentence and substituted "We must do away with the Police and the Firinghees." "This evening Kissen Saha, Jotindra Nath Sen and Sachindra Mohun Sen will return from Calcutta after learning the art of manufacturing bombs. This night I shall consult with them"

Then on the same evening we are introduced to the first secret meeting held at the Basanta Malati *Akrah*.

The report of this meeting appears in Ex. G. The speaker at the meeting is said to have been the Plaintiff's son Ashutosh:

"There was a bench for sitting."

"Ashutosh Das slapped his chest and held forth 'Driving away the Firinghees and Police &c.'

In Rakhal's proof prepared by Lal Mohun, the vernacular and original translation read "Ashutosh Das gave a stirring and inflamatory speech; Lal Mohun has altered this to, "Ashutosh Das jumped up, struck his chest with his hand and said."

Then we find, "There was no mattress but a bench only." Then in Ex. G we find a report dated the 27th May that on that day the informer was entrusted with a letter that Jamini Mullick had received from his nephew, Krishna Prosad Dey, from Calcutta. Now this clearly establishes that the letter was dated not later than the 27th May.

This letter is said to have been subsequently shown to the Moulvi on the 1st of June, when the Moulvi purported to take a copy of it. The copy shows that the alleged letter is dated the 28th May. Counsel for the Defendants admit that there is a difficulty as Ex. G. purports to show that the letter was in the hands of the informer on 27th May and suggests that the date copied by the Moulvi is a mistake. This does not seem to me to be probable; the terms of the letter and the way it is said to have been produced

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suggested far more strongly that the letter never in fact existed.

The terms of the letter are as follows:—

"Youngest maternal uncle, my respectful salutations to you. Besides what has been used in our work we have got 25 implements (Bombs) for putting down the Europeans in excess prepared in our factory. If you require them send a man as soon as you get this letter. If you cannot come please send a man as soon as convenient. If you cannot send any man write to me and I shall hand over the implements for putting down Europeans to the man who will come and show me letter in your handwriting. Why the three or four men of your Basanta Malati Akrah who learnt from us the art of making instruments for putting down the Europeans are sitting down silently? Can the enemy be submitted in this way? We shall wait for your letter or man two or three days and shall go away then with the implements towards any line (some Railway line) what more shall I write? It is useless to say further. 28th May 1908.

Krishna Prosad De,
Jorasanko."

One would have imagined that 25 bombs would have been sufficient for the purpose of exterminating the Europeans in Midnapore. But in the report of the 4th of June (Ex. 56) we find the men who are alleged to have been taught bomb-making in Calcutta saying "when we ourselves have come (here) let us have a house, 25 is a most insignificant number, we shall prepare 2,000 even. Kristo asked us to go within three or four days and that time has been over simply in showing the letter to the members. Probably by this time Kristo has gone out towards any line (some Railway line)."

This story about the 25 bombs and the proposed 2,000 bombs is in my opinion unbelievable. If this story were believed in, it is quite certain that an urgent communication would have been made to Mr. Plowden to endeavour to seize the 25 bombs which the Midnapore conspirators considered to be an insignificant number before Kristo Prosad De went towards some Railway line. An anarchist outrage on a Railway with 25 bombs at one time seems also to be novel.

To this the Defendants say we ascertained the address of Kristo Prosad De and found it correct. That however seems to me to come to nothing. Whoever gave the report was hardly likely to be so foolish as to give a name and address which on the slightest inquiry would be found to be false.

To return to the informer's reports, having got the man from Calcutta who had learnt bomb-making the next thing is a question of ways and means.

The report of the 2nd June (Ex. 56) is the first mention of proposed subscription. The gentleman who is said first to have offered to pay is Babu Satkari Pati Roy, a Sub-Deputy Magistrate.

The Defendants rely on this largely. It appears that on the 2nd June this gentleman was on leave and it was not impossible for him to be in Midnapore. It is quite possible I think that he was in Midnapore on that day. Having regard to the spies and informers that were in the employ of the Police I think it quite possible if Satkari Pati Roy was in Midnapore that a report to this effect was made to the Moulvi.

This gentleman still remains in Government service.

On the 3rd June according to the report in Ex. 56 Jamini Mullick goes to Mr. K.

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B. Dutt with reference to subscriptions for making bombs and a place for making them.

Mr. Dutt is said to have written to the Raja of Narajole for a place. Then on the 5th June (Ex. 56) we find that Mr. K. B. Dutt had sanctioned Rs. 3,000 for manufacturing bombs.

Then on the 8th June (Ex. 56) we find Jamini Mullick saying that "K. B. Dutt, Barrister, sent Annada Charan Pal to the Raja of Narajole for the house but as the Raja's house at Narajole has been searched Raja has got frightened and does not agree to give his house at Gope."

The Raja's house at Narajole at this time had not been searched nor is there any reason to suppose that at the time he believed it was likely to be searched. Next under the same date we find a list of subscriptions for making bombs. The list is headed by Mr. K. B. Dutt with Rs. 100 but in Ex. S. S. (the informer's proof prepared by Lal Mohun) Lal Mohun has struck out Mr. Dutt's name. The 3rd subscription is Pleaders' Bar Library Rs. 400 (money raised by selling vakalatnamas)—this of course means the Bar Association at Midnapore from funds of the Association. The learned Advocate-General has described the Midnapore pleaders as unscrupulous. But even if that were so—a term I should hesitate to apply to gentlemen belonging to an honourable profession—it has not been suggested that they are fools.

That they were going to pay money out of their Association funds for making bombs when each and every pleader would be aware of the fact and the risk of detection would be great is not probable.

Then on the 11th of June (Ex. 56) there is said to have been a meeting at the house o the Raja of Mahisadal. There were 45 or 46 persons present at that meeting. The name of the informer appeared originally as being present at that meeting but his name has been struck out apparently at the time that report was written. Against the informer's name the Moulvi has written "stet."

It is a fact not unworthy of notice that neither in Ex. 56 nor in Ex. G does the name of the Raja's Manager, Nalini Kanta Sen Gupta, appear as one of those who were at the meeting. But a far more significant fact is that the presence of the Raja of Mahisadal's Manager at the meeting of the 11th June is not given in the reports alleged to have been given by the informer until the 26th August the very last report said to have been given by the informer. That report is in these terms "Raja's Ammuktear Nalini Kanta Sen attended the secret meeting which was held in the lodging of Mahisadal on 11th June 1908."

Why such a report should have been given on the 26th August or why the informer's mind on that day was fixed on the meeting of the 11th June and the presence of the Raja's Manager at that meeting one cannot imagine.

At the meeting there is singing and speech-making. Gosto Behari Chandra and Nikunja Maiti sang together to a harmonium accompaniment a Swadeshi song. Then a speech about bombs was delivered.

Meetings advocating the making of bombs one would presume are held in secret. Doubtless this meeting at the Raja of Mahisadal's house is described in the informer's reports (Ex. 56) as "secret." But how far does a meeting at which there is singing, playing on the harmonium and speech-making answer one's ideas of a secret meeting? Besides where were the

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Police and the spies of the police-officers that they did not hear of this meeting which must have been noticed by everybody in the neighbourhood? Lal Mohun in his evidence here stated "my spy generally kept me informed of the doings of the Swadeshi extremists from time to time." But as at many of these secret meetings there was music and a large gathering it seems remarkable that the spies were not able to detect the fact that the meetings were held.

Next we come to the information of the 12th June (Ex. 56).

Deb Das Karan is said to have reported that "he went to Mr. K. B. Dutt, Barrister, and has made him write and post a letter to Surendra Babu in (or of) Calcutta to send bombs. . . . . . The moderate and extremists have all united."

We find the same thing set out in Ex. S S. at p. 17. That Surendra Babu of Calcutta would to any Bengali mean Babu Surendra Nath Banerjee is clear from the evidence. We also know that at the Conference in December 1907 Surendra Babu and Mr. Dutt were two of the small remnant that remained as "Moderates" and it is also in evidence that Surendra Babu and Mr. K. B. Dutt are on terms of intimate friendship. In Ex. S. S. where the passage occurs I find the remark by Lal Mohun "omit." When the Moulvi was cross-examined as to this passage he said "Babu Surendra Nath Banerjee is not Surendra Babu of Calcutta, but Surendra Babu of Barrackpore." But no person that has lived in Bengal would accept such a statement; although it is true that Surendra Babu does in fact live at Barrackpore but the whole of his public life has been associated with Calcutta.

Then much reliance has been placed on the statement in Ex. O. O. O. "Suren Babu not known." The Moulvi's evidence is that subsequent inquiries were made by the Police in Calcutta and they found out that it was another man altogether. But curiously his name also happens to be Surendra Nath Banerjee.

Mr. Plowden did not appear to know anything about this inquiry at all.

I think there can be little doubt that in the first instance at any rate it was intended to implicate Babu Surendra Nath Banerjee of the *Bengali* newspaper. Then we find under the same date "Deb Das Karan will settle (take on lease) the two-storied house of Paramananda Shaha to be let on hire for manufacturing bombs. There will be four houses for manufacturing bombs. If any one gives information to the Police and gets it detected the remaining three will serve the purpose." The next information to which it is necessary to call attention is the one reported on the 14th June (Ex. 56). This gives the return of Santosh and his drilling of the boys who become "excited." Then on the 15th June there was a meeting, said to have been intended to be held at the house of the Maharaja of Mourbhunj but the meeting was postponed as Deb Das Karan could not attend owing to the rain.

On the 16th of June (Ex. 56) the informer was informed that in accordance with the letter written by Mr. K. B. Dutt a bomb had been forwarded from Calcutta and it was being kept as a sample by Deb Das. I very much doubt whether bombs are made from a sample. Moreover the young men who had returned to Midnapore after learning the art of bomb-making at the Anushilan Samiti in Calcutta could hardly require a sample before setting to work. Then on the 17th June (Ex. 56) we find "on the day

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fixed Rash Behary Ghose will come from Calcutta to conduct the case against Satyendra Bose and others. He will not charge any fees for conducting the case." This of course is intended to implicate Dr. Rash Behary Ghose, the eminent Vakil, with Satyendra by showing that he was on such terms with Satyendra that he would come and defend him without fees. Every one in these Courts is aware that Dr. Ghose does not practise in the Criminal Courts.

Next we come to the 18th June (Ex 56). This purports to relate the story of the first production of the bomb by Surendra Nath Mookherjee at the house of Rajabala, a prostitute, where in the presence of the informer, Nikunja Maiti and Jnanendra Sircar, the bomb was placed on the bed of the prostitute and supported by two pillows. This is said to have taken place some time after 10 o'clock at night and it is evident both from Ex. 56 and Ex. S. S. and Ex. G that the prostitute was present.

The discussion that took place at the prostitute's house before the arrival of Surendra Nath with the bomb was "whether India might be free some time or other." The hour is somewhere after 10 o'clock at night. I doubt whether the house of a woman of the town is either the place or a late hour of the night the time where these young men would meet to discuss "whether India might be free some time or other." On this incident as set out in Rakhal's proof as drawn up by Lal Mohun (Ex S. S.) there is one matter worth noting.

The Moulvi and Asadulla have both sworn in this suit that after the end of May all the reports of Rakhal, the informer, which were drawn up by Asadulla were drawn up by him at his own house and that the informer on those occasions never come to the Moulvi's house. This the Moulvi says he did in order to avoid the public finding out the employment of Rakhal.

Now the account of the meeting at Rajabala prostitute's house is drawn up by Asadulla and signed, so is the report on the day previous. But look at Ex. S. S. and see how far the Moulvi and Asadulla's story is supported by that statement. The informer there says as taken down by Lal Mohun "At about 10 P.M., (on the 17th June) when returning home from the house of Moulvi Saheb, Deputy Superintendent of Police, I saw Jnanendra Nath Sircar, brother of Jogendra Nath Sircar "sitting at my door." The informer then proceeds to relate how he went with Jnanendra to Rajabala's.

It is certainly very curious that if the Moulvi and Asadulla's evidence is true that the informer should say he was coming from the Moulvi's house and that this fact was to appear in the proof of the informer upon which he was to be examined by Counsel in Court.

Under the entry of the 18th June in Ex. 56 there also purports to be a description of the wrecking of the train of the Lieutenant-Governor. This part of the alleged information is however omitted from Ex. S. S. (Rakhal's proof). The report states that the information as to the date of the journey of the Lieutenant-Governor was furnished by the elder brother of Khagendra Nath Banerjee (one of the Plaintiffs in the other suits) who was employed in the office of the Lieutenant-Governor.

It appears from Khagendra's evidence that none of his brothers is so employed. Between the 19th and 29th June there are no reports made by Asadulla as it is

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said he was ill. Moulvi says that during this time he recorded Rakhal's information in his confidential diary. That diary has not been produced.

Ex. G however does give reports of two meetings—one said to have been held at Kamini prostitute's on 23rd June and the other held at the house of Trailokya Nath Paul on the 28th June. At the first of these two meetings Satyendra Nath Bose was not only present but he was the speaker at the meeting and at the second meeting Jogjiban Ghose was present. At that time both Satyendra and Jogjiban were out of jail. But one naturally asks what was the first informer Abdur Rahman doing that he did not find out about these two meetings. He was then drawing his pay as a spy and according to his evidence he was on such terms with Satyendra and his party that they had supplied him with revolvers, given him a letter to get a bomb in Calcutta &c. Moreover according to Rahman the first thing that Jogjiban did when he came out of jail on the 18th July was to try and get Rahman to lend his house for the preparation of bombs. Hence Ex. IX.

On the 29th June (Ex. 56) the informer reports that Jamini Mullick said to him "S. P. Sinha, Barrister, was engaged by the Government in the case against Khudiram and Mr. Cotton, Barrister, was engaged on behalf of Khudiram and that S. P. Sinha wants to have Khudiram hanged while Cotton says if Khudiram be hanged there would be disturbance in India."

Mr. Sinha did not appear in the case against Khudiram and Mr. Cotton had left India some years before.

Then on the 30th June (Ex. 56) the informer relates an account of a meeting at which the bomb was produced. In Ex. S. S. (the informer's proof) the informer says nothing about bomb being produced. It is suggested by Counsel on behalf of the Defendants that the informer has made a mistake as to dates in this report and that he was only relating on hearsay what he has been told. I may pass over the report of the 1st July stating that a wealthy Zemindar, Iswar Chandra Chowdhury, had said "Now our work lies in killing the Firinghees" and subscribing Rs. 20 towards the manufacture of bombs and the report of the 2nd July stating that Santosh drilled the boys of Swadeshi Samiti.

Then we come to the report of the meeting of the 3rd July (Ex. 56) said to have been held at the house of Upendra Nath Maiti, the leader of the Bar at Midnapore.

This meeting is called in Ex. S. S. "a secret meeting." There were 37 people present at the meeting. There was again singing to the accompaniment of a harmonium and speech-making Then it is reported "A photo of the Magistrate's house was shown." The Defendant's Counsel rely much on that statement. But at that date Hem Chandra Das's album which contained a photograph of Mr. Weston's house had been exhibited in the Alipore case and it is probable that the Police at Midnapore had been informed of this fact. The next statement, said to have been made by Rash Behari Bose, is "my friend Hem Chandra Das has given me these photos and he has also taught me to make revolvers. I cannot start a workshop for want of funds." The suggestion that in a few days Hem Chandra Das had taught Rash Behari Bose to "make revolvers" is of course absurd. The suggestion by Mr. Norton that what the report means is that Hem Chandra Das

had taught Rash Behari to clean up rusty revolvers does not seem probable as it is not likely that Rash Behari would want to open a workshop for that purpose.

At this meeting on the 3rd July at Upendra Maiti's house the bomb found at the Plaintiff's house on the 8th July is alleged to have been produced. Therefore the meeting is an essential link in the chain of reports. Now the name of Upendra Nath Maiti does not appear in the earlier reports nor does it appear in the later reports. I take the following remarks from the judgment of the Chief Justice and Mookerjee, J., on the hearing of the appeal in the bomb conspiracy case :—"But Upendra Maiti is apparently a man of excellent character and high standing at Midnapore and though originally placed before the Magistrate as one of the conspirators, the Advocate-General, Mr. Sinha, withdrew the charge against him. The Additional Sesssions Judge in his judgment has stated that in his belief Upendra Maiti has not done and said what was alleged against him—and before us the Advocate-General, Mr. Gregory, has conceded that the story of the meeting at Upendra Maiti's house must be discarded as false."

Mr. Gregory stated before me that he made no such admission at all. All that he says he did was to state that if he was asked what portion of his case he would abandon he said he would abandon the case against Upendra Maiti. I think Mr. Gregory's recollection is at fault. The case against Upendra Maiti had been abandoned by Mr. Sinha months before. The learned Judges who heard the appeal are clear in their recollection that Mr. Gregory made this statement and are supported by their judgment as to which no exception was taken until the hearing of this present suit.

Of course Mr. Gregory's statement cannot bind the Defendants in this suit. But the Moulvi was present in Court whilst the appeal was being heard and Mr. Gregory's statement must have been made in his presence. If the meeting at Upendra Maiti's did not in fact take place it creates such a break in the chain of the reports as almost to destroy the story.

Then the Defendants rely much on the statement in the report of the 5th July (Ex. 56) as to the list of the witnesses in the case against Jogjiban under the Arms Act. But such list if known to anybody would be known to the Police. Then we come to the report of the 7th July (Ex. 56) when the Raja of Narajole is said to have come to Jamini Mullick's to see the bomb. Now what was the Raja coming to see—to all outward appearances a ball wrapped up in jute.

This story does not seem very probable but when I turn to Ex. G. which was drawn up by Asadulla, Head Constable, to enable the informer to get up his evidence, I find that the date of 7th July is written and then a blank space is left so that the incidents of the 7th July may be written in subsequently. But this is not all. For when I go to the proof of the informer drawn up by Lal Mohun (Ex. S. S.) I find in the vernacular the report of the incidents of the 7th July as originally written were different to those contained in Ex. 56 for the same date. But subsequently the vernacular of Ex. S. S. has been considerably altered in a different ink to bring the story into line with that set out in Ex. 56.

Before proceeding to consider the application for the search warrant of the Plaintiff's house on the evening of the 7th July I will refer to the transfer of Ashutosh from Midnapore to Mozufferpur on the 3rd July.

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Ashutosh was a mail clerk in the Midnapore Post Office and was transferred on six hours' notice to Mozufferpur by order communicated by telegram from the Postmaster General. That the transfer took place at the instance of Mr. Weston, cannot be doubted. The only question is whether Mr. Weston took action on the representation of the Moulvi and Lal Mohun or on his own initiative.

Before the Sessions Judge Mr. Weston stated "The Police in charge of this case suggested to me that Ashu should be transferred. I took action on that representation."

Mr. Cornish's evidence is to the same effect.

But here Mr. Weston goes back from the statement he made in the Sessions Court and says that he asked Mr. Plowden to get Ashu transferred as letters sent by him got lost in the post.

If it was suspected that Ashutosh was stealing letters at Midnapore it hardly seems a good reason to transfer him to another post-office on six hours' notice where he could do the same.

Moreover, the request for Ashutosh's transfer coming through the Criminal Investigation Department suggests that the reason given by Mr. Weston before the Sessions Court and Mr. Cornish in his evidence here is the true one.

On the 5th July, Noresh, Sub Inspector, and Mohendra, Sub-Inspector, called at the Plaintiff's house to enquire about Ashu. Noresh says the Moulvi told him to find out where Ashu was. Santosh says that Noresh came and enquired about Ashu as he said he wanted to deposit money in the Post Office Savings Bank and he wanted Ashu to tell him the rules.

Santosh gave the police-officers a chillum of tobacco which they sat and smoked in the Plaintiff's *baitakhannah* within a few feet of the bomb if the informer's story be correct.

I now come to the incidents on the night of the 7th July. On that night the Moulvi applied for and obtained from Mr. Nelson a warrant to search Santosh's house.

It is in dispute whether this application was made with the approval of Mr. Weston. The Defendants in their written statements admit that it was so made but on this suit being called on for hearing Mr. Norton applied for leave to amend the written statements by striking out this admission. The evidence however satisfies me that Mr. Weston did know beforehand of the intention to apply for the warrant to search Santosh's house.

Mr. Cornish so stated in his evidence and on the 3rd March (Friday) the Moulvi in cross-examination also so stated. But on the following Tuesday (7th March) he resiled from his previous statement. In my opinion the evidence of the Moulvi given on the 3rd March on this point is the true version.

Then early on the morning of the 8th of July the search party consisting of constables and Military Police under the command of Mr. Brett, Assistant Superintendent of Police, started from the Sub-Inspectors' quarters. The party was broken up into two—one party under the command of Mr. Brett proceeding to the Plaintiff's house, the other party in charge of Asadulla going to surround Hanumanjee's temple.

On arrival at the Plaintiff's house the Military Police surrounded the house and then knocked at the door. After some little delay the door was opened. There has been a good deal of evidence as to

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how long this delay was. However in any view of the evidence the delay lasted some minutes, quite long enough to enable Santosh to get rid of the bomb if he knew of its existence and he so desired. It is said that this could not be done because some of the Military Police were posted on the roof of the Plaintiff's house before the door was opened. This evidence I do not accept. It is put forward in this Court for the first time. The Subadar, Mr. Wilson, who was in charge of the Military Police who spoke as to the placing of the Military Police on the roof was not a satisfactory witness. The door being opened the Police entered with their search witnesses. The Moulvi pointed out Santosh to Mr. Brett. Then the boy Bonomali who had been sleeping either on a *khat* or on the floor beside a *khat* in the *baitakhannah* was immediately placed under guard by the Moulvi.

The Plaintiff said that before the search commenced he must have his own witnesses to the search. These were sent for and having arrived the search commenced. Santosh's room was searched first. Certain *Bande Mataram* badges and flags, lists of volunteers and some other papers were found there. Then the rest of the house was searched and lastly the *baitakhannah*. While the *baitakhannah* was being searched neither Mr. Brett nor the Plaintiff was present. Asadulla at that time came from the Hanumanjee's temple and was permitted to enter the Plaintiff's house. Asadulla's evidence is that as they had been kept waiting so long at the Hanumanjee's temple (about two hours) he came to see why the search party were taking such a long time. He says that Mr. Wilson, the Subadar, searched him before he allowed him to enter the house. This I do not believe. He made the statement voluntarily and not in answer to any question and Mr. Wilson was never asked anything about this in his evidence. Almost immediately after the arrival of Asadulla the bomb was discovered. It is said to have been first seen by a constable Chuni Singh and then by Asadulla. Asadulla ran to Mr. Brett and informed him that something round had been found.

The constable, Chuni Singh, has not been called as a witness in this case.

The bomb was found amongst some loose door frames which were leaning against the wall; near the door frames was a *palki*.

Now the information of the informer that Asadulla says he recorded on the evening of the 7th July states that "Santosh took the bomb to his *baitakhannah* the doors of which he shut up from inside." It is a remarkable fact, as I have already pointed out, that Ex. G contains no account of the incident of the 7th July, only the date of the 7th July being written, a blank space being left below to write in the incidents later.

In Ex. LXXXIIIA, a statement of Rakhal recorded by Mr. Weston on the 22nd August 1908, Rakhal in relating the incidents of the 7th July says he saw Santosh get the bomb from near the *palki* and when Santosh was taking the bomb back from Jamini Mullick's house the same day he said "I followed to see where the bomb was put and the same night I gave information to the Police."

Santosh when he saw the bomb said it was a *benati* ball (a ball used in some game) and then a *langota* (that is loin cloth worn when wrestling)—and Santosh wanted to pick up the bomb but he was prevented from doing so.

Then Santosh was arrested. Mr. Brett placed the bomb in his handkerchief and carried it so suspended.

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Santosh after the excitement felt thirsty and wanted a drink of water and Mr. Brett took him into the inner apartments to his mother where he was given a drink of water and some refreshment as he had not broken his fast that morning. The old lady took hold of Mr. Brett's hand with which he was holding the bomb and raised the back of it a few times to her forehead. Unfortunately Mr. Brett at that time did not understand the vernacular and cannot therefore say what the old lady said. Mr. Norton suggests that the old lady was performing an act of reverence towards Mr. Brett imploring him to save her son Santosh and that the old lady's story ought not to be accepted. The old lady's story is that she told Mr. Brett that her son was innocent and that she was willing to stake her life on his innocence and if permitted would strike the bomb against her forehead to show that the article was not a dangerous one.

I have no hesitation in accepting the mother's story as to this. Then Santosh was taken away by the Moulvi and Lal Mohun. They went to the Hanumanjee's temple where a short search was conducted by Lal Mohun, after which Santosh was sent to the Thanah.

Then there is a conflict on the evidence as to whether the Moulvi returned to the Plaintiff's house that day. I am of opinion that he did and that the old lady's evidence on this point is substantially accurate. Her story is that in about half an hour after Santosh had been taken away the Moulvi returned and found her in tears. She said that her son was innocent and that this was the second time within a short period that her house had been searched by the Police. However she said she was the aunt (*mashi*) of Dr. Rash Behary Ghose and she would lay all the facts of the case before him and see her son righted. She says that upon her mentioning the name of Dr. Rash Behary Ghose the Moulvi said that Dr. Ghose was an old class friend of his own and therefore if she was Dr. Ghose's *mashi* she must be his *mashi* also. That all Santosh had got to do would be to follow the advice of the Police, and all would be well—and that he would call the next morning and tell her how to act. The Moulvi denies this interview with the old lady altogether.

I accept not only the fact of the interview but also substantially the old lady's account of what took place. Later, on the 8th of July, other house searches took place. Amongst the houses so searched was that of Jamini Mullick. The bomb was subsequently opened by Major (then Captain) Weinman, I. M. S., who found that the "core consisted of a yellowish brownish powder mixed with shot" and it was then taken by Mr. Brett and handed over in Calcutta to the Chemical Examiner. Major Weinman gave his certificates on the 9th July (Ex. 36). On the 8th July Santosh was kept at the Thanah *hajut*. Santosh's evidence is that there the Police tried to induce him to confess both on the night of the 8th July and the morning of the 9th July.

The mother's evidence is that on the morning of the 9th July the Moulvi saw her and later she visited Santosh at the Thanah.

It is said that in consequence of this Santosh was put up before Mr. Nelson as a confessing prisoner it being hoped that the mother had induced him to confess.

Now what do we find when Santosh is put up before Mr. Nelson, Joint-Magistrate, on the 9th July? Mr. Nelson denies that Santosh was put up as a confessing

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prisoner but what do the records of the Court show?

First of all Mr. Nelson has handed to him by a police-officer the Court Inspector Rash Behari Sen a form headed "Form for recording the confession of an accused person." He then proceeds to put to Santosh the question that is usually put by a Magistrate to a confessing prisoner.

"*Q.*—Do you understand that I am a Magistrate and that any statement you may make may be used in evidence?

A.—Yes."

Santosh's statement so far from making a confession stated that the article found on the 8th July was not a bomb.

Mr. Nelson's order-sheet for 9th July is also very instructive:—

"Date, Order.

9-7-08. Santosh Das makes no confession."

Mr. Nelson's memory is, I am sure, at fault in stating that Santosh was not produced before him on the 9th July as a confessing prisoner. The documents seem to me to be absolutely conclusive to the contrary. There is also the evidence of Lackhi Narain Sarkar, Mr. Nelson's bench clerk, who has been called as a witness for the defence in this case. He states that on one occasion Santosh was produced before Mr. Nelson in Court as a confessing prisoner and that he was placed at the side of the Magistrate's table to have his confession recorded. It is not suggested that this could be on any other occasion except the 9th July. The Court Inspector, Rash Behary Sen, though cited as a witness and present in the Court premises has not been called as a witness.

But if Santosh was produced before the Court on the 9th July as a confessing prisoner why was it supposed that on that day he would make a confession. The only reasons that can be suggested are that after the visits of the Police to Santosh and his mother and the visit of the mother to the son at the Thanah it was hoped that Santosh would make the desired confession.

On the 9th July, Mr. Nelson remanded Santosh to jail till the 23rd of July.

Now it is alleged by the Plaintiff that the bomb was placed in his house by the boy Bonomali at the instigation of the Moulvi.

Bonomali's story is that on a day just at the end of June a constable Kartick Singh came and took him to the house of the Moulvi where the Moulvi asked him if he was willing to enter his service and that Bonomali expressed his willingness to do so and the Moulvi said he would send for him when he wanted him. Bonomali's story is that on the 7th July the Moulvi again sent for him and the Moulvi gave him the bomb. Bonomali says that the Moulvi directed a constable to accompany him back to the Plaintiff's house. He says he was unable to place the bomb in Santosh's room as requested as Santosh was occupying his room but he placed it in the *baitakhannah* on a loose door frame that was resting against the wall and then informed the constable who left. Next morning the search of the Plaintiff's house took place.

Bonomali says that after the search he went to his mother's house and subsequently was taken by a constable to Santragachi where the constable left him. There he met a boy who took him to a place called Podra where he entered into service of one Kally Kristo Bose. There he says he remained for about three months, and then returned to Midnapore at the time of the Pujas. The Defendants deny the story altogether. They say that there is only one constable named Kartick

Singh in Midnapore District and he was transferred from Midnapore Town to Ramjibanpore on the 24th May 1908 and there he remained until long after the end of June. The boy Bonomali identified the witness constable Kartick Singh as the man who took him to the Moulvi—so there is no doubt as to the constable the boy means. The Moulvi in his évidence before me at first tried to get out of the story told by Bonomali by stating that from the 27th June he was away from Midnapore undergoing medical treatment in Calcutta. That story has been conclusively demonstrated to be incorrect.

Is the evidence sufficient therefore to show that the constable Kartick was in Midnapore at the end of June? The evidence shows that one constable Kartick was transferred to Ramjibanpore on the 24th May. But Mr. Dutt suggests that this is a different Kartick.

The grounds he puts this suggestion on are first why should Bonomali say that Kartick out of the 600 constables in Midnapore District took him to the Moulvi if Kartick was not in fact in Midnapore. Next it appears from the District Order Book that a constable named Kartick Singh was censured for keeping a pistol without license. This ought, if it refers to the Kartick Singh at Ramjibanpore, to have been communicated to the Police Station at Ramjibanpore for communication to Kartick there. It appears from the evidence of the police-officers from Ramjibanpore that no such censure was communicated to them and therefore Mr. Dutt says that the censure does not relate to the Kartick Singh at Ramjibanpore but to some other Kartick. Then before the Committing Magistrate the Moulvi in cross-examination stated :—

"I have no constable by the name of Kartick. There was one of that name at the Thanah. I don't remember if he was there in July. I had to have him removed to the Thanah as he used to give out our secrets to the Extremists. I do not know if he was dismissed but he was reported against and sent away. I do not know where he is now. I do not know what Kartick's duties were. He was not working under me. I never sent Kartick constable to bring the boy to my house. He never brought the boy to my house." In the Sessions Court the defence summoned Kartick as a witness for the defence. The prosecution did not call Kartick neither did the defence. The case was closed. The defence Counsel had finished their addresses when the unusual procedure was adopted by the Sessions Judge at the suggestion of the Crown Counsel of calling not only Kartick as a witness but also two other witnesses Mon Mohan Roy and Mahomed Amir Khan to corroborate him.

The Sessions Judge then allowed the defence to call a witness Gyanda Nandan Sen and also to recall a witness Kishoripati Rai.

Kishori deposed that the reason Kartick had been summoned as a witness was because Kishori had met him at his (Kishori's) uncle's, an Honorary Magistrate, where Kartick told him he had taken the boy to the Moulvi and that after Kartick had been summoned as a witness for the defence at Sessions he went to see Kishori. Kishori said Kartick told him then that as he was in Police service he could not speak against the Police. That Kartick on coming to Midnapore after receiving his summons did go to see Kishori is not denied by Kartick in this Court although Kishori was not one of the pleaders engaged for the defence.

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The evidence seems to establish that Bonomali's story about going to Kali Bose's at Podra after the search is true. But after all the whole of the story as to whether the Moulvi had the bomb introduced into the Plaintiff's house hinges on the fact whether Kartick took the boy Bonomali to the Moulvi as alleged. Doubtless as I have pointed out there are some circumstances that may suggest that the Kartick that was transferred to Ramjibanpore on the 24th May 1908 is not the Kartick referred to by Bonomali.

The witness Kartick has denied that he was transferred for misconduct as alleged by the Moulvi before the Committing Magistrate.

There was also the desire of the Moulvi in his evidence to show that he was absent from Midnapore at the time it was said that Kartick took Bonomali to him but which had to be abandoned.

Then Mr. Dutt complained that none of the orders relating to the constable Kartick which were passed by Mr. Cornish were put to Mr. Cornish although he gave evidence before me. But that they have been proved by a subordinate officer who was not even stationed at Midnapore at the time the orders were passed.

The onus however of proving that Kartick took Bonomali to the Moulvi is on the Plaintiff. There may be some matters of suspicion on the evidence. I am of opinion however that the Plaintiff has not discharged the onus that is on him. As I have already said that the whole of the story of the bomb having been placed in the Plaintiff's house at the instigation of the Moulvi rests on the Plaintiff being able to prove that Kartick took Bonomali to the Moulvi. This the Plaintiff has not proved. On the evidence before me I am unable to say who placed the bomb in the Plaintiff's house but in my opinion Santosh did not.

I shall now deal very shortly with the rest of the reports said to have been given by the informer after the 8th of July.

Now one would have thought, after the searches on the 8th of July, the conspirators would be somewhat careful as to their movements, for if the story related by Rakhal be true they must have thought that the Police had got information as to the conspiracy. But one finds on the 10th July (Ex. 56) there is a meeting of 31 persons at the house of Mr. Birendra Nath Dey of the Indian Civil Service.

Again Gosto Behary is there singing to the harmonium. The song he sings is "the song of the 3rd July." If the meeting said to have been held at Upendra Maiti's on the 3rd July did not take place as both the Sessions Judge and the High Court on appeal held "the song of the 3rd July" is a somewhat serious difficulty. For if the song was not in fact sung on the 3rd of July it may well be argued that it was not sung on the 10th July.

Then speeches against the Firingees and in favour of bombs are delivered. All this takes place between 6 and 7 in the evening.

Again on the 12th July (Ex. 56) there is a report of a meeting at the house of Jamini Mullick at which 42 persons were present.

Gosto Behari again sings a seditious song to the accompaniment of a harmonium. Then there are speeches against the Firingees and about bombs. All this takes place between 11 and 12 in the morning. One cannot help asking what were the Police of Midnapore doing if they did not find any trace of these meetings held in the day time at the houses of leading citizens. Moreover with regard to

Jamini Mullick at whose house this meeting is alleged to have been held it has to be remembered that his house had been searched on the 8th of July. It was therefore highly improbable that he would hold a meeting at his house in broad daylight four days afterwards at which there would be singing and speech-making. There is also a significant fact with regard to Jamini Mullick that it is common ground that on the 9th July, the day after his house was searched, a meeting took place between him and the Moulvi at the latter's house. Jamini's account of the meeting at the Moulvi's is that the Moulvi sent for him and demanded Rs. 10,000 and said it was better to pay Rs. 10,000 now than spend a lakh hereafter. The Moulvi's account is that Jamini came and asked him why his house had been searched and the Moulvi informed him he could not give him the reasons as it was by the Magistrate's order. During the cross-examination of Jamini by Mr. Garth he put it to him that he (Jamini) had told Dr. Bankim Chandra Ghose that the story about the Moulvi demanding Rs. 10,000 was untrue and that this interview between Dr. Bankim and Jamini was overheard by Sub-Inspector Noresh. Both Dr. Bankim and Sub-Inspector Noresh have been examined here as witnesses on behalf of the Defendants. Not a single question was put to either of them with regard to the alleged interview between Jamini and Dr. Bankim or of Noresh overhearing the conversation. I am inclined to think that Jamini's account of the interview he had with the Moulvi is the true one. But whichever account one accepts of the interview it is highly improbable that Jamini would hold a large meeting at his house on the 12th July. Then on the 13th of July (Ex. 56) the informer reports that Jamini has sent a letter by post to his nephew at 4 P.M., with envelope and paper on which was written *Bande Mataram*. This letter asked his nephew to keep ready "gunpowder" and other things necessary for preparation of bombs.

Space forbids me to do more than to deal shortly with the rest of the alleged reports of the informer. But the report of the 17th July cannot be passed over. The portion I refer to is as follows:—"Surendra Mookerjee prepares bombs, &c. The one he made on the terrace of Hanumanjee's temple exploded when being wrapped up. He has thrown that off (away) and is preparing a new one. He will prepare it within 4 or 5 days." One may doubt whether Surendra, the temple having been searched on the 8th July, was likely to be making bombs on the terrace of the temple on the 17th July. But the story that the bomb exploded whilst Surendra was wrapping it up and therefore he threw away the remnant is so absurd that it is impossible to ask any one to believe it. The bomb that was subsequently found at the Dutt's record house is said to have been substituted by Surendra in place of the bomb that exploded.

On examination by the Chemical Examiner this bomb was proved to be of a highly dangerous character. If the bomb had exploded in Surendra's hand there can be no doubt that not only would there be no part of the bomb left for him to "throw away" but that Surendra must have been terribly injured. But so far from being injured we find Surendra industriously working away at the new bomb, so much so that on the 19th July at 2 P.M. Surendra showed the informer on the terrace of the temple the new bomb "half prepared." Then at a meet-

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ing at Saroda Dutt's on the 23rd July at 9-30 A.M. Surendra produces the new bomb which was ultimately found in the record room of the Dutt's on the 31st July.

Between the 23rd July and the 30th July that bomb was going about from place to place. On the 30th July (Ex. 56) the informer reports : "last night Govinda Mookerjee and Nikunja Maiti went to kill the Magistrate, the Deputy Superintendent of Police and the Jamadar Asadulla with the bomb prepared by Surendra. But their work was unsuccessful. This morning at 7 or 8 A.M., Nikunja Maiti told me these words at the house of Nishi Goalini where Rajabala prostitute kept by Nikunja Maiti lives. I shall cause to be seized to-day the bomb prepared by Surendra Mookerjee which Baroda Dutt has kept."

This again seems to be improbable. That Govinda and Nikunja were likely to find the Magistrate, the Moulvi and Asadulla together at night so as to be able to kill them with one bomb is improbable. It may be noticed for what it is worth that Ex. G which was prepared by Asadulla to assist the informer in giving his evidence states that it was Nikunja Maiti alone who went with the bomb to kill the Magistrate and the Moulvi. Ex. S. S. the proof of Rakhal for the Crown brief prepared by Lal Mohun states that Nikunja Maiti took the bomb with intent to kill the Magistrate only. This closes Rakhal's reports so far as we have the originals. The last words written by the informer at the end of his report of the 30th July are "All these are false" (Everything that I have written down is false).

At what time the informer wrote these words it is impossible to say. I must not however omit to notice the report of the 16th July (Ex. 56) as a statement in this report is much relied on by Mr. Norton. The statement is "That the informer has learnt from Jamini that Deb Dass Karan has kept the bomb in a stone-built room in a tank or excavation in the house of Parmananda Shaha." It appears that Mr. Macpherson discovered that on the land adjoining Parmanand's house there is a well or tank hewn out of the rock. Mr. Norton says that this is strong corroboration of the informer's report. I do not agree in this view. On the 16th July 1908 it is improbable that there was no water in the well or tank. It is not likely that Deb Dass Karan would keep his bomb which was constantly being brought out in water. On the 31st July a search took place at the house of Baroda and Saroda Dutt resulting in the discovery of the bomb in a record room at their premises. This was followed by the arrest of the second batch of prisoners including Surendra Nath Mookherjee. The record room in which the bomb was found was used for storing the old zemindari papers and was very rarely opened. It was in the possession of Madhu Sudan Dutt, the common Manager of their joint estate. When the Police had broken open the lock of the door it was found that the floor was strewn with old zemindari papers. The room was thick with dust. In fact so much so that Mr. Cornish states that although he went into the room he came out because the dust was so thick. Now what would strike any man going to search a room in this condition in the early morning of the 31st July for an article which had not been there on the night of the 29th July? I should have thought obviously to see if there were any marks in the dust to show if any one had been into the room recently or of any

of the papers having been recently disturbed. But no such precautions were taken. Lal Mohun began to shovel the papers on the floor from one side of the room to the other with a "piece of timber." At a spot not far from a window, in which there was a broken bar, Lal Mohun came across some old books of account, one placed across the top of the others separated into two heaps and lifting the top book off with his hand he discovered the bomb there. It certainly was fortunate for Lal Mohun that he ceased shovelling the papers just in time to find the bomb, otherwise the consequences must have been disastrous to him. One would certainly have thought when Lal Mohun came to the books, if the story of the finding of the bomb is true, that Lal Mohun would have noticed that these books had been recently disturbed and called Mr. Cornish's or some of the search witnesses' attention to the fact. I must confess for my own part that I feel a doubt whether an experienced police-officer would set about a search of a room in which he expects he may find a bomb hidden by shovelling the papers on the floor from one side to the other with a piece of timber.

Mr. Cornish in his evidence in this Court stated 'when I saw the window with the broken bar it did strike me that the bomb had been put in from outside. The bomb was found near the widow.' The evidence is very suspicious, but I cannot say that it is such that I can find that the bomb was placed in the record room by the Police.

In the judgment on appeal in the criminal case I find the following remarks "The Advocate-General (that is Mr. Gregory) has stated before us that he placed no reliance on this bomb and has refrained from discussing its discovery. But if, as we hold, there is strong reason to doubt the genuineness of that discovery it must affect our attitude towards the evidence which relates to the bomb in Peary's house." Mr. Gregory now stated that he made no such statement at all. All I can say, if that be so, is that it is exceedingly unfortunate that Counsel should allow this statement to go unchallenged for years.

The persons arrested on the 31st July were produced before Mr. Nelson on the 1st August and remanded by him until the 15th August.

It might have been expected that after what had happened on the 31st July the rest of the conspirators who had not been arrested would now at any rate for some little time remain quiet.

But on the 1st August, the informer reports again that "Surendra Bose, Sarat Chandra Patra, Jnanendra Sarkar went this day to Deb Das to bring the bomb to kill the Magistrate." Doubtless the informer says they did not get it.

In passing, I may mention that from the 1st August the original reports of the informer are not produced but only documents stated to be translations of the same. On the 2nd of August there is a report of a meeting in the drawing room of Baroda and Saroda who had been arrested on the 31st July. There was a discussion about bombs and picric acid was produced. On the 3rd August there is a long report about bombs.

On the 4th and 5th August the informer again reports. On the 6th August the informer reports about a bomb which Rash Behary Bose kept in the cash box of Rhidoy Suri, a wine merchant, and which he saw the wine merchant give to Rash Behari who having got it tied it to

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his waist and rode away on his bicycle. On the 7th August there is another report. Also on the 8th August, the 9th August, the 10th August, when Rash Behari Bose produces his bomb. Again on the 11th, 13th and 16th, the informer reports. On the 17th August the informer reports that Jamini Mullick produced from his pocket a bomb saying "see I am always keeping it with me, saying this he kept it back in his pocket and went away." On the 18th of August again there is a long report. On the 20th August there is a meeting about the establishment of a bomb factory and the preparation of bombs. On the 21st August there is another report. Also, on the 25th August, Jamini is reported to have said that he had sent to Calcutta for 40 bombs. And on the 26th August comes the last report, in some ways the most extraordinary. It says "Raja's Ammuktear Nalini Kanto Sen attended the secret meeting which was held in the lodging of Mahisadal on 11th June 1908."

Why on the 26th August should the informer make such a report of his own motion does not appear.

On the 26th August the last batch of warrants were applied for and on the 28th August the third batch were arrested.

Before proceeding further, it will be convenient to consider what are the provisions that the Legislature in its wisdom has thought fit to impose as to information to the Police and investigation by the Police of alleged offences.

These are contained in Part V, Chapter XIV of the Code of Criminal Procedure. Sec. 154 enacts : "Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a Police Station shall be reduced to writing by him or under his direction and be read over to the informant and every such information whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in that behalf."

The first information is the basis upon which an investigation under Ch. XIV of the Code of Criminal Procedure commences.

The careful and accurate record of the first information has always been considered as a matter of the highest importance by the Courts in India, the object of the first information being to show what was the manner in which the occurrence was related when the case was first started. It is really not necessary to quote any authority in support of this statement which is clearly deducible from the words of the section itself.

If authority however were required it would be sufficient for me to rely on the judgment of Prinsep and Henderson, JJ., in the case of the *Emperor* v. *Kampu Kuki* (3). "Such a practice" say the learned Judges is altogether contrary to sec. 154 of the Code of Criminal Procedure. The first information if recorded as directed by sec. 154 at the time that it is made is of considerable value at the trial because it shows on what materials the investigation commenced and what was the story then told. Any statement recorded as in this case several days (in fact in that case it was four days) after the commencement of the investigation and after there had been some development is not only no first information but has very little or no value at all as the original story because it can be made to fit into the case

(3) 11 C. W. N. 554 at p. 556 (1902).

as then developed. No one would accept such a statement as reliable in its details after the lapse of time even if it were admissible in evidence." What do we find in this case? No first information was recorded between the 8th of July and the 7th September.

The Moulvi says this was not done as "we don't do that in Conspiracy cases." He however admits that he is well aware of the provisions of the law set out in sec. 154. In these circumstances the explanation that "we don't do that in Conspiracy cases" hardly seems sufficient.

Nor is there any reason to believe that the provisions of the law as to the recording of first information are set aside by the Police in a particular class of cases.

The first information filed by the Moulvi on the 7th of September came into being in the following manner. On the 3rd of September the Inspector-General of Police (Mr. Morshead) accompanied by the Deputy Inspector-General (Mr. Plowden) visited Midnapore. They noticed that no first information had been filed. So it is arranged that a first information should be drawn up in Calcutta. Accordingly on Mr. Plowden's instructions Rai Ram Saday Mookerjee Bahadur of the C. I. D. who according to Mr. Plowden has had great experience in drawing up first information of this nature drew up the first information, it then passed through Mr. Plowden's hands, then Mr. Morshead's and was ultimately settled by an attorney, Mr. Withal. That a document drawn up like this is a proper first information within sec. 154 cannot be suggested for one moment.

What the law requires is not a first information drawn up by a police-officer (however much experience he may have had in drawing first information of this nature) and finally settled by an attorney but the statement of the person himself giving the first information.

As the first information can be used in evidence under secs. 157 and 158 of the Evidence Act to corroborate or impeach the testimony of the person lodging the first information it will be seen how valueless the document becomes if the first information is drawn up by some person other than the proper informant. One example of this from the first information filed on the 7th September must suffice though this is not the only one that might be drawn.

"The following are some of the important places where the members of the said society used to meet and conspire together for the above purposes and other unlawful objects . . . .

At the premises of the Raja of Mourbhunj Bakshibazar Midnapore."

There is nothing in the informer's reports giving the house of the Maharaja of Mourbhunj as a place where the conspirators used to meet and conspire although the informer does mention an intended meeting at the Maharaja's premises which was put off. Moreover the house of the Maharaja is not in Bakshibazar.

The Moulvi says this statement in the first information is a mistake. On the other hand Mr. Plowden says the first information having been gone through so carefully by himself, Mr. Morshead and Mr. Withal with the information which had been sent to the C. I. D. that the statement must have been taken from that information. Which of the two statements is correct it is impossible to state. If the provisions of the law had been observed, such a state of things could never have happened. The first information drawn up by the C. I. D. implicated 154 persons ranging as has been said from 'Raja to Beggar'!

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I can only assume that Mr. Withal the attorney settled the first information in ignorance of the provisions of the law.

The next section of the Code of Criminal Procedure that it is necessary to refer to is sec. 172.

"(1) Every police-officer making an investigation under this chapter shall day by day enter his proceedings in the investigation in a diary setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and the statement of the circumstances ascertained through his investigation." The second sub-section of the same section authorises any Criminal Court to send for the diary and to use the same to aid it in the inquiry or trial. The object of the special diaries under sec. 172 (which are commonly called 'case diaries') has been well expressed by Edge, C. J., in *Queen-Empress* v. *Mannu* (4). "The early stages of investigation which follows on the commission of a crime must necessarily in the the vast majority of cases be left to the Police and until the honesty, the capacity, the discretion and judgment of the Police can be thoroughly trusted it is necessary for the protection of the public against criminals, for the vindication of the law and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for investigation or for trial should have the means of ascertaining what was the information, true, false or misleading, which was obtained from day to day by the police-officer who was investigating the case and what were the lines of investigation upon which the police-officer acted."

It is hardly necessary to state that the Moulvi and Lal Mohun both state that they are aware of the provisions of the law as to the keeping of "case diaries." Now what do I find in the present case? Between the 8th of July when Santosh was arrested and the 3rd of August, no "case diary" was opened. The Defendant, Lal Mohun, who was the investigating officer states that this was a mistake but this statement I cannot accept.

Therefore during by far the most important period of the investigation in the Bomb Conspiracy case the provisions of the law for enabling the courts to check the method of the Police investigation have been deliberately disobeyed.

I shall now consider the evidence that has been given on both sides as to the truth or untruth of the statements in the informer's reports. I shall first deal with the evidence given on behalf of the Defendants. From the case diary, Ex. V, it appears that on the 22nd August 1908 Lal Mohun held a consultation with his officers as to "a plan of action."

On the 23rd August the plan of action resulted in the production of two witnesses and this was the first evidence obtained corroborating the reports.

The witnesses all speak to having overheard words or seen incidents which had been uttered or taken place long before.

They one and all say that Lal Mohun sent a constable to bring them to him. How Lal Mohun was able to discover these witnesses may be matter for comment.

The first witness is Akhoy Kumar Pal. By way of introduction it may be stated that some time ago the widow of a pleader named Mookerji brought a certain suit against him. In answer to this suit Akhoy produced a receipt which the Subordinate Judge held to be a forgery and directed Akhoy to be prosecuted for forgery and

(4) I. L. R. 19 All. 390 (1897).

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on appeal the District Judge has confirmed this order. At least two of the other witnesses for the defence in that suit, Kangali Ghorai and Amir Ali, gave evidence in the suit brought by the widow against Akhoy to prove that they saw the receipt executed. Akhoy in his evidence here stated "the Government have now taken me under their protection." There would appear to be some foundation for this for according to Akhoy's evidence the Government intended to settle certain lands with him but which lands after he had entered into possession he had to vacate because the lands belonged to a gentleman who defended the coolies in the train-wrecking case and not unnaturally this gentleman insisted upon his right to his own land.

It would also appear from Akhoy's evidence that he has been allowed to avail himself of the services of the Government Pleader. It is however only fair to the authorities to say that Mr. Macpherson, the Commissioner of the Burdwan Division, stated that he was wholly unaware that Akhoy was being allowed the services of the Government Pleader until he read it in the public press during the proceedings in this case. It does not appear that Akhoy could obtain no other pleader who would work for him so that the authorities had to allow him the services of the Government Pleader. For he said in evidence before me "I don't mean to say that all the pleaders and muktears declined to work for me. I engaged two or three pleaders to file my written statement." Akhoy's statement was recorded by Lal Mohun under sec. 161 of the Criminal Procedure Code on the 30th August. Akhoy cannot say how Lal Mohun came to send for him.

In the statement Akhoy said that he had seen the Raja of Narajole walking through the town in *Bande Mataram* processions Such a statement as to the conduct of the Raja of Narajole it is impossible to believe. Before me he has stated that what he meant was that when the Raja came out the people got excited and followed him and it looked like a procession.

It really is not worth while to go through the evidence of Akhoy, as I am satisfied he is a thoroughly disreputable and untruthful witness.

His statement however in his evidence here "I did not say one single word to Lal Mohun of my own accord," even if it means that Akhoy only answered questions put to him by Lal Mohun tends to show that his statement was not recorded very satisfactorily. Akhoy in his evidence speaks to a meeting held five, six or seven days before the Mozufferpore outrage at the house of Deb Das Karan. Akhoy is positive that Santosh was present at that meeting. It is established without doubt that at that time Santosh was at Ranchi. There is only one other matter relating to Akhoy Pal before parting with his evidence. That is with regard to Ex. 61 which has been produced by Akhoy as being, he alleges, a note sent by Mr. K. B. Dutt offering to pay him money if he would refrain from giving evidence. Akhoy says he knows Mr. K. B. Dutt's handwriting as he has on one or two occasions leant over Mr. Dutt's chair when Mr. Dutt was engaged in Court and had seen Mr. Dutt writing in English in the margin of his brief with a Bengali word every here and there. He also says that some years ago he saw a letter asking for votes in connection with a Municipal election. Counsel for the Defendants stated that they were going to call Mr. Hardless

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the Government expert in handwriting to prove the writing in certain documents and had these documents sent to the Survey of India for the purpose of having them photographed preparatory to Mr. Hardless's evidence. Ex. 61 was one of these documents. Mr. Hardless however has not been called by the Defendants, so presumably his evidence if he had been called would not have assisted the Defendants. There is no doubt in my mind that Ex. 61 is a forgery. But while saying this I am satisfied on the evidence that there is not the slightest ground for suspecting that either Mr. Weston or Mr. Hadrill had anything to do with it nor did they in any way suspect that it was not a genuine document.

The next witness on this branch of the case is Kangali Charan Ghorai. He was also sent for by Lal Mohun in Bhadra. Lal Mohun asked him about a meeting at Deb Das Karan's house and the witness answered. This witness gave evidence to prove the receipt in the suit brought against Akhoy Kumar Pal by the widow of the pleader.

Kangali also appears to be engaged in litigation of a very doubtful nature. His evidence is that "Moti Babu (*i.e.*, the officiating Government Pleader) was engaged by the Government to conduct my cases. The Government have been paying the cost of these two cases and the Police are looking after them."

Doubtless after a night's rest he resiled to a considerable degree from this statement but I am not satisfied that the original statement is not correct.

One of these two cases referred to by the witness is a criminal prosecution against him and another witness for the Defendants, Radha Nath Raut, for defamation, the defamation charged being that these two men said that a woman died from the effects of abortion whereas apparently the body which was examined by a medical man showed that the woman died from the effect of a snake bite. The prosecution in that case alleges that the witness made the defamatory statement in order to extort money. The Deputy Magistrate has framed charges against the witness and Radha Nath and there the matter for the present rests. The witness also appears to have been concerned in other criminal cases. Lal Mohun recorded the statement of the witness under sec. 161 on the 13th October 1908. A constable took him to Lal Mohun. How again did Lal Mohun manage to get hold of this witness? The substance of the statement of this witness recorded under sec. 161 was to speak to the meeting held at Deb Das Karan's.

The witness is, I am satisfied, a thoroughly untruthful witness.

The next witness is Radha Nath Raut. He formerly worked with the last witness Kangali. He was convicted of some offence on the 20th August 1908, but having presented an appeal he was out on bail pending the hearing of his appeal when Lal Mohun sent a constable to bring him on 31st August 1908. This witness according to his statement was discovered by Akhoy Pal.

The witness also appears to be engaged in some litigation including the defamation prosecution in which he is jointly charged with the witness Kangali. He stated "I know the Government is paying the costs of one suit (of ours)." Again, this witness resiled from this statement.

The witness speaks to the meeting said to have been held at Deb Das Karan's. In my opinion there is no truth in his evidence.

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The next witness on this branch is Lal Mahomed Khan. He is a teacher in the Lower Primary School at Midnapore. He also writes up the books of account of one Mullick, a baker.

His evidence is that two or three days after the *Ultarath* in 1908 when leaving the baker's in the evening he determined to go and see his doctor as he was not feeling very well. When he was passing by the house of Mr. Birendra Nath Dey, I. C. S., he noticed two or three carriages there and people were going into the house. Whilst he was listening to the *golmal* he saw Babu Abinash Chandra Mitter drive up in his carriage. Abinash said "Hallo master, what brings you here"? The witness said he told Abinash that he was on the way to the doctor. Abinash said "now come with me" and the witness went into the house with Abinash and there he saw a large number of persons seated. The witness says he also saw a young Babu singing songs to the accompaniment of a harmonium and that there were 30 or 40 persons present. The witness said he made an entry as to his attending this meeting in the books of the baker. This witness also says he made his statement to Lal Mohun two or three months after the date of the meeting. How did Lal Mohun manage to find out this witness?

That Abinash was likely to invite a person he met casually in the street to come to a meeting where the making of bombs was going to be discussed two days after Santosh's arrest can hardly be suggested.

The next witness is Mohesh Chandra Kundu. He states that on the day previous to the *Ultarath* he saw the Raja of Narajole at dusk leaving the house of Jamini Mullick. This witness states that Lal Mohun sent a Daroga for him in September 1908, who took him to Lal Mohun where his statement was recorded. How out of all the 30,000 inhabitants of Midnapore did Lal Mohun in September find out that this witness who does not live near Jamini Mullick's house happened to see the Raja of Narajole leaving it on the evening of the 7th July?

As a complement to the last witness we have the evidence of Rakhal Bera. He states that on the evening before the *Ultarath* in 1908 he saw the Raja of Narajole arriving at Jamini Mullick's house in his carriage. At the back of the carriage where the syces generally stand were standing two men with swords. The witness says he *salamed* the Raja.

Again this witness says that Lal Mohun sent a constable to bring him in Bhadra (September) and that Lal Mohun then recorded his statement. The witness admits that during the time that the Raja of Narjole was out on conditional bail, he wrote and signed a document that one Pitamber Roy Kaviraj had tutored him to make the statement to Lal Mohun. Pitamber is described in Lal Mohun's case diary as "an enemy of the Raja of Narajole." The Plaintiff's Counsel suggests that Pitambar has what are delicately called relations with the Police.

Doubtless in his evidence here the witness has stated that he was compelled to give the statement in writing that he had been turored by Pitamber. But I am not prepared to accept that statement of the witness.

Another witness on this branch of the case is Taju Khan.

He says that a constable came and took him to Lal Mohun and Lal Mohun asked him 'if he had seen anything in connection with the Babus.'

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He said that in the month of Jaista at about 2 or 3 in the afternoon as he was going to his work and happened to be passing by the premises of the Mullicks, he saw Babus entering the *Rasmancha*. His curiosity was awakened as he thought the Babus were going to have a *jatra* or a *nautch* at 2 or 3 in the afternoon. He went and peeped into the green room and saw a large number of Babus there. Then one of them told him to quit the place and he left.

On another occasion the mother of this witness happened to be ill. She had a fever and a "pain under her ribs" so he started off to find Dr. Abhoy Kundu with two bottles in his hand—one to cure the fever and the other the pain under the ribs. He first went to the house of Dr. Abhoy but finding his shop closed he went to his residence. There a lady came out and told him the doctor has gone to the Mullicks'. The witness hastened there and went near the *Thakur-dalan* and called for Dr. Abhoy who came out to him. He saw a large number of Babus sitting there, also a young Babu playing on the harmonium and another young Babu singing.

Again on another occasion whilst the witness was waiting for coolies to come to work, he saw Babus going into the house of Kamini prostitute. The witness says he calls the mother of Kamini sister. He asked the mother what was going on and she told him. The witness recognised several of the people mentioned by the informer. The witness was not sent for by Lal Mohun until 2, 3 or 4 months after he had seen the first meeting.

The next witness is Bankim Behary Haldar. He was sent for by Lal Mohun in September 1908. His story is that two days before the first *Rath* he went to Troylokya Nath Pal's house to see about some litigation in which a friend of his was engaged and as he passed the windows of Troylokya's house he heard the following words, but he cannot say by whom they were spoken, "that money would have to be collected until after the disposal of the Arms Act case, and that we should have to live with care up to that time." He also says he saw certain people whose names he had mentioned there.

Troylokya, he says, told him to come next day, then he left. This witness also appears to have had three criminal cases brought against him since 1906.

The next witness is Nibaran Chunder Ghose, a Mohurir. This witness made a statement to Lal Mohun on the 25th September 1909.

The witness occupied a room in the house of Nishi Goalini where also lived Rajabala, prostitute, who was the mistress of Nikunja Maiti.

The witness states that on one night when the door of Rajabala's room was closed he heard from outside these words being spoken in her room "The Firingees would have to be killed by means of bombs."

He states that "two" voices said this—the two voices were the voices of Nikunja Maiti and Gosto Behary Kundu.

The next witness is Saday Jana. He seems to have had some previous experience of litigation as he has on two occasions been fined for bringing vexatious complaints.

Raja Sri Narain Pal is his zemindar with whom he had litigation some time during the last four days of Assar. He says Sri Narain Pal sent for him. The witness said he could not go to the Raja that morning but would go in the evening. He went to the Raja's house in the evening but finding that the Raja had

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gone to the cutchery of the Raja of Mahisadal, he followed him there, and when after some difficulty he arrived at the Mahisadal cutchery, he heard the words "that unless the Police were beaten, assaulted or killed, nothing could be done," but could not say who said these words. He saw 30 or 40 people some of whose names he gave.

Gosto Behary Kundu was playing on the harmonium and Ninkunja Maiti was singing a *Swadeshi* song. I am satisfied that there is not a word of truth in the evidence of any of these witnesses.

I shall interpose here the evidence of a witness Gajendra Nath Bhunia. The witness is the Mohurir of Mohendra Nath Das, pleader.

His evidence is that late in the night of the 13th September 1908, when he had gone to sleep at his master's premises, two constables—one of whom was Allabux—came and arrested him on the ground that he had a sword-stick with him.

Gajendra was taken to the Thanah where he says he saw the Defendant Lal Mohun and some Sub-Inspectors. Previously he says he had been approached by the Police to give false evidence in the Bomb case against Upendra Nath Maiti but he had refused. Gajendra further says that Lal Mohun asked him at the Thanah why he had not come and seen him although he repeatedly sent for him through Allabux. Gajendra also says that he suffered certain ill-treatment and the charge was altered to one of being drunk and disorderly. Shortly before 2 o'clock in the morning Gajendra was bailed out by one of his friends Haripada Bhunia, a Mohurir in the Collectorate, who has been called as a witness for the defence in this suit. Upon his release Gajendra went immediately to the house of Bepin Behary Ghosh, a pleader, who advised him to go and find some Magistrate who would be able to speak to his being sober.

Gajendra hastened to the house of Babu Sarat Chandra Roy one of the Deputy Magistrates at Midnapore.

The Deputy Magistrate (who has given evidence in this case for the Defendants) having been aroused from sleep came out, when Gajendra fell at his feet and told him of his arrest on a false charge. The Deputy Magistrate agrees in the story so far and says that Gajendra was perfectly sober and that he did not smell of liquor at all. But Sarat Babu says Gajendra did not make any complaint against the Police except that they had arrested him on a false charge. Haripada Bhunia, the Collectorate Mohurir, gave evidence to the same effect. Next morning when the case appeared on the file of the witness Sarat Babu (the Deputy Magistrate), Gajendra at once filed a statement Ex. A10 stating that he had been falsely arrested for refusing to give false evidence against Upendra Nath Maiti in the Bomb case.

The case only remained on the file of Sarat Babu for a few minutes before he transferred it to Mr. Mirza another Magistrate for disposal but it appears from the order of transfer that Sarat Babu had read Gajendra's statement. Gajendra said he could not get any pleader to file his statement. This can be well imagined for the other witness for the defence Haripada Bhunia says that at that time not only was he himself in fear of being arrested but some of his neighbours were in such a state of fear that they were flying from their homes. Mr. Norton quite frankly admits that having regard to the statements of his own witnesses and the statement filed before the Deputy Magistrate by Gajendra there can be little doubt that Gajendra was arrested

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on a false charge and that probably some of the inferior Police had been trying to get him to give false evidence against Upendra Nath Maiti but he says that there is no reason to suppose that Lal Mohun was concerned in this.

But why should I accept every portion of Gajendra's statement except as to the presence of Lal Mohun at the Thanah when he was arrested and taken there? Besides Lal Mohun was the investigating officer and he was procuring either by himself or through his subordinates the evidence in support of the case. It seems to me highly improbable that two Police constables would have approached Gajendra to give false evidence against Upendra Nath Maiti unless it was with the sanction of Lal Mohun.

I accept Gajendra's evidence.

The Plaintiff on the other hand calls some thirty witnesses who state they did not do the things which Rakhal's alleged reports mention them as having done.

In my opinion the most important of these witnesses—not by reason of his wealth but on the ground of his respectability and position—is Babu Upendra Nath Maiti, the leader of the local Bar at Midnapore. He is one of the Plaintiffs in the other suits. He has given evidence before me and I am satisfied that his evidence is true. He states that no meeting ever took place at his house on the 3rd July 1908 or on any other date. The reports of Rakhal give a meeting as being held that day in his house at which there was singing and speech-making and the bomb found on the 8th of July at the Plaintiff's house was produced.

The learned Sessions Judge in the course of his judgment said with regard to Babu Upendra Nath Maiti "I may say at once that some of the persons incriminated in Ex. 56 have not in my belief done and said what is alleged against them. Babu Upendra Nath Maiti is an instance."

This view of Upendra Nath Maiti was also taken by the Appellate Bench on the hearing of the Criminal Appeal. In this view of Babu Upendra Nath Maiti I entirely concur. Now if one finds such an essential link in the story as the meeting of the 3rd July held at Upendra Babu's house to be untrue, I must confess it makes one look with some suspicion on the remainder of the report. For if the report of the meeting at Upendra Nath Maiti's on the 3rd of July be untrue why should one readily assume that the reports of the other meetings are true? Upendra Nath Maiti was arrested on the bare statement in Ex. 56 as to the meeting being held in his house on the 3rd July 1908.

The next witness on whose evidence I place much reliance is Babu Radha Nath Pati. He is a pleader practising at Midnapore.

Radha Nath Pati says he never attended any secret meeting or paid any subscription towards the manufacture of bombs. The reports give Babu Radha Nath Pati as having attended the meeting at Kamini prostitute's on the 23rd June. He says he was never in the house of a prostitute in his life. I have no doubt that the evidence of Radha Nath Pati is true. Another witness on this point is Abinash Chandra Mitter who is one of the Plaintiffs in one of the other suits. He is a man of considerable wealth. He says he took part in the *Swadeshi* movement and started a *Swadeshi* shop. He however denies that he did any of the things that are reported against him in Ex. 56. I accept his evidence on this point. Abinash was also one of the persons arrested. Then there is the evidence of Khagendra Banerjee, also another Plaintiff in one of the other suits. He denies attend-

ing any of the meetings which he is said to have attended.

In the report (Ex. 56) of the 18th June 1908 there purports to be a description of the attempt to wreck the train of the Lieutenant-Governor at Naraingarh with which I have already dealt.

There is no reason to think that Khagendra's brother was employed in the office of the Lieutenant-Governor.

Gopal Chandra Bannerjee is another Plaintiff in one of the other suits He was also arrested. He denies attending the meetings which he was alleged to have attended. His evidence, I think, is true.

Space forbids me to go through the other witnesses on behalf of the Plaintiff on this point. It is sufficient for me to say generally that I am satisfied from their evidence that they did not do and say the things mentioned as done and said by them in Ex. 56 and Ex. G.

But while I say this it must not be taken that I agree with Mr. Dutt in saying that all these witnesses were loyal and law-abiding subjects. I think some of them probably were not. There appears from the evidence circumstances of suspicion against some of them that they were neither loyal nor law-abiding. But the question is whether they were in the conspiracy related by Rakhal aud I am satisfied they were not. Take for instance the witness Piyari Lal Ghose. He seems to have been deeply in the Swadeshi and boycott movement. The house where the *tantsala* opened by Satyendra was carried on belonged to him. He was also a relative of Satyendra's. But I have heard nothing in this case to make me think that Piyari Lal Ghose was in the conspiracy said to have been reported by Rakhal.

Much has been said against the Raja of Narajole. I agree that there are circumstances which tend to show that some of the Raja's subscriptions were not above suspicion. But, again, there is nothing to connect those subscriptions with the alleged reports of the informer. I am satisfied that the Raja never went to Jamini Mullick's on the evening of the 7th July to see a bomb. This is the only meeting the Raja is alleged to have attended. The other reports against the Raja in the reports are also I think untrue.

The Raja says that he had to pay the Police the sum of Rs. 40,000 to extricate himself from the criminal case. The evidence shows clearly that the Raja did come to Calcutta and change Government Promissory notes for Rs. 30,000 into ten-rupee notes. That the Raja intended to make a payment with those ten-rupee notes that could not be traced is I think clear. He says that the Rs. 30,000 was handed over to his maternal uncle Ashutosh Roy for payment to the Police. Ashutosh Roy is said to be on terms of friendship with the Police. That the Raja intended to make a present of Rs. 30,000 to his maternal uncle in ten-rupee notes is not I think likely. The Plaintiff has however failed to call Ashutosh Roy and without Ashutosh Roy's evidence no Court could assume that the money reached the Police. Then the Raja spoke as to Lal Mohun and Noresh coming to him after he was released and asking for this Rs. 30,000 to be paid, as they said there was going to be an inquiry, and they might lose their posts. Whilst I am not prepared to say that the Raja's story as to this visit is untrue, it is obviously insufficient to prove the receipt by the Police of the Raja's money. Indeed the case of the Defendants is that Ashutosh Roy has "pocketed," as Lal Mohun said, the bulk of the money himself, and there certainly appears to be some grounds for this suggestion. Before parting with the Raja I must express my

strongest disapproval of the language used by the Advocate General with regard to him. Unfortunately owing to the acoustic properties of the Court being so bad I did not myself catch the remarks of the Advocate-General at the time The Assistant Registrar has however supplied me with a copy of a verbatim note of the words as taken by Dr. Suhrawardy, one of the Counsel for the Plaintiff in the case.

The words are as follows:—"There he (the Raja) sat, a disgusting sight, drink-sodden, more beast than man." No words more insulting to a witness could be imagined. That Dr. Suhrawardy's note is substantially correct there can be no doubt, for Mr. Norton informed me that he was instructed that the Advocate General stated that the Raja was "more beast than man." If I had heard at the time the words used by the Advocate-General I should instantly have checked him. The Raja, it must be remembered, is a nobleman amongst his own people, and however dissipated or disloyal the Advocate-General may think him to be, it does not entitle him to use such language.

The evidence of two of the Plaintiff's witnesses has been relied on by the defence.

The first is Rash Behari Bose. Doubtless there appears to be strong suspicion to connect him with that very improper portrait sent to Mr. Weston and which has been referred to as the stabbing portrait. But how does this connect him with the conspiracy said to have been related by Rakhal which makes no mention of this portrait? The other witness is Moti Lal Mookerjee. The Defendants rely on his case because he did not surrender until the 17th October although a warrant had been issued against him on the 26th August. His evidence is that he was lying ill in Calcutta and was attended by Dr. Pushong and therefore did not surrender earlier. Then the fact that his father-in-law's residence was No. 2, St. James' Lane, Calcutta, has been relied on because this address is given on one of the exhibits in this case. These facts are obviously wholly insufficient in any way to establish the truth of the story said to have given by the informer.

The evidence therefore as to the truth of the informer's reports stands as follews:—

On the side of the Defendants there is the evidence of the witnesses to whose evidence I have already referred. There is also the deliberate attempt to get the witness Gajendra Bhunia to give false evidence. On the side of the Plaintiff there is a body of some 30 witnesses, some of them men of irreproachable character, all of whom have stated that they did not do what was alleged against them in the alleged reports of the informer. These coupled with the improbabilities of the reports said to have been given by the informer lead me to the clear conclusion that the informations are not true.

Whether the informer actually gave these reports or not it is impossible to say. That they were evolved by a drunkard like Rakhal the informer does not appear probable. Nor is the account of the way in which the reports are said to have been written as given by Moulvi and Asadulla satisfactory. In the absence of Rakhal it is impossible to say who wrote the reports.

Mr. Norton has stated that the Plaintiff ought to have called Rakhal as a witness. This obviously the Plaintiff could not do. Moreover it appears from some of the documents used at Mr. Macpherson's inquiry that the Police had Rakhal out of jail and examined him at that inquiry.

I must now go back and deal with the evidence relating to the period between the 8th July (when Santosh was arrested) and

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the 23rd July (when the Plaintiff was arrested).

The reasons set out in the written statements of the Defendants Weston and the Moulvi for the arrest of the Plaintiff is "of there being reasonable grounds for the belief that the Plaintiff has been accessory to the commission of an offence under the Explosive Substances Act in connection with the said bomb which was found in his house." This is the case in the pleadings which the Defendants set up in reply to the Plaintiff's case and upon this they came to trial.

The application for the warrant to arrest Peari on the 23rd July 1908 (Ex. R in No. 1) states that "the surrounding circumstances of the conspiracy give rise to a reasonable suspicion that the accused Santosh Dass's father Babu Peari Mohan Das who ... lives in the same house and mess with the accused is fully aware of the operations and the possession of the bomb for an unlawful object."

Now the case set up in the pleadings of the Defendants Weston and the Moulvi that the Plaintiff was arrested as there were reasonable grounds for the belief that the Plaintiff had been accessory to the commission of an offence under the Explosive Substances Act in connection with the bomb found in his house has been wholly abandoned at the hearing and an attempt made to set up a wholly different defence to that raised in the pleadings.

The Defendants are obviously not entitled to pursue such a course The case the Defendants are now endeavouring to set up is not that they arrested the Plaintiff or caused him to be arrested on the ground that they reasonably believed him to be accessory under sec. 6 of the Explosive Substances Act, 1908, but that they arrested or caused him to be arrested under sec. 5 of the same Act.

Sec. 5 of the Act is in the following terms:—"Any person who knowingly has in his possession or under his control any explosive substance under such circumstances as to give rise to a reasonable suspicion that he does not have it in his possession or under his control for a lawful object shall unless he can show that he had it in his possession or under his control for a lawful object be punishable with transportation for a term which may extend to 14 years"

The learned Advocate General stated that under this section whenever a bomb is found in a house every member of the family is liable to be arrested. That in my opinion is far too broad a statement In this country the joint family system prevails and the family frequently consists of a very large number of persons. That every person in such family should, merely on the ground that a bomb is found in the joint family residence, be liable to be imprisoned and tried for an offence under the Explosive Substances Act is not in my opinion the law. Sec. 5 of the Explosive Substances Act only applies when a person has in his possession or under his control an explosive substance. Though doubtless when once it is established that a person has in his possession or under his control an explosive substance the Statute casts the onus of proving that he had it in his possession or control for an innocent purpose on such person, but still one has to come back to the question, when an article is found in the residence of a joint Hindu family, in whose possession or under whose control it is. If the article is found in a portion of the house, of which one member of the family has the exclusive use, then no difficulty arises, for such member must *primâ facie* be held to be liable for anything that is found there. But if an article is found in a portion of the house of which

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all the members of the family have the use then *primâ facie* the *Karta* (the managing head) of the family is responsible.

But in either case it is only a presumption which may be rebutted and if the Police act on information, which they believe, showing that an article found in a house is in the exclusive possession of one member of the family and the article is found in a portion of the joint family residence of which all the members of the family have the use, then I apprehend that the head of the family is not liable to arrest merely on the ground that the article is found in a portion of the house, to which all the family can resort.

These seem to be the principles which are reasonably deducible from the decision of *Queen-Empress* v. *Sangam Lal* (5). In the present case there is not a word in the reports of the informer on which the Defendants say they acted to suggest that the Plaintiff was in possession of the bomb.

The story told by the Defendants here is as follows :—That Mr. Weston did not know of the application for the search warrant on the night of the 7th July and that when he came to hear of the search on the 8th July and saw the other two Defendants, he asked them why they had not arrested the Plaintiff. They said it had not occurred to them to arrest the Plaintiff as the information regarding the bomb implicated Santosh only. The Moulvi and Lal Mohun then offered to return and arrest Piyari but Mr Weston said that was not necessary as the Plaintiff would not run away and he would wait until he knew whether the article was really a bomb or only a hoax. That until the evening of the 20th July when the Moulvi says he got the demi-official of the Chemical Examiner's report, which he says he gave to Mr. Weston that same night or on the next morning, Mr. Weston was not certain whether the bomb was a dangerous article or not. But that upon receiving the demi-official report of the Chemical Examiner Mr. Weston directed that the Plaintiff should be arrested as the owner of the house. Then inquiring the date for which Santosh's case was fixed and being told it was fixed for the 23rd July, Mr. Weston said it would be sufficient if the Plaintiff were arrested on the 23rd July and accordingly the Plaintiff was so arrested. The whole of this story rests upon one fact, namely, that Mr. Weston did not know the nature of the article found at the Plaintiff's house on the 8th of July earlier than the evening of the 20th July or the morning of the 21st July.

This time has to be fixed, as Mr. Weston admits that he had an interview with the Plaintiff on the 19th July and also because the Plaintiff has preserved a note (Ex. *h*) which Mr. Weston wrote to him on the 20th July. If it is established that after the date when Mr. Weston was fully aware of the character of the article found in the Plaintiff's house on the 8th July, Mr. Weston not only had an interview with the Plaintiff but also wrote to him appointing another interview, then the story told by the Defendants that as soon as the character of the article was ascertained Mr. Weston decided that the Plaintiff should be arrested and after that date had no communications with the Plaintiff, falls to the ground.

Now on the 9th July Major Weinman gave a certificate (Ex. 36) as to the bomb found at the Plaintiff's house on the 8th July.

The certificate states that "the core cosisted of a yellowish brownish powder mixed with shot."

With regard to this Mr. Cornish states "after I had seen Major Weinman's certificate I had no doubt as to the dangerous character of the article found in Santosh's

(5) I. L. R. 15 All. 129 (1893).

house," and again, "on the 11th July the Moulvi and Lal Mohun had no doubt as to what the bomb contained nor do I know that Mr. Weston had any doubt"

Mr. Nelson states that "I had no doubt after Major Weinman had examined the bomb as to its dangerous character."

But we have a much more extraordinary piece of evidence than the statements of Cornish and Mr. Nelson. On the 12th of July the Moulvi addressed to Mr. Weston a letter (Ex. 70) asking for permission for himself and Lal Mohun to have an interview with Santosh in jail to question him abou the bomb. This letter ends with the very significant sentence "In his statement before the Joint-Magistrate in charge of the Sadar Sub-division he (*i.e.*, Santosh) said it was a ball made of rags and intended for *benati* whereas on examination it has been found to contain certain explosives and shots." Mr. Weston states that he does not remember seeing this document. But that he saw it is clear from the endorsement by Mr. Weston in the margin "Jailor please allow this, D. Weston. 11th July 1908." And why should Mr. Weston allow the two police-officers to question Santosh in jail as to an article he thought might be a hoax?

Then again the evidence shows that Mr. Weston was in possession of the demi-official of the Chemical Examiner's report earlier than the night of the 20th July or the morning of the 21st July.

The copy of the demi-official report sent to Midnapore has written beneath it "Calcutta July 1908. Copy forwarded to W. H. Cornish, Esq., Superintendent of Police, Midnapore. (Signed) G. C. Denham, Special Assistant S. B. Bengal 17-7." The evidence shows that a letter posted in Calcutta in the evening reaches Midnapore early next morning and that a letter posted in Calcutta in the morning reaches Midnapore the same evening.

Mr. Cornish's evidence is that he showed the demi-official report of the Chemical Examiner to Mr. Weston immediately after he received it by post and then made it over to the Moulvi. The Defendants' case is that Mr. Cornish gave the document to the Moulvi and that Moulvi showed it to Mr. Weston.

I accept Mr. Cornish's evidence on this point. Then again Mr. Cornish says 'I must have received it (*i.e.*, the demi-official report) on the 18th July.' The Defendants' case is that the document was not received in Midnapore until the 20th July.

In my opinion the demi-official report was in Midnapore without doubt on the 18th July. It is not likely that the document would be three days in the post between Calcutta and Midnapore nor that Mr. Denham having signed the copy of the demi-official report on the 17th July would not have it posted in the ordinary course. I therefore find as a fact that the demi-official report of the Chemical Examiner was received by Cornish on the 18th July and immediately shown by him to Mr. Weston.

I do not accept the date written by the Moulvi on Ex. 79 as a genuine date.

On the evidence I come to the conclusion that Defendants after Major Weinman's report of the 9th July had no doubt as to the dangerous character of the bomb although probably they did not know the nature of the explosive used. On this view of the evidence the Defendants' story as to why the Plaintiff was not arrested falls to the ground. I am satisfied that this story put forward by the Defendants has no foundation in fact. It was suggested by Lal Mohun that Mr. Plowden had given orders for Peari's arrest. But this Mr. Plowden says is not

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so. Mr. Plowden did say that when he saw Lal Mohun he did make a remark, "just a casual remark," as to whether the owner of the house had been arrested. I think Mr. Plowden's memory is at fault with regard to this. He spoke to this remark long after it had taken place and it is possible that Mr. Plowden may have been asked about this incident and quite honestly after discussion have thought he remembered it.

The evidence shows clearly that Mr. Plowden in fact had nothing to do with the arrest of the Plaintiff.

I now turn to the Plaintiff's story as to the reason why he was arrested.

On the 9th or 10th July Peari presented a petition to the Joint-Magistrate (Mr Nelson) praying that he might be allowed to supply Santosh with some clothes in jail. Under the provisions of the Prisons Act and the Jail Code the Plaintiff was entitled as of right to be granted this. Under-trial prisoners are not required to wear jail clothing This application was rejected by Mr. Nelson.

Moti Lal Mukerjee, the pleader, states he saw this petition being taken with a red slip on it towards Mr. Weston's house. Mr. Nelson states that 'on the 9th July I distinctly remember an application being made to me by Peari for leave to send clothes to Santosh in jail. I cannot remember what I did with it. I did not send it to Mr. Weston for orders.' Mr. Weston says he does not remember this petition.

That Mr. Nelson rejected this petition is clear. But why? Mr. Nelson could hardly be desirous of preventing Santosh from having proper clothing in jail. Mr. K. B. Dutt suggests that Mr. Nelson rejected this petition at the instance of Mr. Weston so that the Plaintiff might go and present a petition to the higher authority, Mr. Weston. There is nothing on the evidence to show that that was so. The result however of the rejection by Mr. Nelson of that petition was that Peari went to see Mr. Weston on the 11th July.

It is unfortunate that the petition presented by Peari to Mr. Nelson, like many other documents in this case, is missing. It ought to have been with the record in the Joint-Magistrate's Court.

On the 11th July the Plaintiff went to Mr. Weston's house. It is admitted by Mr. Weston that the Plaintiff had an interview with him on that day. The Plaintiff's evidence is that at that interview Mr. Weston did not say anything about the desirability of making Santosh confess. Mr. Weston says that the Plaintiff asked his advice and that he advised that the best thing for Santosh to do would be to confess or rather make a clean breast of it if he were guilty and penitent and perhaps the Court would take a lenient view of Santosh's offence. Mr. Weston is not an inexperienced officer. He acted for some years as Chief Presidency Magistrate in Calcutta and he must have known that if Santosh followed his advice he could not hope to get a light sentence. Moreover Mr. Weston's evidence is that at this time he was only waiting for the Chemical Examiner's report to see if the Plaintiff should be arrested. On the other hand, it cannot have escaped Mr. Weston's notice that with regard to the conspiracy said to have been reported by Rakhal he had no evidence on which he could hope to convict the conspirators—nay more on the evidence then in his profession it might even be difficult to convict Santosh. This statement of Mr. Weston's as to the advice he then gave the Plaintiff does not seem to fit in with his statement that he did not know the character of the article found at the Plaintiff's house on the 8th July. For

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if Mr. Weston then felt any doubt as to the dangerous character of the article or thought it might be a hoax, one would have expected him to advise the Plaintiff to wait and see what the article proved to be. On the 11th July the Plaintiff under an order obtained from Mr. Weston went to the jail to see Santosh but he was not allowed to do so as the jail authorities said Santosh was not well.

After seeing the Plaintiff on the 11th July, Mr. Weston saw the Moulvi and Lal Mohun and gave them an order to visi Santosh. On the same day the Moulvi and Lal Mohun went to the jail and had an interview with Santosh in his cell. They say they were with Santosh for about 15 minutes but Santosh said he was not well and told them that they should come the next morning. Santosh, on the other hand, says he was perfectly well and that the Police were with him for over on hour. The jail gate-register shows that the police-officers or rather the Moulvi was in the jail from 4-10 P.M. to 6 P.M. Santosh's statement as to the time the Police were with him is far more probable than that of the Defendants. Nor could Santosh's illness be of such a serious character as to prevent him holding a conversation with the police-officers for the police-officers say they saw him at 8-45 next morning, that is only about 15 hours later, when Santosh appears to have been perfectly well.

Santosh's account of what took place at that meeting on the 11th July was that the Moulvi and Lal Mohun told him that he ought to confess and that all that he would have to say was that the Raja had gone to Jamini Mullick's the night before his (Santosh's) arrest and also he would have to speak to the meeting at Kamini's and at Saroda and Baroda Dutt's and to some other meetings. Santosh says that the police-officers also told him if he did not consent to make a confession his father would be arrested and that they would come again to-morrow by which time he had better make up his mind.

On the following morning, the 12th July, the Moulvi and Lal Mohun again saw Santosh in his cell. The interview took place about 8-45 A.M. The Moulvi and Lal Mohun say that the Moulvi questioned Santosh about secret meetings but he made no reply and all that he said was that he would make a statement to the Magistrate after consulting his father.

Santosh, on the other hand, says that the police-officers asked him to admit being present at the meetings held at Baroda and Saroda Dutt's, at Kamini's and at Upendra Nath Maiti's and also as to the Raja of Narajole going to Jamini Mullick's on the evening of the 7th July. Santosh also says that the police-officers showed him a warrant for the arrest of his father the Plaintiff and that by threat and persuasion they made him write a lettter to the Magistrate (Ex. 69) The Moulvi and Lal Mohun say they never saw Ex 69 until they saw it in the Sessions Court.

The truth of Santosh's account of this interview must therefore largely depend on whether Santosh's story as to the writing of the letter Ex. 69 to Mr. Weston is true. Santosh says that the Moulvi produced from his pocket a piece of paper, and pen and ink having been sent for, he wrote the letter at the dictation of the Moulvi.

This letter Ex. 69 is written on a piece of country made paper commonly called "Bally" paper.

The Jail Code provides that in case of convicted prisoners their correspondence shall be written upon Jail Miscellaneous Form No. 87. True it is that the Jail Code does not in words provide that the corres-

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pondence of under-trial prisoners shall be written on the same form, but Capt Salisbury's and other evidence shews that when an under-trial prisoner expresses his desire to write a letter, he is given a Jail Miscellaneous Form No. 87.

The Jail Code moreover provides that all correspondence of both convicted and under trial prisoners shall pass through the Jailor who shall certify that the contents of the letter are admissible under the rules and the Jailor shall then take the orders of the Superintendent of the jail who may direct that the letter may be posted

Now what do we find with regard to this letter of the 12th July (Ex. 69)? First it is not written on Jail Miscellaneous Form No. 87, nor does it bear the usual endorsement of the Jailor that the contents are admissible under the rules, nor the order of the Superintendent that the letter may be posted. There is also the absence of the usual official covering letter from the Superintendent to the District Magistrate, "Jail Miscellaneous Form No. 79."

In place of these we find a memorandum endorsed without any date "Forwarded to Magistrate of Midnapore for favour of disposal, S C Chakravarti for Superintendent of Central Jail, Midnapore." The practice is, as Ex. 68 shows, for the Superintendent to forward such letters to the District Magistrate with a covering letter. Mr. Weston says he cannot say how Santosh's letter of the 12th July came into his possession. The Moulvi and Lal Mohun say that they had nothing to do with this letter. I accept Santosh's story supported as it is by all the probabilities that this letter was written by him in his cell on paper supplied by and at the dictation of the Moulvi and that the Moulvi took the letter away with him. That being so I in substance accept Santosh's account as to what took place at the interview in his cell on the morning of the 12th of July. Early on the same morning, the 12th July, the Plaintiff had presented to Mr. Weston a petition (Ex. 67) asking that he might be allowed to visit Santosh in jail on that day and on every alternate day. Mr. Weston sent this petition to the Superintendent of the jail for disposal and on the same day Major Weinman ordered that the Plaintiff should be allowed interviews with Santosh twice a week, on Wednesdays and Sundays.

The Plaintiff's story is that he and his son Ashutosh drove together to the jail on the morning of the 12th July, that the Plaintiff on going to the jail office found the Moulvi and Lal Mohun there. The Plaintiff also says that, on seeing Santosh, he told the Plaintiff that the Moulvi and Lal Mohun had been trying to get him to implicate respectable people, and had made him write to the Magistrate. Ashutosh says that he did not go into the jail office but remained outside, and that when Santosh was being brought from the jail, their eyes met, and he shouted out to Santosh that he was convinced of his innocence and would see that it was established. That thereupon the Moulvi and Lal Mohun having Police cases in their hands rushed at Ashutosh but the Plaintiff intervened and told Ashutosh to go and sit in the carriage. The Moulvi denies this story altogether but says that as he and Lal Mohun were driving away from the jail, they passed the Plaintiff's carriage going to the jail.

Immediately they had passed the Plaintiff's carriage the Moulvi suddenly recollected that he had forgotten to give a private message to the Assistant Jailor. The Moulvi thereupon stopped the carriage aud got down and walked back to the jail. There he saw Ashutosh making signs to Santosh.

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The Moulvi says he gently reproved Ashutosh, telling him it was very wrong of him to make signs to Santosh. Having given his message to the Assistant Jailor the Moulvi left the jail. He says he did not see the Plaintiff. Lal Mohun says he did not see the Plaintiff's carriage pass them on the way to the jail.

The story about the Moulvi immediately he passed the Plaintiff's carriage suddenly remembering that he had a message to give to the Assistant Jailor and his return to the jail and the gentle reproof to Ashutosh appears to me to be highly improbable. I accept the Plaintiff's account of what happened at the jail office on the 12th of July. To return now to Ex. 69, the letter of Santosh of the 12th of July to Mr. Weston

Mr. Weston now says that he has no recollection whatever as to how he received Ex 69. Before the Sessions Judge Mr. Weston said "I received this (Ex. 69). On it I must have allowed Santosh's father to see him I sent the petition on to Mr. Cornish."

Mr. Cornish's evidence here is: "An interview must have been arranged between the father and the son. The application was made to the Magistrate. The interview took place. The Magistrate arranged it."

Now if this be true, as I think it is, then the probabilities are that Mr. Weston sent for the Plaintiff after receiving Ex. 69. The Plaintiff's story is that he received a chit from Mr. Weston on the 13th or 14th July asking him to come and see him With regard to chits received by the Plaintiff from Weston, the Plaintiff's evidence is that "Mr. Weston sent me chits asking me to come and see him." "I received three. I lost two. Lal Mohun and Moulvi brought them all. I got two chits between the 12th and 19th July." Having regard to Ex. 69 and Mr. Cornish's evidence the probabilities are strongly in favour of the Plaintiff having received a chit from Mr. Weston on the 13th or 14th July. The Plaintiff says that the next interview he had with Mr. Weston was on the 14th July. All the probabilities are that this interview took place following on the receipt by Mr. Weston of Ex. 69 (Santosh's letter of 12th July).

The Plaintiff's account of what took place at that meeting is as follows:—He says he swore before God that his son was innocent. Mr. Weston said he should not be so nervous as the Police had made no reports against him (the Plaintiff). But if he sought his son's safety, he should get his son to be an approver. The Plaintiff fixes another interview with Mr. Weston on the 15th or 16th July, but as to this there is nothing to confirm him. I hold this interview not to be proved.

The next interview that took place is common ground between the parties—that is the interview on the 19th July.

Now why should the Plaintiff go and see Mr. Weston on the 19th July 1908 which was a Sunday? It could not be that he wanted to see Mr. Weston in order to get an order for an interview with Santosh in jail on that day, for the Plaintiff had already under Ex. 67 got an order to see Santosh on all Wednesdays and Sundays.

I can hardly think in these circumstances that the Plaintiff went to Mr. Weston of his own accord. If he did not, then the probabilities are that Mr. Weston sent a chit for him to come and see him. If that be so then this would account for the third chit which the Plaintiff said he received from Mr. Weston. Mr. Weston says he does not remember what took place at that interview except that the Plaintiff wanted to see his son.

That does not seem satisfactory in view of

the documentary evidence that we have. Ex. H. which is a note sent by Mr. Weston to the Plaintiff on the 20th July is in the following terms:—"I cannot see you as arranged at 7 P.M. on Tuesday. Come at 9 A.M. on Wednesday."

Now why did Mr. Weston arrange an interview with the Plaintiff at 7 P.M. on Tuesday which was the 21st July 1908?

The hour, Mr. Weston agrees, is unusual as he usually sees people on these matters in the early morning. He says that he thinks 7 P.M. in the evening was probably fixed so that the Plaintiff might see him after he had seen Santosh.

There can be no doubt that this note (Ex. H) shows that this proposed interview on the 21st July with Piyari was arranged by Mr. Weston so that he might see the Plaintiff after he had had an interview with his son Santosh. But what did Mr. Weston want to see the Plaintiff for after he had seen his son in jail?

Mr. Weston says he remembers nothing further that passed at the interview on the 19th July except that the Plaintiff wanted to see his son.

The Plaintiff's evidence is that Mr. Weston told him the only way to save his son was to make him an approver and that if he could not manage to get his son to make a statement he himself would be arrested.

Then we have the fact from Santosh's history ticket that the Plaintiff did see Santosh in jail on the 21st July which was a Tuesday. Mr. Weston must have authorised this visit. I have no doubt but that the Plaintiff's account of this interview is correct.

The next interview that the Plaintiff alleges he had with Mr. Weston is on the 22nd of July.

By this note of the 20th July (Ex. H) Mr. Weston had appointed 9 A.M. on the 22nd of July as the time of meeting.

The Plaintiff, however, says that he did not keep the appointment as he had failed to induce Santosh to agree to make a confession on the 21st. In the afternoon of the 22nd July, the Plaintiff says, he mustered up courage to go and see Mr. Weston. The Plaintiff says that Mr. Weston told him he would give him one more chance and that he gave him an order so that he might be allowed to see Santosh in jail. The Plaintiff says that when he arrived at the jail, he saw the Superintendent who told him that he had come late and it was just about closing time. But as the Plaintiff had brought an order from the Magistrate, he allowed the Plaintiff to see Santosh. Santosh however, the Plaintiff says, did not agree to make a confession. The Plaintiff says he returned to Mr. Weston and told him the result of his interview with Santosh and Mr. Weston said he would think over what should be done.

Next morning Santosh was produced before Mr. Nelson and the Plaintiff either in the Court room or just outside it was arrested. Between the 12th July and 23rd July interviews in jail took place between the Plaintiff and Santosh as appears from the history ticket on the 15th, 19th, 21st and 22nd July. There was also, according to the evidence of the Plaintiff and Santosh, the second meeting in jail on the 22nd July, late in the afternoon.

In his retractation, dated the 7th September 1908, Santosh states "My father while visiting me in jail in the afternoon previous to the day of his arrest (that is the 22nd July) told me, if I did not turn an approver, then the Magistrate would cause him to be arrested. He also showed me a slip that the Magistrate had given him"

The evidence also satisfies me that during

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the period between the 9th and 22nd of July, there were frequent visits by the Moulvi and Lal Mohun to the Plaintiff's house and that pressure was brought to bear on the Plaintiff to induce him to get Santosh to confess and as time went on, this pressure passed from inducement and persuasion into threats.

The evidence on the part of the Plaintiff is that some of these visits took place when Romesh Bose, the Plan-maker, a Government servant, was present making a plan of the Plaintiff's house for the purpose of being used in the criminal case. The Plan-maker has not been called by the Defendants as a witness.

The story as to the Moulvi explaining the Explosive Substances Act to the Plaintiff and his wife is I think true.

There is also substantial corroboration of the story told by the Plaintiff and his witnesses in the statement of Ashutosh of the 18th August 1908 sent to the Government on the 27th August. Counsel for the Defendants has suggested that this statement is the invention of the Bar at Midnapore. This suggestion seems to me to be quite impossible having regard to the date and other circumstances relating to the document The document was, I think, clearly a genuine statement of Ashutosh's. As against this evidence given on behalf of the Plaintiff, there is the case set up by the written statements that the Plaintiff was arrested as an accessory which has been wholly abandoned and the case attempted to be made at the trial that Mr. Weston determined to arrest the Plaintiff as soon as he knew the dangerous character of the article found at the Plaintiff's house, which has wholly failed.

I must now take shortly the events subsequent to the Plaintiff's arrest on the 23rd July.

The history ticket of the Plaintiff states that on his entry to the jail "health-bad old age"; across the corner of the history ticket I find written "to be strictly segregated." The evidence shows that the Plaintiff was kept in solitary confinement during the whole time he was in jail. The Plaintiff who was suffering from diabetes with accompanying ailments might surely have been let out on bail. His applications for bail, however, were opposed, but each of the Defendants had denied that he had anything to do with the opposition to them.

The treatment of the Plaintiff in jail was in clear breach of the provisions of the law. The rules contained in what is known as the Jail Code are rules framed by the Local Government under the powers contained in the Prisons Act and subsequently sanctioned by the Governor-General in Council. Rules when so framed and approved have the same force as the Statute and it is not open to any person to set aside the provisions of such Rules.

Then who was responsible for the order on the Pinintiff's history ticket "to be strictly segregated?"

It must be either Mr Weston, Mr. Nelson, or Major Weinman. All three of them deny any knowledge of this order. Accordingly I am unable to decide by whose authority the Plaintiff was kept in solitary confinement, a result which cannot be considered satisfactory. On the 29th of July, the Moulvi and Lal Mohun again visited Santosh in his cell.

Now what were the Police doing in the cell of Santosh again on the morning of the 29th of July?

There can be little doubt, to my mind, that they had come to see the effect of the father's arrest on the son. The Plaintiff was sent for and taken to Santosh's cell. There the Police appealed to the higher

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feelings of Santosh to save his father in his old age and to make a confession. But the Plaintiff said that they must have some time to think the matter over.

Later in the day the Police returned to Santosh's cell representing that his father had consented to his making a statement and took him to Mr. Weston's house

Mr. Weston says he examined Santosh and finding that he was willing to make a confession, he sent for Mr. Nelson to record the confession. Mr. Weston admits that he was present at the recording of the confession and that he did put some questions to Santosh from papers he had in his possession and suggested other questions to Mr. Nelson.

This course cannot be justified at all. Mr. Weston obviously had no right to be present at the recording of the confession. Then much has been made of the preliminary questions put by Mr. Nelson to Santosh which are as follows:—

"Do you know who I am?"

"Yes."

"Any statement you make will be of your own free will. You are under no compulsion I understand." It has been much argued as to whether the words "I understand" are an answer to the questions that go before or form part of the previous sentence. I think obviously they are not an answer. First "I understand" is not an answer to the question "You are under no compulsion." Then in the whole of the confession I cannot find that Mr. Nelson has omitted to write a full stop in any other place where one ought to appear. It seems to me clear that Mr. Nelson did not properly comply with the provisions of sec. 164 of the Code of Criminal Procedure. Mr. Nelson says that he never heard the police-officers had been visiting Santosh in jail. Probably if he had known this he would have been more careful to comply with the provisions of sec. 164. Now Santosh had come to confess how he had come into possession of a bomb. Instead of doing this he commences to relate his history as from October or November 1907.

Then we have the extraordinary coincidence that in Ex. 56 the name of a man said to be present at some of the meetings alleged to have been held is given as Gosto Behary De, his real name is in fact Gosto Behary Chandra. The name of this man as given in Santosh's confession in two places was originally Gosto Behary De The word "De" being subsequently struck out and the word "Chandra" written in place thereof.

Moreover in Ex. G this man's name is written "Gosto Behary Chandra (Dey?)."

Then again in the confession Santosh states that he attended a meeting on the 30th June. This is also the date given of this meeting in Ex. 56. According to the Defendants, subsequent enquiries show that this meeting was held on the 29th of June.

Then, again, the first four names mentioned in the report of the 30th June in Ex. 56 are given in exactly the same order as in the confession. These may be coincidences only, but they are, to say the least of it, peculiar.

Then the following expression "The Raja of Narajole gave Rs. 2 per month," "Satyendra Nath Bose gave nothing," "No bomb was produced," "I think I could identify him," "I can't remember the date," show clearly that portions of the confession which purport to have been given by Santosh in a narrative form must in fact have been given by him in answers to questions put to him.

There can be no doubt to my mind that this confession was not recorded in the manner required by sec. 364 of the Code of Criminal Procedure which requires every

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question put and every answer given to be recorded. But whilst I say this I altogether disbelieve the suggestion that Mr. Weston and Mr. Nelson or either of them put to Santosh questions which they knew to be untrue. The truth of the matter is, I think, that Mr. Weston thought that with a little judicious examination Santosh might make a full disclosure with regard to a considerable portion of the conspiracy. Mr. Weston did not, however, bear in mind the visits of the Police to Santosh and the arrest of the Plaintiff.

Although I think Mr. Weston's conduct as to the confession of Santosh was improper and irregular, I can see no ground for suggesting that Mr. Weston put to Santosh questions and received answers which he knew to be untrue

The 7th of August was the day fixed for the production of the Plaintiff and Santosh before Mr. Nelson. It is admitted that neither of them were so produced. This was in manifest breach of the provisions of sec. 344 of the Code of Criminal Procedure. Mr. Norton admitted that if Mr. Weston knew of this it would be his duty as District Magistrate to call Mr. Nelson's attention to the fact. I find from a letter, dated the 9th August (Ex. 33), which Santosh wrote to Mr. Weston, the following:—"The date of appearance of the Petitioner and his father was fixed on the 7th instant, but they were not brought to Court on that day. If the Petitioner's old father be detained here any longer period, he may be deprived of his life."

It would appear therefore that Mr. Weston did know that the Plaintiff and his son were not being produced before Mr. Nelson in the manner provided by law.

On the 5th of August, Mr. Nelson passed an order remanding Surendra Nath Mukerjee to Police custody for seven days but Surendra owing to ill-health could not be handed over to the Police until the 7th August when he was handed over, by the jail authorities to Lal Mohun.

From the 7th August to the 12th August Surendra was kept at the Midnapore Thanah and during such period he says he was tortured by the Police.

Under sec. 167 of the Criminal Procedure Code before a Magistrate remands an accused person to Police custody the accused must be produced before him, for the section says "The Magistrate to whom an accused person is forwarded"

The section also requires that a Magistrate remanding an accused person to Police custody shall record his reasons for doing so. Mr. Nelson did not observe any of these provisions.

Moreover, it is provided by the Bengal Police Code, Chap XVI, pp 374-388, that an application for remand to Police custody under sec. 167 of the Code of Criminal Procedure must be made personally by the Chief Police Officer present to the Chief Magisterial Officer present, that is to say, at the head-quarters of a district (as Midnapore is), by the Superintendent of Police to the District Magistrate unless this is impossible owing to the absence of one of the officers concerned or through some other exceptional cause.

Surendra's story is that between the 7th and 12th August he spent most of his time at the Sub-Inspector's quarters where he was ill-treated by Lal Mohun and other police-officers.

Further that on the 11th August the ill treatment was so severe that after it he was in a state of collapse and that Dr. Bankim Chunder Ghose was sent for by the Police to attend him.

It is common ground between the parties that on one occasion while Surendra was in

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Police custody he was in urgent need of medical aid. The Moulvi and Lal Mohun fixed this date as the 31st July the day of Surendra's arrest when they saw Surendra was suffering from an attack of simple fever and they sent a constable to find the Assistant Surgeon, but not finding him at home he brought Dr. Bankim Chunder Ghose. Dr. Bankim's fees are stated by Lal Mohun to have been paid out of the Secret Service Fund and that a receipt which he gave for his fees was handed to Mr. Cornish. Mr. Cornish was not asked anything about this receipt.

Mr. Norton stated it was probable that Surendra did suffer ill-treatment of some sort from subordinate police-officers during this lengthened detention at the Thanah in Police custody but he denies that Surendra was ill-treated by Lal Mohun or the Moulvi. Surendra's statement that he was tortured whilst in Police custody must, of course, be taken with some reserve and can only be accepted if it is either corroborated or fits in with the probabilities of the case.

The first point to decide is when did Dr. Bankim Chunder Ghose attend Surendra?

Now Dr. Bankim Chunder Ghose has produced two of his books in support of his statement, namely, a Prescription Book and a Dispensary Book. He had two other sets of books which he has not produced. In the Prescription Book which he has produced I find an entry of the 31st of July of a prescription for Surendra Nath Mukerjee. Counsel for the Plaintiff suggested that as the 31st of July was the last day of the month there was a blank space where a prescription might be written in. This standing alone would obviously not be sufficient. But when one takes the entries of the next day the manner in which the book has been altered is apparent. In fact Mr. Norton admits that the entry is a suspicious one. This entry on the 1st of August is for quinine pills which it is suggested were for Surendra on the morning of the 1st of August.

But the merest glance at the name at the heading of the prescription shows that it was originally "For Upendro," then that a capital "S" has been squeezed in between the 'for" and "Upendro." Then to the "p" in Upendro has been added a slanting stroke converting it into a capital "R", but with half of the "R" below the line. Dr. Bankim Chunder Ghose admits that the stroke which converts the "p" into an "r" in Upendro is written in different ink to the rest of the letter. The net result of the alterations to the word "Upendro" is that it is altered into "Surendro," the first three letters "Sur" being all capitals, half of the "r" being below the line.

Then the word Upendro so altered is penned through and Dr. Bankim writes above it Surendro Nath Mukerjee A. M. B. case (accused Midnapore Bomb Case).

Then I come to the Dispensary Book.

Now if you take the entries in the Dispensary Book for the 30th and 31st July and 1st August as originally written, that is omitting the entry of the alleged prescription for Surendra on 31st July and subject to the alteration of the name of the person for whom the quinine pills were prescribed on the 1st of August, the book before the alterations were made was in correct order. On the pages which contain the entries for 31st July I find the number of every prescription has been altered the alleged prescription for Surendro being written last on the page.

If one turns back to the page on which the prescriptions for the 30th of July are entered one finds that the last prescription entered on the 30th of July bears the same number as the altered number of the first prescription of the 31st July. . . . . .

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Then on the page which contains the entries for the presciiptions of the 1st of August, I find the name of the person for whom the quinine pills were prescribed is altered.

But a portion of the first letter of the name that was originally written is visible and the Court Interpreter informs me that the portion visible appears to be the tail of a capital Bengali "U," and there can be little doubt that the word written originally was "Upendro."

Why should these entries be altered in this manner unless it is to support the case that Dr Bankim at ended Surendra on the 31st July? It seems to me quite clear that Dr. Bankim's books have been altered for this purpose

When once one comes to the conclusion that Dr. Bankim attended Surendra on some day other than the 31st July, one gets rid of the sto·y set up by the Moulvi and Lal Mohun.

Then it has been suggested that even if Mr. Bankim did not attend Surendra on the 31st of July yet he m·y have attended him on some other date for fever. That suggestion it is not possible to accept, the Defend ants having put forward a definite case that Surendra was treated by Dr. Bankim for fever on the 31st July. Accordingly I am of opinion that Surendra was attended by Dr. Bankim on the 11th August

Now, why should Dr. Bankim be sent to treat Surendra on the 11th August? Suren dra's story is that since he had been in Police custody from the 7th August, he had been subjected to ill-treatment to try and induce him to confess, and on that day Lal Mohun had so ill-used him that he lost control over himself and having been compelled to evacuate on the floor he lay in a state of collapse. That Dr. Bankim was hurriedly sent for to come and attend him and that a *Mehter* was sent for from the Municipal Office to clean the place and a blanket that had got soiled.

I have looked at certain works on Medical Jurisprudence in order to see if a kick in the stomach would produce the effect that Surendra has stated it produced on him. Apparently the shock to the nerve centre might produce the effect which Surendra has stated. But what has weighed with me more than this is that the Defendants called two medical men, Major Weinman and Dr Bankim Chunder Ghose, as witnesses. No questions were put to them that assuming that Surendra was kicked in the manner he has stated the kick could not have had the effects Surendra has related.

Why then are the Moulvi and Lal Mohun so anxious to fix the date of Dr. Bankim's attendance on Surendra as the 31st July which is clearly not the true date?

It seems to me there can be no other reason for this except that on the date that Dr. Bankim did attend Surendra, something had happened to Surendra which they are anxious to conceal. This being so, I think, one can reasonably accept the evidence of Surendra corroborated by Bholanath, Ramtullah and Sanyasi as to the main incidents as to what happened on that day.

It is only fair to Mr. Weston, however, to state that I am satisfied that he knew nothing about the treatment of Surendra at the Thanah.

On the 12th August, Lal Mohun started for Salboni taking Surendra with him He returned to Midnapore on the 13th August; the train arriving at Midnapore Railway Station at 1-30.

According to Ashutosh's evidence, from the 24th July he was having frequent interviews with the Moulvi. He also from time to time saw Mr. Weston. It is not, how-

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ever, necessary to go into this portion of the evidence, although some interviews are admitted, or as to whether during this period attempts were being made to get Ashutosh to be a witness in the Conspiracy case. It will be sufficient to start with the incidents of the 13th of August. But before considering the incidents of the 13th August I ought to state that Mr. Weston saw the Plaintiff in jail on the 5th August. Mr. Weston says the only complaint the Plaintiff made to him was that the jail officials had taken away his bed-stead. Mr. Weston says that upon enquiring of the jail officials why this had been done he was told that they were afraid that the Plaintiff would commit suicide by standing the bed-stead on its end and then hanging himself to it It does not seem to have occurred to Mr. Weston to question the jail officials as to what sort of treatment the Plaintiff had been subjected to that they should be afraid he would commit suicide. Mr Weston ordered the Plaintiff's bed stead to be restored.

Then again, on the 11th August, it is agreed on both sides that Santosh in answer to his letter of the 9th August (Ex 68) had a further interview with Mr. Weston. Mr. Weston says that Santosh at that interview wished to add two further names to his confession. Santosh says he sought the interview in order to ask Mr. Weston to release his father. Ex 68 shows clearly that this was the thought uppermost in Santosh's mind. Then we come to the incidents on the 13th August. It is agreed that on the afternoon of that day both Santosh and Ashutosh saw Mr. Weston. The story of the Defendants is as follows :—

That in the afternoon—the Moulvi fixes the time about 3 o'clock—whilst the Moulvi and Lal Mohun were driving with Santosh from the jail to the Thanah, having taken him into Police custody for three days, Ashutosh ran up to the carriage when they were near to Mr. Weston's compound and asked to be allowed to speak to his brother Santosh The police officers said they could not allow this without the consent of the Magistrate. Thereupon they drove into Mr. Weston's compound and they all saw Mr. Weston who said Ashutosh might have an interview with Santosh at the Thanah. Mr. Weston further said that if Ashutosh wished to make a statement the police-officers might record it but he warned Ashutosh that he could not expect a pardon if he made a statement.

The improbability of the police-officers disturbing Mr. Weston in the afternoon to ask if Santosh and Ashutosh might have an interview may be left out of account for this story is conclusively proved to be untrue. Lal Mohun returned to Midnapore with Surendra on the 13th August by the train reaching Midnapore at 1-30 The jail gate-register shows that Santosh on the 13th August left the jail at 1-25. At Midnapore the evidence shows that they keep standard time. It was therefore impossible for Lal Mohun to be driving with Santosh to Mr. Weston's house as stated.

Ashutosh's evidence, on the other hand, is as follows :—

That he had been ordered to be at Mr. Weston's house on the morning of the 13th August and that he went there as directed but was told that Mr. Weston was sleeping and that he was to come back later. That he in accordance with this order went back later to Mr. Weston's and after a time the Moulvi arrived in a carriage bringing Santosh with him but that Lal Mohun was not there. That they went in and saw Mr. Weston and that Lal Mohun arrived subsequently. That it was then decided to take Santosh into Police custody for three

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days and to confront Santosh, Ashutosh and Surendra together.

Santosh's jail history ticket supports this view. There are two entries on the history ticket for the 13th August, the first: "Went to see the Magistrate," the second: "Made over to Police custody for three days."

Surendra, in the meantime, who had been left by Lal Mohun at the Police office had been sent back to jail. He was brought back from jail to the Thanah. On the 13th and 14th August, Santosh, Ashutosh and Surendra and Jotindra Sen (Ashutosh's nephew) were tutored at the Thanah and Surendra persuaded to make a confession.

On the morning of the 15th August Ashutosh and Surendra were taken to Mr. Weston's house. There is a conflict on the evidence as to whether Mr. Weston saw Ashutosh on the morning of the 15th August. Mr. Weston says he did not. All that happened he says was that he was shown a statement of Ashutosh's which he thought concealed more than it stated and therefore he told Lal Mohun to tell Ashutosh to go away. Lal Mohun says that Ashutosh was standing near a Mahomedan shrine in Mr. Weston's compound about 80 or 100 yards from the house and he went and gave Mr. Weston's message. Then Ashutosh left the premises. Ashutosh's story, on the other hand, is that he saw Mr. Weston and he asked Mr. Weston if his father would be released if he made the statement. Mr. Weston stated, that did not rest with him, thereupon Ashutosh said he declined to make the statement until he had seen his father. Mr. Weston gave him an order to see his father and he left Mr. Weston's house. The original of Ashutosh's statement that he made to Lal Mohun is missing. The document purporting to be a copy, Ashutosh says, is not in fact a copy. Whether that be so or not it is impossible to say. It is certainly a most extraordinary fact that so many original documents are not forthcoming.

Ashutosh's evidence as to what happened at Mr. Weston's house on the morning of the 15th August is, I think, correct and is substantially corroborated by documentary evidence.

First, there is Lal Mohun's case-diary of the 15th August "Asu Das brother of Santosh at first wanted to make a statement before the Magistrate regarding his knowledge in the affairs and then took time to consider over the matter." This certainly suggests that Ashutosh saw Mr. Weston on that morning.

Secondly, there is Ex. 45 which is an application by Ashutosh of the 15th August to be allowed to see his father which was allowed by Mr. Weston on the same date

Ashutosh's evidence is that he wrote this on the verandah of Mr. Weston's house on the morning of the 15th August.

Now this application of Ashutosh's differs from all the other applications that he presented to Mr. Weston as it is written in the vernacular. All his other petitions to Mr. Weston were written for him in English by a dismissed post-master.

This document shows that the story about Ashutosh not getting within 80 or 100 yards from Mr. Weston's house is not true. Ashutosh's evidence as to what happened on the morning of the 15th August is, I am satisfied, true and is confirmed by his statement of the 16th August (sent to the Government on the 27th August) Ex. F.

Then Mr. Weston proceeded to deal with Surendra. He sent for Babu Surendra Nath Chakrabatti, Deputy Magistrate, to record Surendra's confession.

Surendra's confession was recorded in Mr. Nelson's house by the Deputy Magis-

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trate, Mr. Nelson being present most of the time. If Santosh's confession suggests that portions of it were not given in a narrative form but in answer to questions, Surendra's confession does so with far greater force. In fact the Deputy Magistrate who recorded it stated in his evidence before me that any one reading the confession would probably think that it had been recorded in answer to questions put to Surendra. The Deputy Magistrate also states that he was not aware that Surendra was coming out of a long period of Police custody which was obviously a material fact for the recording officer to know.

Now the first matter that strikes one, on looking at the confession and the statement of Surendra recorded by Lal Mohun which was with the Deputy Magistrate and Mr. Nelson at the time when the confession was recorded, is a most extraordinary coincidence. Lal Mohun in writing the word "Das" in English writes the letter "a" open and the letter "S" he forms in a peculiar manner with a tail so that any person unacquainted with his writing would think the word written was "Dey." Then there is a very extraordinary fact that in two places in the confession of Surendra which was recorded in Bengalee the word originally recorded was "Dey" instead of "Das." This was subsequently altered into "Das." Surendra says this was done at Mr. Weston's house later. Space forbids more than a few instances being given of Surendra's confession which must have been recorded in answer to questions put to him.

First, near the beginning where Surendra is purporting to speak of the *Basanta Malati Akra*: "The Raja of Narajole used to pay a monthly subscription of Rs. 2 for that *Akra*. I don't exactly remember the name of the Raja of Narajole."

Considerably later in the confession we find the following statement:—

"Before the last *Ulta Rath* in the month of Asar (I do not remember the date and the day) the Raja of Narajole whose name is Raja Narendra Lal Khan came to Jamini Mullick's house."

Can any one doubt that in the first part of the confession a question was put to Surendra as to what was the name of the Raja of Narajole and that he answered "I don't exactly remember," and on the second occasion Surendra was asked if the name of Raja of Narajole was Raja Narendra Lal Khan? Then we come to the part of the confession as to the meeting said to have been held at the *Basanta Malati Akra*.

The confession as to this is as follows:—

"That meeting was held at about 8 P.M. There was no special arrangement for sitting. There was only one bench. There was no bed."

I cannot doubt that questions were put to Surendra as to the seating arrangements at that meeting. Moreover we have a very significant fact that in Ex. G which was drawn up by Asadulla to be used by the informer Rakhal for the purpose of getting up his evidence there is this statement with regard to the meeting at the *Basanta Malati Akra*. "There was a bench for sitting."

Next, one other statement as to the meeting at the *Basanta Malati Akra*:

"I do not remember what other things were said in that meeting by what other persons." Then as to the meeting said to have been held at the *Rasmancha* of the Mullicks':

"I don't exactly remember who were present at that meeting. Jyoti Das, Jamini Mullick and Moti Babu were there. Hem Chandra, Abhoy Chandra Kundu too were present. It might be 25 or 30 persons in all. I can say if names are mentioned to me.

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Q.—(Suggested by Mr. Nelson, struck out) Was Jogendra Mullick there?

A.—Yes. Jogendra, Gobinda Pal, Hari Kristo Patal, Rakhal Chandra Pal, Ashutosh Kundu, Ashutosh Das (originally written Dey) all these persons were there. . . . I don't remember what other speeches were made."

Then at the meeting at the house of Kamini prostitute:

"I don't remember who else made speeches."

Then take the meeting at the Raja of Mahisadal's house:

"The date I cannot exactly remember . . . . I cannot say who live at the Mahisadal Raja's house and whether those who live there were present at the meeting."

Then, lastly, one further example. The confession originally recorded gave the name of "Honorary Magistrate Abinash Chandra Dutt." Later in the confession we find "whether Abinash's title is Mitter or anything else I do not know." Whereupon the former part of the confession "Honorary Magistrate Abinash Chandra Dutt" is altered to "Abinash Babu."

In my opinion there can be no doubt but that by far the greater portion of this confession was obtained from Surendra by means of questions put to him and that the confession was recorded in a form in manifest breach of the plain provision of the law which according to the Deputy Magistrate's own statement were well-known to him. I do not, however, believe that Mr. Nelson and the Deputy Magistrate knew that the confession that Surendra was making was untrue.

The Deputy Magistrate admits that if he knew Surendra was coming out of Police custody he would be much more careful. It is unfortunate that that the Deputy Magistrate was not so told.

On the 15th August under the permission given by Ex. 75 Ashutosh saw his father in jail. Ashutosh informed his father what had taken place and his father advised him to go to the Bar Library and see the pleaders. The same afternoon Ashutosh went to the Bar Library and related his story how his father had come to be arrested and the attempts made to get him to be a witness.

A deputation accompanied by Ashutosh waited on Mr. Bradley Birt, the Additional District Magistrate, but Mr Bradley Birt told him that he could not interfere and that they must go to Mr. Weston The deputation said that Mr. Weston was absolutely in the hands of the Police On the 16th August a number of gentlemen of Midnapore wrote to Mr. K B. Dutt who was then the Chairman of the Midnapore Municipality requesting him to acquaint the Lieutenant Governor with the existing state of affairs. Pursuant to this requisition Mr. Dutt telegraphed to the Chief Secretary on the 16th August, the telegram (Ex N) in which it is stated 'We are satisfied on materials which we desire to place before the Government that evidence implicating respectable and absolutely innocent persons is being fabricated." On the 27th August Mr. Dutt forwarded to the Government two statements of Ashutosh dated respectively the 16th and 18th August, a statement of Jotindra Nath Sen (the Plaintiff's grandson) and also a statement of Upendra Nath Mukerjee (the brother of Surendra Nath Mukerjee).

Counsel for the Defendants suggest that these statements were invented by the Bar at Midnapore That seems to be quite an impossible theory. I think the statements are genuine and on the whole they contain a substantially accurate account of what had happened.

The 15th August had been fixed as the

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date on which the persons arrested on the 31st July should be produced before Mr. Nelson. None of them were so produced.

On the 21st August Santosh was produced before Mr. Nelson but not in open Court but in some other room at the Court premises This again was in direct contravention of the provisions of the law.

Sec. 352 of the Code of Criminal Procedure enacts "the place in which any Criminal Court is held for the purposes of enquiring into or trying any offence shall be deemed an open Court to which the public generally may have access so far as the same can conveniently contain them.

The Plaintiff says that on the 21st August he was not taken out of jail at all. I think he is right in this but it matters little whether he was or was not.

The production of Santosh but not in open Court on the 21st August seems to suggest that his non-production on the 7th August was done of a deliberate and set purpose

On the 21st August two petitions for bail were filed on behalf of Santosh and the Plaintiff (Ex. LXXXVI in No. 1 and Ex. K. K. K. in No. 1). The petition of Santosh stated that he was innocent. The Plaintiff's petition stated in paragraph 2 "The petitioner's said son was pressed from the very beginning to make a confession but he denied all knowledge of the bomb Para. 3. That after the arrest of Santosh Chandra Das your petitioner was pressed by 'various authorities' to induce his son to make a confession which not being done your petitioner was arrested on the 23rd July 1908 and was remanded to *hajat* on the very day where he is rotting since then."

This petition sets out clearly the cause of the Plaintiff's arrest, *viz.*, his failure to induce Santosh to make a confession. The only thing that is not stated specifically is who were the "various authorities" that caused the Plaintiff to be arrested.

By the 21st August it had been found out that the confessions of Santosh and Surendra contained mistakes which did not fit in with the reports of the informer. According to Lal Mohun, on the 21st August he went to the Police office at the Court and questioned Santosh as to his confession Santosh according to Lal Mohun immediately cleared up all difficulties, corrected the dates and brought the incident of the 7th July into line with the alleged reports of the informer. Lal Mohun says that he recorded this additional statement of Santosh. Santosh says he gave no such statement. I accept Santosh's statement. The additional statement if true was one of considerable value. No statement of Santosh recorded by Lal Mohun could be used in evidence. There was a Magistrate in the building, and it is inconceivable, if Santosh did make this statement, that Lal Mohun would not at once have taken him before a Magistrate and had his statement recorded.

Surendra in his confession had come to grief more, because he had given, as being present at the meeting at the *Basanta Malati Akra*, Santosh who was then in Ranchi and Satyendra Nath Bose who was then in jail.

Lal Mohun says he went to the jail on the 21st August and saw Surendra who immediately corrected the errors in his confession. Surendra says he did nothing of the sort. I accept Surendra's statement. I am satisfied if he had made this important correction he would have been taken before a Magistrate and the alteration would have been recorded.

On the 28th of August, as I have already stated, the third batch was arrested. It is said that it was intended to arrest Ashutosh

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on that day but this could not be done as he was absconding.

I am satisfied that Ashutosh was not absconding. He was present in Court on the 31st of August. It is now said that the Plaintiff's house was again searched on the 28th of August by Asadulla.

Not a single question as to this search was put to the Plaintiff or any of his witnesses.

This search I am satisfied never took place and the return to the warrant by Asadulla is not genuine.

The warrant (Ex. CCXXV in No. 1) purports to show from the return on the back of it that the search took place in the presence of one witness, Abdulla, only. Sec. 103 of the Code of Criminal Procedure requires that there shall be at least two witnesses to a search.

Asadulla now says that there were two other witnesses—a doctor with leprosy on his hands and a blacksmith—neither of whose names does he recollect.

I reject Asadulla's evidence. The search I am satisfied never took place. Then on the 31st of August the Plaintiff, Santosh, Surendra and others were produced before Mr. Nelson in Court.

Mr. P. K. Bose, a Barrister, who is described in the list of Moderates and Extremists (Ex. LXXX) as an Extremist and supporter of all the *Akras*, appeared for the Crown. The first thing that occurred in Court on that day was that Mr. Keays applied for bail on behalf of the Raja of Narajole.

Then Mr. Dutt applied for leave of the Court to hand over to the Plaintiff, Santosh and Surendra three petitions to sign if they desired. It appears that Mr. Dutt said they were important petitions. (See evidence of P. K. Bose on behalf of the Defendants).

The petition handed to the Plaintiff was according to Lal Mohun "a long petition" and when he had read a page or two of it he got his son Santosh to read the rest of it to him. The three petitions were then signed and handed back to Mr. Dutt. So far there is not much controversy on the evidence on this point.

The Court then adjourned for lunch. Lal Mohun's evidence is that he spent the luncheon interval in conversation with a connection of his wife who had come down to the Court to see him. This I do not believe. The evidence on behalf of the Plaintiff is that the Police asked Santosh and Surendra during the adjournment of the Court what the petitions they had signed were and they said they were petitions for bail.

The evidence also is that the police-officers told the Plaintiff that he was going to be released but as he had signed a petition he could not be released unless he withdrew it. On the Court resuming after the adjournment the Plaintiff asked for his petition back and struck his name out.

A petition (Ex. B) which is said to have been the petition signed by the Plaintiff is produced here. At first it was challenged by Counsel that this was not the petition on the ground that the petition signed by the Plaintiff on the 31st of August was a short petition. Lal Mohun's evidence put an end to this suggestion for he says the Plaintiff's petition was a long petition. Ex. B consists of a petition written on five and half sheets of foolscap the writing being on one side of the paper only, anything much shorter than this could hardly be described as a "long petition."

The evidence satisfies me that Ex. B was the petition signed by the Plaintiff on the 31st August.

To return to what happened in Court on the 31st August after the midday ad-

journment. Lal Mohun first gave some formal evidence and the case was withdrawn against the Plaintiff and two others.

Then Mr. K. B. Dutt made an application for bail for Santosh and Surendra and some other of the accused. Mr. Nelson's evidence is that it is the usual practice for applications for bail to be founded on petitions.

So in the usual course the application for bail on behalf of Santosh and Surendra would be supported by petitions.

Santosh's petition (Ex. 43) withdrew his confession and asked for an opportunity to make a statement which would disclose the circumstances under which he was by threat, inducement and persuasion compelled to make his confession. Surendra's petition (Ex. 44) did not formally withdraw his confessions but he asked that an opportunity should be given him of making a statement in Court.

Apparently, while Mr. Dutt was making his application, Mr. Nelson was not paying great attention to it for the evidence shows that he was writing orders on other petitions. Mr. Nelson rejected the application for bail and immediately afterwards the case was adjourned, the record being immediately carried away by the Court Inspector, Rash Behary Sen, who is a police-officer who conducts prosecutions in the Court.

The Court Inspector at that time had charge of the record in the case. He was, as I have already said, cited as a witness by the Defendants in this case but was not called. Presumably, therefore, his evidence on this point, if he had been called, would not have supported the Defendants' case.

The question is, were these two petitions put in on the 31st August or were they, as Counsel for the Defendants says, "smuggled into the record."

According to Mr. Norton, Mr. Dutt deliberately "cheated and defrauded the Court" on that day.

Mr. Cornish's evidence on this matter is as follows :—

"On the 31st August I heard of applications being signed by Santosh, Surendra and Peari. I think the Moulvi told me this before I went to the Club He told me some petitions had been signed and put in. I think he said, but I can't remember, that they had been surreptitiously filed .... He must have told me what the petitions were. He told me I think that they were petitions of retractation of Santosh and Surendra. To the best of my belief I went and reported the matter to Mr. Weston. Mr. Weston wrote to Mr. Nelson and asked him if these petitions had been filed. Mr. Nelson so far as I remember knew nothing of them. When Mr. Nelson looked he found that they were with the record. This was on the 31st August. The Moulvi told Mr. Weston that the petitions were retractations."

If Mr. Cornish's evidence be accepted there can be no doubt that the Defendants knew about these petitions being filed and that they were petitions of retractations, on the 31st August.

The Moulvi's evidence now is that he was in Court for only a few minutes on the 31st of August. But before the Committing Magistrate, on the 8th September 1908, he said "I was in Court on the 31st (*i.e.*, the 31st August). I did not hear of any applications to retract confessions. I do not know up to now if any such petitions were filed. I had not heard that two such petitions were filed and disappeared from the record. I have not heard of the existence of such petitions and their disappearance.

To Court. I have heard of some petitions being smuggled into the record."

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No reliance can be placed upon the evidence of the Moulvi.

Then the evidence of Lal Mohun is that he saw Santosh and Surendra sign the two petitions in Court on the 31st August but they were not filed in Court on that day. At the rising of the Court he says he glanced through the record but could find no petitions filed on behalf of Santosh and Surendra. He then says he went and informed Mr. Weston that Santosh and Surendra had signed but had not filed two petitions.

This, however, does not agree with Lal Mohun's evidence at Sessions where he said " Bail petitions were made for all the accused on the 31st August. They were presented in my presence.

Q. The petition for bail and the petition for retractation of confession is the same identical petition.

A. I know now. I did not know at the that time."

Lal Mohun at the Sessions evidently meant the Court to believe that petitions were filed on behalf of Santosh and Surendra on the 31st August but he thought they were petitions for bail.

Then, again, the account given by Mr. Weston here is substantially different from the account he gave at the Sessions.

At Sessions, Mr. Weston said " I had the petitions of retractation in my house because I wanted to see them. I am in the habit of seeing records; it is part of my duty. I sent for them from Court These were then in a flat file with the record, not part of the record. They came from the custody of the Court. I know there is a dispute as to what had become of them. They were underneath the record forming no part of the record. I heard of their existence because applications were put in for copies of them before the trying Magistrate."

This is a different story to that which Mr. Weston has told here. On the 1st September, an application was made to the Court for copies of the confessions and "also for copies of the petitions filed by Santosh and Surendra filed on the 31st August."

Mr. Nelson rejected the application for copies. In his order of the 2nd September he states "These petitions were certainly not brought to my notice during the hearing. A perusal of them shows that both Surendra and Santosh demanded to be examined that day" Mr. Nelson had been concerned in recording both Santosh and Surendra's confessions and one would have thought, as soon as he become aware of the petitions of Santosh and Surendra asking for an opportunity to make a statement to him, he would at once either have gone to the jail or have had Santosh and Surendra produced before him and given them the opportunity of making a statement to him

On the 2nd September Lal Mohun and Moulvi went to the jail and saw Santosh

The Moulvi says he did not go into the jail and see Santosh but he waited outside and that Lal Mohun only went in.

The entry in the case-diary of Lal Mohun for the 2nd September is as follows:—

"With Moulvi Mazharul Huq went to the jail and questioned Santosh Das about the petition alleged to have been signed by him on the 31st in Court of Joint-Magistrate, and he said that he signed it without reading its contents considering it to be a bail application." Why "alleged to have been signed," when Lal Mohun saw Santosh sign the petition in Court? Santosh's evidence is that the Moulvi and Lal Mohun came to him in jail and tried to get him to disclaim the petition of the 31st August. Santosh's story is, I think, far more probable.

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First of all, the police-officers on the 2nd of September did not go to question Surendra in jail, the reason apparently being that Santosh's petition formally withdrew his confession whilst Surendra did not do so but only stated that he wanted to make a statement to the Court.

Secondly, when Mr. Reid—Mr. Nelson having been transferred on the 2nd September—went to jail on the 3rd September and asked Santosh and Surendra about the two petitions, "they admit their signatures and that the petitions are theirs" (See Mr. Reid's order of the 3rd September). Santosh made no reservation on 3rd September that he thought he had signed the petition as a bail petition.

Mr. Reid's order on the 3rd September was "Orders will be passed thereon later." No orders were in fact ever passed on these two petitions. I cannot help thinking it would have been wiser that Mr. Reid on the 3rd of September had given Santosh and Surendra an opportunity of making a statement.

The conclusion I come to with regard to the two petitions of the 31st August is as follows:—First that the two petitions were without doubt filed in Court on that day, that Mr. Nelson was not attending to what was being said in Court but was writing orders on other petitions. That when Mr. Nelson was questioned about these petitions subsequently he did not know of their existence and therefore it was assumed that the two petitions had been improperly put into the record. I think that it was owing to this that the subsequent unpleasant events arose. The evidence doubtless is in some parts suspicious as to there being an attempt to suppress these two petitions, and if Mr. Cornish's evidence is accepted doubtless it goes far to establish the Plaintiff's contention. But on the whole after very careful consideration of the evidence I am of opinion that the whole incident arose out of a misunderstanding.

Then the Plaintiff's evidence is that on the night of the 31st August and again on the 1st September Lal Mohun came to his house to induce him to try and get Santosh to stick to his confession and that Ashutosh did write a letter to Santosh to this effect. But whether that be so or not, it is common ground that on the 2nd of September Lal Mohun and, as I hold, the Moulvi also interviewed Santosh in his cell with reference to his petition. Whatever instructions Mr. Weston may have given the police-officers, I am satisfied that on the 2nd September they tried to persuade Santosh to disclaim his petition of the 31st August. On the 4th September, Ashutosh was arrested and put up before Mr. Reid when he filed a petition for bail (Ex. L. L. L.). In this petition he stated that "the Police and the superior officer (*Urdhatam Karmachari*) have been for a long time trying to make your Petitioner a witness in the Bomb case." That the "superior officer" refers to Mr. Weston is not open to doubt. I have little doubt but that the arrest of Ashutosh was a move to try and get Santosh to stick to the confession which had required so much trouble to obtain and without which the Defendants knew the criminal case would probably go to pieces.

On the 3rd September Piyari Lall Ghosh, Vakil, wrote to the Superintendent of the jail asking for an interview with Santosh and Surendra and other prisoners. This interview was granted as regards the prisoners other than Santosh and Surendra. With regard to Santosh and Surendra Mr. Weston himself came to the jail with Lal Mohun on the 5th September and says he asked Santosh and Surendra if they wished to see a Vakil.

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Mr. Weston then says he entered an order in the visitors' book as follows:—"I visited the confessing prisoners with whom a Vakil had asked for an interview. As the prisoners expressed no wish to see him the Superintendent may inform the Vakil accordingly." Other attempts by legal advisers to see Santosh and Surendra proved also unsuccessful There seems to have been a very heated interview between the Superintendent of the jail and Mr. Keays and Mr. A. N. Chaudhuri.

Major Weinman in his evidence before the Committing Magistrate said "when the Counsel asked me to see Santosh and Surendra, I asked why should I put it into his head that he could see them when he had already said he did not want to see a legal adviser." Major Weinman says however that he went and asked Santosh and Surendra, "Do you want to see a Vakil?" Major Weinman knows perfectly well that an European or any other Barrister is not described in the vernacular as a "Vakil."

The evidence satisfies me that every possible difficulty was being put in the way of Santosh and Surendra seeing their legal advisers.

The net result was that before being taken to Court on the 7th of September, Santosh had seen his pleader for three minutes that morning, and Surendra had not seen a legal adviser at all. It is suggested by Counsel for the Plaintiff that the pleader was allowed to see Santosh for three minutes on that morning, because Santosh had formally withdrawn his confession, and that special rules framed by Mr. Weston and Major Weinman as to interviews with confessing prisoners did not apply to Santosh.

On the 7th September the accused were taken to Court. Immediately Counsel applied for an interview with Santosh and Surendra. Mr. Reid allowed it "with certain precautions." Mr. Cornish was stationed outside the room in which the interview took place.

The interview appears to have lasted about two hours. Santosh and Surendra both signed petitions setting out the facts. They also—Santosh on the 7th September and Surendra on the 7th and 8th September—in the Court of Mr. Reid wrote out more detailed statements. These statements if true are of great importance. Now until the morning of the 7th September Santosh and Surendra had seen no one who could have tutored them to make these statements.

Counsel for the Defendants say, however, that the legal gentlemen at the interview allowed by Mr. Reid on the morning of the 7th September tutored Santosh and Surendra. This is pure suggestion and there is not a word of evidence to support it.

The legal gentlemen who saw Santosh and Surendra on the morning of the 7th September were Mr. Godfrey, now Assistant Government Advocate in Burmah, Mr. K. B. Dutt, Mr. A. N. Chaudhuri, Mr. A. C. Dutt, and probably also Mr. Keays, now Second Presidency Magistrate, and Mr. H. Mullick. There was also the pleader Piyari Lall Ghose present.

The Defendants try and get rid of the European barristers as tutoring counsel by saying they were present only a few minutes. There is not the slightest reason to suppose that these statements were not written by Santosh and Surendra without any outside assistance. I have already stated what happened in the Bomb case resulting finally in the acquittal of Santosh, Surendra and Jogjiban in this Court. A great deal of evidence has been given on behalf of the Plaintiff in this case as to the treatment of the under-trial prisoners in the Bomb case

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in jail. There can be little doubt that the treatment of many of the prisoners was contrary to the provisions of the Jail Code.

Major Weinman was a most unsatisfactory witness. He came here and gave evidence that the evidence he gave before the Committing Magistrate was incorrect or as he said it contained "many, many mistakes" I think his evidence before me contained many mistakes also and I am not satisfied that his evidence before the Committing Magistrate was incorrect.

I refrain from going into the treatment of the prisoners in jail not because I accept Major Weinman's or Mr. Brett's evidence but because I think that the evidence that has been given here is insufficient to establish that any of the Defendants are responsible for such treatment

To sum up.

From a careful appreciation of the evidence and having had an opportunity of seeing the witnesses on both sides in the witness-box I find the following facts :—

First, that the story given in the reports alleged to have been given by Rakhal Chandra Laha was not in fact a true story.

Secondly, that the Plaintiff has not proved that the bomb found in his house on the 8th July 1908 was placed there at the instigation of the Defendant, the Moulvi.

Thirdly, that the Defendant Weston believed that the story contained in the reports alleged to have been given by Rakhal Chandra Laha was true.

For this purpose it might be sufficient for me to say that the Defendant Weston's belief in the story would be sufficiently evidenced by the manner in which he had his house guarded by armed constables. But as in the course of this judgment I have had occasion to severely criticise the Defendant Weston's conduct, it is only fair to him that I should state that I am satisfied that not only did he believe in the story set out in the alleged reports of the informer but also that if he had suspected that the reports were untrue he would not have acted on them.

I apprehend that it is no part of a District Magistrate's duty to be an expert in criminal investigation. The Defendant Weston, however, does appear to have endeavoured to have taken some steps to try and satisfy himself that the story was true. But he had neither the time, for his charge at Midnapore seems to have been an extraordinarily heavy one, nor the experience to do this in a satisfactory manner.

In this respect there seems to have been an extraordinary blunder somewhere Mr. Cornish's evidence is that he was really ousted from any control over the police-officers engaged in the investigation of this case. His control, he says, was altogether nominal and that he understood that the police-officers were working under the control of the Criminal Investigation Department. Mr. Plowden, the Deputy Inspector-General, having control of the Criminal Investigation Department, says that his Department had nothing to do with the investigation into the Bomb Conspiracy case at all except that occasionally he was asked for and gave advice. The result was that the Defendants, the Moulvi and Lal Mohun, were under the control of no superior police-officer. Whether Mr. Cornish's view is correct or not, it is not necessary for me to state. There can be little doubt that Mr. Cornish had not a strong belief in the story related in the reports—nay more, he stated in his evidence that when the bomb was found in the record room of the Dutts on the 31st July, he suspected that the Police had put it there. It does not appear that he communicated this suspicion to the Defendant Weston.

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I think that the Defendant Weston was misled as to the truth of the reports by the other two Defendants.

Fourthly, I find that the Defendants, the Moulvi and Lal Mohun, did not believe in the story set out in the alleged reports of the informer.

This I infer from the procuring and attempting to procure false evidence, the tutoring of confessing prisoners and others by these two Defendants.

Doubtless it does not follow as a matter of necessity that because these two Defendants did these things that they know that the story was not true. But when evidence has been given establishing these facts it raises a strong presumptive case against these two Defendants which if they fail to displace is in my opinion sufficient proof of their not believing in the story.

Fifthly, I find that the reason of the Plaintiff's arrest was to put pressure on his son Santosh to confess and not in the belief nor with a reasonable or other suspicion that the Plaintiff had anything to do with the bomb found in his house nor on the ground that the Plaintiff was the owner of the house in which the bomb was found I also find that prior to the arrest of the Plaintiff, each of the Defendants, at first by advice and persuasion and then by threats, tried to induce the Plaintiff to get his son Santosh to make a confession and on his failure to induce Santosh to confess the Defendants caused the Plaintiff to be arrested.

The evidence to my mind establishes conclusively that the three Defendants were working together in concert for a common object. The motive of the Defendant, Mr. Weston, for joining the conspiracy may be very different from that of the two other Defendants But the law does not permit of a man being arrested in order to put pressure on his son to confess, even if the person causing the arrest believes that by so doing he will get evidence that will lead to the conviction of persons engaged in a huge conspiracy

I disbelieve altogether the suggestions of a corrupt motive that have been made against the Defendant Weston.

The story of the sale of his motor car to Mahisadal Raj has been satisfactorily explained by him, although it may not have been very discreet of him to sell it to the Raj at the time the Dewan was cited as a witness for the defence.

I must now deal shortly with the points of law that have been raised by Counsel. First, it is said that the standard of proof in a case like the present is the same as if the Defendants were being tried for a criminal offence Doubtless the English textbook writers are not agreed on this point. Such eminent writers as Taylor and Stephen support the view that the standard of proof is in a case like the present such as would be required in a criminal case. The tendency, however, of the authorities in England appears to me to be the other way.

However, in India the law of evidence is modified The Act defines when a fact is said to be proved although, of course, in a case like the present due regard must be had to the presumption of innocence. This matter is, however, not open to argument in this Court. The point has recently been decided by Jenkins, C. J, and Woodroffe, J., in *In the Goods of Gopessur Dutt, deceased* (6), in a judgment delivered so recently as the 18th July 1911 in which they decided that whatever may be the rule in England there is no rule under the Indian Evidence Act that the standard of proof in a case like the present must be the same as if the Defendants were being tried on a criminal charge.

(6) Unreported

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The next point argued is that a suit to recover damages resulting from a conspiracy is not maintainable in British India. The argument is put in this way. That as the only conspiracy which constitutes a criminal offence under the Indian Penal Code is that of a conspiracy to wage war against the King, therefore no suit can be maintained for damages resulting from a conspiracy. To that argument I am unable to assent. This being a case instituted in a Court in the mofussil the Court has to apply the principles of justice, equity and good conscience to the case, that is to say the principles of the law of England so far as suited to India and the state of society here.

That the Indian Penal Code took away by express words any civil remedy cannot be suggested nor can I see that it did so by necessary implication. I have therefore to consider the case apart from the provisions of the Indian Penal Code. On what principle of justice, equity or good conscience ought a Plaintiff in a suit in a Court in India not to be entitled to recover damages which have resulted from a conspiracy to injure him? In my opinion in such a case the Plaintiff has a right of suit in India.

To hold otherwise would I think be a blot upon our system of jurisprudence.

The learned Advocate-General has referred as part of his argument to a memorandum by Lord Dunedin and Sir Arthur Cohen annexed to a report of the commission on trade disputes expressing the view that it was only such conspiracy as amount to a criminal offence that can give rise to civil liability. But the report obviously refers to conspiracies which are indictable according to the common law of England. Lord Macnaghten in his judgment in *Quinn v. Leathem* (7) expressly lays down that because a Statute has exempted certain conspiracies from the purview of the criminal law, this does not in any way affect civil liability Nor are judges of the highest eminence all agreed that it is only such conspiracies as are indictable that can give rise to civil liability.

The next point raised by the Advocate-General is that the Plaintiff has brought his suit on a conspiracy and he must be kept strictly to the cause of action that he has set out in his plaint. To that view I assent.

But then argues the learned Advocate-General that this suit is in substance only one for malicious prosecution against joint tortfeasors, aud therefore the Plaintiff's suit must fail. To that view I cannot agree

I take the following from Lord Coke's Commentary on Littleton, Hargrave and Butler's edition, published in 1794, a book of the highest authority amongst English lawyers.

Note on 161 A.

"II. Where two or more conspire to harass any person by false and malicious suit whether criminally or civilly it is a crime punishable by indictment or the parties injured may sue for damages by writ of conspiracy; and both of these remedies lie at common law, that part of the Statute or *Ordinance Articuli super chartas* which gives remedy against conspirators by writ out of Chancery being according to both Staunford and Lord Coke only an affirmance of the common law, Staunford P. C., 172, 2 Inst. 561, 562."

"IV. There is also a remedy for a false and malicious prosecution though the aggravation of a conspiracy or confederacy is wanting and the injury comes from one only; for in such a case the party prosecuted may have an action upon the case for damages."

(7) [1901] A. C. 495.

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A conspiracy to maliciously prosecute a man is obviously indictable according to the common law of England.

As Lord Brampton pointed out in the case of *Quinn* v. *Leathem* (7). "A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law or to do that which is wrongful and harmful towards another person, it may be punished criminally by indictment or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements whether of a criminal or of an actionable conspiracy are in my opinion the same though to sustain an action special damage must be proved. This is the substance of the decision in *Barber* v. *Lesiter* (8)."

Applying the test given by Lord Brampton it is clear that if the conspiracy is a criminal one it gives rise to civil liability if special damage has been suffered by the Plaintiff. The conspiracy in the present case would obviously be indictable at common law in England and therefore if damage resulted the Plaintiff would have a good cause of action in England. In my opinion he has a similar right in India.

The truth of the matter is that in a case like the present the Plaintiff has two causes of action, one to recover the damage that has been occasioned to him as the result of the conspiracy, and the other to recover damages for malicious prosecution against the Defendants as joint tortfeasors. This is well illustrated by the case of *Quinn* v. *Leathem* (7). There the Plaintiff in his pleading charged in the first four Courts as separate causes of action four separate acts each of which was alleged to have been done wrongfully and maliciously and with intent to injure the Plaintiff and to have occasioned him actual loss, injury and damage. The fifth count charged as a separate cause of action that the Defendants unlawfully and maliciously conspired together and with others to do the various acts complained of in the previous counts with intent to injure the Plaintiff and his trade and business and that by reason of the conspiracy he was injured and damaged in his trade. The jury returned a verdict in favour of the Plaintiff on all five counts and the verdict and judgment were upheld on appeal in the House of Lords.

In my opinion the present suit to recover damages resulting from the conspiracy is maintainable by the Plaintiff. These points of law as to whether a suit to recover damages resulting from a conspiracy and as to the nature of the present suit do not in any way affect the merits of the suit. Their importance lies in the fact that if the suit is only one for malicious prosecution then the suit is barred under the provisions of the Indian Limitation Act as being brought after the statutory period has expired. I therefore decide the first issue in favour of the Plaintiff and also the second issue so far as relates to the overt acts mentioned in cls. (*c*), (*d*) and (*e*) of that issue.

The third issue is whether the Defendants were entitled to notice of this suit under sec. 80 of the Code of Civil Procedure. In my opinion they were not. A public officers sued in respect of an act done in bad faith is not entitled to notice under sec. 80. The decisions in this Court of *Shahunshah Begum* v. *Fergusson* (9) and *Raghubans* v. *Phool Kumari* (10) establish this proposi-

(7) (1901) A. C. 495.
(8) 7 C. B. N. S. 175 (1859).
(9) I. L. R. 7 Cal. 499 (1881).
(10) I. L. R. 32 Cal. 1130 (1905).

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tion without doubt [See also *Muhammad* v. *Panna* (11)].

In these circumstances it is not necessary for me to determine the fourth issue.

The fifth issue is whether this suit is barred by limitation.

The article of the Indian Limitation Act 1908 which applies to the present suit is, I think, Art. 36. This suit is, I think, a suit "for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for;" the period of limitation for such a suit is two years from the time when the malfeasance, misfeasance, or non-feasance takes place. In this view the Plaintiff's suit is brought within time. I do not agree with the argument that this suit is governed by Art. 23 as being a suit "for compensation for a malicious prosecution," the period of limitation for which is one year from the time when the Plaintiff is acquitted or the prosecution is otherwise terminated.

If this suit is not governed by Art. 36 I should hold that Art. 120 applies. That article fixes six years as the period of limitation with regard to suits for which no period of limitation is provided elsewhere in the Second Schedule to the Act.

I am therefore of opinion that the present suit is not barred by limitation.

The sixth and last issue is what damages is the Plaintiff entitled to. In order to sustain an action of this nature the Plaintiff must prove special damage. The conspiracy must be the proximate cause of the damage or the damages must be such as to have been in the contemplation of the parties.

In the present case the Plaintiff has given evidence that he was compelled to spend a considerable, though not a heavy sum, owing to his arrest.

(11) I. L. R. 26 All. 220 (1903).

The question is whether these damages legally resulted from the conspiracy. The case principally relied up on by the Defendants is the decision in *Barber* v. *Lesiter* (8).

But all that decision laid down was that on the facts alleged in the declaration the conspiracy was not the proximate cause of the damage nor was the damage to the Plaintiff in the contemplation of the parties.

The damages in the present case are not in my opinion too remote I adopt Lord Justice Fitzgibbon's statement in his charge to the jury in *Quinn* v. *Leathem* (7), "I told the jury that pecuniary loss directly caused by the conduct of the Defendants must be proved in order to establish a cause of action and I advised them to require to be satisfied that such loss to a substantial amount had been proved by the Plaintiff. I decline to tell them that if actual and substantial pecuniary loss was proved to have been directly caused to the Plaintiff by the wrongful acts of the Defendants that they were bound to limit the amount of damage to the precise sum so proved."

I accordingly award to the Plaintiff the sum of Rs. 1,000 as damages. The Defendants must pay to the Plaintiff his costs of this suit on Scale No. 2.

Before parting with this case I wish to make a brief reference to a matter which, though not bearing directly on the result, is intimately connected with the conduct of this case and involves a serious imputation of unprofessional conduct, which two senior members of the Bar, one of them being the Advocate-General, have seen fit to make on the conduct of Counsel opposed to them.

It was made a matter of deliberate and unrestrained attack on Mr. Dutt that he

(7) [1901] A. C. 495.
(8) 7 C. B. N. S. 175 (1859).

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had not gone into the witness-box. Mr. Dutt has himself explained the reason of his abstention and that reason appears to me to be satisfactory. His client in whose favour his testimony would have been given, with full knowledge of this saw fit to retain him as his Counsel and it cannot be suggested that there was anything improper in Mr. Dutt's accepting this retainer. Having done this it was in strict accordance with the rule of professional ethics of almost universal application that having taken up the position of an advocate he should refrain from testifying on a trial which was being conducted by him. I may observe that this rule of professional conduct was not, I regret to say, observed by Mr. Dutt's opponents. I may further add that I viewed at the time and still view with complete disapproval Mr. Norton's unfounded and abusive attack on Mr. Dutt's junior, Mr. H. D. Bose.

Mr. J. C. Dutt, Attorney for the Plaintiff.

Messrs. Orr, Dignam & Co., Attorneys for the Defendants.

Suit decreed with costs.

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NOTES.

THE CHIEF COURT OF LAHORE HAS TAKEN THE somewhat novel step of setting up arbitrary limitations to the number of lawyers in the Punjab. It has absolutely stopped the enrolment of more mukhtears and has notified to the intending candidates for the law degrees of the University that only such number of them would be admitted as will be notified by the Chief Court; only the Court has undertaken to declare three years previously what that number would be in any year.

WE MUST CONFESS AT THE OUTSET THAT THE question of the congestion of the legal profession is not without its difficulties and we are prepared to accept that it would be very much better for the country if our young men should try to open up new avenues of life rather than crowd into the Bar. But it is open to the gravest doubt whether drastic measures like those adopted by the Lahore Chief Court would not be a remedy worse than the disease. There can be no question that it would lead to a fall in the efficiency of the members of the profession. For, under the system now in force everywhere except in the Punjab a successful practitioner has to rise to his eminence through a course of keen struggle and competition which has a most useful influence in his self-education for the work. Besides it is with him always a survival of the fittest from amongst a fairly large number to which every one satisfying the preliminary requirements is welcome. Arbitrary limitation of their number would shut out a large number of these not because they were not the best fitted for their work but on quite other grounds. Such limitation would likewise tend to create a more or less close body which would surely affect its efficiency and the public will be obliged to pay more for less efficient work.

IT IS ABSURD TO SUPPOSE THAT ANY BODY OF MEN can possibly estimate the exact requirements of the public in the matter of the number of lawyers. It is only in its most exaggerated forms that the want of proper adjustment between demand and supply in the profession can become apparent, as when lawyers are generally found to be charging enormous fees or when a large body of them is found to be on the verge of starvation. The necessary adjustment between these extremes is scarcely capable of proper estimation by mere observation. With a free access to the profession these adjustments are naturally made; for when the profits of the profession come below normal, people would naturally refrain from flocking to it.

THE ONLY EFFECTIVE WAY OF CHECKING THE evil would seem to lie not in the hands of lawyers and judges so much as in the hands of the Government and the people. It is time that close attention were given to technical education and also to the problem of providing for our young men who are receiving education. It is also an imperative public duty of every man who can afford to do so to attempt to find out means for the profitable employment of their energies. New paths must be carved out and new spheres of ambition must be found for them. When avenues of life bringing better and surer reward than law are found out, the profession of law would have far less attraction for them than it has now. The adjustment of demand and supply will then take place naturally and there would be no necessity for putting artificial checks on the growth of the number of lawyers. We have already got too many checks in our social, economic and administrative conditions to young men of education getting a decent living and too few openings for life. It is scarcely fair to add this new check and leave numbers of educated young men to shift for themselves. If any restriction is at all expedient or necessary, we should prefer some less artificial method working less hardship than the arbitrary one we are discussing. Such a limitation may possibly be found in the German

system of which we gave an account not very long ago (15 C. W. N. cclxxxiv), requiring intending practitioners to pass through a period of probation and apprenticeship and to show possession of means of livelihood for five years. This would add both to the efficiency and respectability of the profession. We think this system would be infinitely better than the arbitrary limitations imposed by the Lahore Chief Court.

THE FOLLOWING QUESTIONS AND ANSWERS RELATING to professional conduct and practice which appear in the Bar Council's Report for 1911, will be of interest to the profession :—

The council have had under their consideration the following questions submitted to them by a member of the English Bar practising in India :—(1) If a counsel knows or has reason to believe that he will be an important witness of fact in a case about to be tried, ought he to accept a retainer in the case? (2) If, neither knowing nor having reason to believe that he is likely to be such witness, he accepts the retainer, but at the opening or any subsequent stage of the case, before the evidence is concluded, it becomes apparent that he is an important witness and the other side objects to his appearing as counsel, ought he to persist in so appearing? (3) If a counsel knows or has reason to believe that his own professional conduct in matters out of which an action arises is likely to be impugned in the case, ought he to accept a retainer in such action? (4) If, in the case last put, he neither knows nor has reason to believe when he accepts the retainer that his professional conduct is likely to be impugned, but finds in the course of the case that it is so impugned, ought he to persist in appearing as counsel in the case? (5) In either of the cases (2) and (4) above-mentioned, is there any rule of "professional ethics" which debars the counsel, if he continues to act as counsel in the case, from going into the witness box and being cross-examined?

The council were of opinion that the answers to the above questions should be as follows: (1) If a counsel knows, or has reason to believe, that he will be an important witness of fact in a case about to be tried, he ought not to accept a retainer in the case. (2) If a counsel, neither knowing nor having reason to believe that he is likely to be such witness, accepts the retainer, but at the opening or any subsequent stage of the case before the evidence is concluded it becomes apparent that he is a witness on a material question of fact which is in issue, he ought not to continue to appear as counsel unless in his opinion he cannot retire from the case at that stage without jeopardising the interests of his own client. The council do not consider that the objection of the other side has any bearing on the course which counsel ought to adopt. (3) If a counsel knows, or has reason to believe, that his own professional conduct in matters out of which the action arises is likely to be impugned in the case, he ought not to accept a retainer in such action. (4) If a counsel neither knows, nor has reason to believe when he accepts the retainer, that his professional conduct in matters out of which the action arises is likely to be impugned in the case, but finds in the course of the case that it is so impuged, he ought to adopt the same course of conduct as mentioned in answer to question (2). (5) In either of the cases (2) and (4) above-mentioned, there is no rule of professional ethics which debars a counsel, if he continues to act as counsel in the case, from going into the witness box and being cross-examined.

LINGUISTIC BOUNDARIES OF BENGAL.

"With a few exceptions, Bengali is the language of the great sub-province of Bengal proper, Hindi of Behar and Chota Nagpur and Oriya of Orissa. North of the Ganges, however, Bengali has invaded Behar territory and in the portions of Purnea and Malda which lie to the east of the Mohananda river, the language in common use is Bengali and not Hindi."—*Gait's Census of India, 1901, Vol. VI, Pt. I, p. 315.*

"In Purneah the number of persons speaking Bengali is estimated by Dr. Grierson to be 603,000," *i.e.*, roughly speaking ⅓rd of the total population of the District which was 1,874,794 in 1901. As you proceed further west of the Mohananda, Bengali as spoken in Bengal proper is gradually replaced by a dialect "which according to Dr. Grierson,* is in the main Bengali with a strong admixture of Hindi but it is written in the Kaithi character in which Hindi and not Bengali is usually written."—*Gait's Census of India, 1901, Vol. VI, Pt. I, p. 315.*

In Malda, "Bengali is spoken by 74 per cent. of the population and Behari by 21 per cent." This Behari in the western part of the District is greatly influenced and affected by Bengali.—*Imperial Gazetteer of India, 1909, E. B. and A., p. 243.*

"South of the Ganges, in the Sonthal Parganas, Bengali is current in the whole of the eastern and southern portions, in the Dhalbhum Pargana of Singhbhum, in the greater part of Manbhum and in about half of the State of Seraikela. It also, according to the census, projects to some distance into the District of Hazaribagh."—*Gait's Census of India, 1901, Vol. VI, Pt. I, p. 315.*

In Sonthal Parganas "Behari is returned as the language of 13.5 per cent. of the population, the dialect in common use being Maithili. The Maithili (which is spoken in the western part of the district) is influenced more or less by the Maghai and partly also by Bengali. The result is a well-marked dialect called the *Chhika-Chheki Boli*. The Rajmehal Hills separate the speakers of this dialect from those who speak Bengali but in the Deoghur Sub-division the two vernaculars are seen to overlap without combining . . . . . . Bengali is the language of 13.5 per cent. of the population and is common in the east of the district."—*Bengal District Gazetteers, 1910, Vol. XXII, p. 66.*

The *Chhika-Chheki Boli* is also used (1) in the

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* In Grierson's Seven Grammars of the Dialects and Sub-Dialects of the Behari Language, in Part VIII, under the heading *Maithili-Bengali Dialect of Central and Western Purneah*, the following observation occurs "Towards Central Purneah this dialect shows a distinct tendency towards Bengali. The dialect of Eastern Purneah is a variety of Bengali."—ED.

southern part of the Bhagulpur District* roughly speaking that portion of the district which is south of the Ganges and which constitutes the Sudder and Banka Sub-divisions of the District and (2) in the south-eastern portion of the Monghyr Sub-division, *i.e.*, in what is known as the Kharagpur country.—(*See Bengal District Gazetteers, 1909, Vol. XVII, p. 53*).

"The vernacular of the District of Manbhum is the western dialect of the Bengali known as *Rahri Boli*."—*Imperial Gazetteers of India, 1909, Bengal, Vol. II, p. 380.*

"Bengali is current in the Dhalbhum Pargana of Singhbhum."—*Gait, p. 315.*

Along the Oriya Bengali boundary line, "the Oriya of North Balasore shows signs of being Bengalised . . . the character employed in writing is usually the Bengali."—*Gait, p. 316.*

"Goalpara is not a part of Assam proper: and 69 per cent. of the population speak Bengali."—*Imperial Gazetteers, 1909, E. B. & A., p. 516.*

In Sylhet "Bengali is the common speech of of the people, and was returned by 92 per cent. of the population."—*Imperial Gazetteer, 1909, E B. & A, p. 421.*

In Cachar, "rather more than half the population speak Bengali, 21 per cent. Hindi and Hindusthani, 10 per cent. Manipuri and 4 per cent. hill Cachari."—*Imperial Gazetteer, 1901, E. B. & A., p. 444.*

As a matter of fact in Cachar 66 per cent. speak Bengali. If Cachar hills portion of the district is left out, then the whole of the rest is practically Bengali speaking.

B. K. LAHIRI.

LEGISLATIVE COUNCIL FOR THE PRESIDENCY OF BENGAL AND THE REGULATIONS.

The raising of the five Divisions of Bengal proper into a Presidency Government will necessitate a reconstitution of the Legislative Council for Bengal and modification of the Council Regulations.

Before going into the question of reconstitution, the Government should take this opportunity of removing the restrictive regulations which did not exist under the Regulations framed under the India Councils Act of 1892 but appeared for the first time under the Indian Councils Act, 1809, and which chiefly marred the reputation of the Reform Scheme. These restrictive clauses have been condemned by public opinion throughout India and now that an opportunity has presented itself the Government of India should amend them. In our issues of 22nd November and 29th November of 1909 (14 C. W. N. notes, pp. 6, 7 and 14), we pointed out the objectionable features of these restrictive clauses and we shall now more specifically deal with the main heads of these objections.

MUNICIPALITIES AND DISTRICT BOARDS.

In the first place, the only seats that are available to the educated community, the professional classes and the general body of rate-payers and tax-payers of the country are the seats to which a candidate may be returned by the Mofussil Municipalities and the District Boards. These were the old constituencies under the Act of 1892 and under the old Regulations thereunder the only restriction to one's candidature for these constituencies was that one must be ordinarily a resident within the constituency, which was interpreted in certain election cases by the Bengal Government to mean that one must have a place of residence in and practical connection with the Electoral Division. Thus under the older regulations, Mr. S. P. Sinha and Dr. Rash Behary Ghose were qualified candidates for election by the Municipalities or District Boards of the Burdwan Division. But under the Regulations framed under the Act of 1909, they have been disqualified. For, under the new Regulations no one who is not a Municipal Commissioner or a member of a District Board or has been one for three years, is eligible for election by either. The result of this has been to disqualify the best men of the Division and of the Province for seats in the Legislative Councils.

ANTECEDENTS AND REPUTATION OF CANDIDATES.

Then again some general restrictive clauses as regards candidature have for the first time been introduced in the new Regulations. Of these, Reg. IV, cls. (*a*) to (*e*) are not open to any objection. But cls. (*f*) to (*i*) are and even the Government may be said to admit that they are so, because they conclude with a proviso that the Governor or Lieutenant-Governor may by his order remove the disqualification in any of the cases falling under (*f*) to (*i*). Of the disqualifying clauses, (*f*) provides that no dismissed Government servant may be eligible; (*g*) that no one who at any time has been sentenced to imprisonment by a Criminal Court for an offence punishable with imprisonment for more than six months or bound down, is eligible; (*h*) that no legal practitioner debarred from practising is eligible; (*i*) that none whose reputation and antecedents in the opinion of the Governor or Lieutenant-Governor would make his election contrary to public interest is eligible.

Of these restrictions (*f*), (*g*) and (*i*) are open to very serious objections. Dismissal from Government service does not necessarily imply or leave a moral stain on a man's character. The same

* In Part VII, Grierson's Grammar, which treats of *South Maithili-Bengali Dialect of South Bhagulpur*, the following occurs "South Bhagulpur is in fact one of the meeting grounds of Behari and Bengali and the dialect spoken there is essentially border tongue."—ED.

may be said with regard to convictions, or binding down orders by Criminal Courts. A man may be sentenced to imprisonment for simple assault, contempt of Court or a number of other offences which do not necessarily imply moral turpitude or bound down for land dispute or literary or journalistic indiscretions and it would be most unjust to disqualify him for life in consequence.

In the absence of any similar restrictions in the Regulations under the Act of 1892 and having regard to the fact that for nearly twenty years the Government had no occasion to take any exception to any candidate returned under the old Regulations on the ground of any such moral delinquency of the candidate or of his "antecedents" and "reputation," the restrictions imposed in the new Regulations above referred to are without any justification.

It may be pointed out here that the effect of the new restrictive Regulation has been to disqualify a public man of the standing of Mr. Surendra Nath Banerjea who had served in the old Council for more than 10 years and to find a constituency for whom the Bengal Government had on one occasion caused a redistribution of seats amongst the constituencies. Of course, it is now optional with the Government to waive the disqualifications in such cases as it may think fit. But men with any sense of self-respect would not offer themselves for election when they know that they are not eligible as of right but as a matter of favour. The Regulations therefore are in this respect reactionary and retrograde and should be amended. Should it however be felt desirable by Government that some power should be reserved for disqualifying any person on the ground of his "antecedents" or bad "reputation," cl. (*i*) of Reg. IV might be retained and cls. (*f*) to (*h*) might be repealed, since cl. (*i*) covers all the cases contemplated under cls. (*f*), (*g*) and (*h*) and even (*e*).

EDUCATION AND INCOME-TAX AS QUALIFICATIONS.

We would further suggest that special electorates should be formed for the Indian educated community and the Indian commercial community. The member for the University is at present elected by ordinary fellows who are mostly Government nominees. It is strongly felt by the educated community that the registered graduates of the University should also be allowed to take part in the election of the representative of the University.

The European commercial communities have constituencies of their own. But the representatives of the Indian commercial community are nominated. Nothing can be easier than to create suitable constituencies for them by reference to the income-tax or trade licenses in Municipal towns.

LANDHOLDERS' CONSTITUENCIES.

Landholders' qualifications vary widely in Eastern and Western Bengal. They ought to be brought into line and the money qualification should be so reduced as to enable landholders of the middle class to vote and to be eligible. It is the landholders of the middle class who are generally more intelligent, better educated and more representative of their class than the upper ten. There is also a popular feeling that the landlords' interests are over-represented in the Councils. They have their special electorates. Then again, as in Eastern Bengal, they are put down as eligible by the District Boards as well. In West Bengal they are not so eligible. The Regulations for the Presidency of Bengal should follow the Regulations for West Bengal in this respect.

MAHOMEDAN CONSTITUENCIES.

As for the special electorates for the Mahomedan community the qualifications in Eastern and Western Bengal should be made uniform Government title should not be made a voting qualification either in the case of landholders or Mahomedans.

THE STATUTORY LIMIT TO MEMBERS.

Regarding the reconstitution of the Legislative Council for the Presidency of Bengal we shall assume that the Council will, as at present, consist of 50 members although we must say that the general feeling is that the number should in the new Statute be increased so as to create general electorates by reference to education and income-tax or trade licenses and enable the general public to take part in the elections and to send representatives of the middle class people to the Councils. The Municipalities only represent the towns and the District Boards only theoretically represent the landlord and tenant's interests in rural areas but the latter being semi-official bodies the representatives of the District Boards are ordinarily and practically official nominees.

ELECTED, NOMINATED AND OFFICIAL MEMBERS.

Thus the general body of the educated classes and of Indian merchants and traders except in the big cities have no votes or representation at all in the Provincial Councils. But for the present we shall consider the question of the re-constitution of the Council for the Presidency of Bengal on the basis of the existing Statute of 1908 and the Regulations for Bengal and Eastern Bengal thereunder. We shall assume that for the present there are to be only 50 members for the Bengal Presidency. Of these under the Bengal Regulations, 26 are now elected and 24 are nominated by Government. Out of the latter 17 must be officials but as regards the remaining seven there is no statutory bar to the Regulations being modified and some of the seats at any rate made over to suitable electorates. How many of these may or ought to be so made over we shall consider after we have examined how the 26 seats which are now given by election should be allotted between the

five Divisions, Burdwan, Presidency, Rajshahye, Dacca and Chittagong.

ELECTORATES OF WEST BENGAL.

The separation of Behar, Orissa and Chota Nagpur has left the following 13 seats which were given by election to the Burdwan and Presidency Divisions and Calcutta.

Calcutta Corporation	1
Calcutta University	1
Burd. & Presy. Division Municipalities	2
Burd & Presy. Div. District Boards ...	2
Burd. & Presy. Division Landholders ...	2
Burdwan (and *Orissa*) Mahomedan Communities	1
Presidency Div. Mhd. Community ...	1
Bengal European Chamber of Commerce	2
Calcutta European Trades	1

ELECTORATES OF EAST BENGAL.

Similarly the separation of Assam from Eastern Bengal leaves the following 13 seats which were given by election to Eastern Bengal.

District Boards of the Rajshahye, Dacca and Chittagong Divisions ...	3
The Landholders of the 3 Divisions ...	2
Jute interest	1
Chittagong Port Commissioners ...	1
Mahomedan Community for the 3 Divisions	3
Municipalities of the above 3 Divisions	3

It should be noted however that the Chittagong Division, including the Surma Valley Division, elected one member for the Council alternately with the Assam Valley Division.

SEATS BY NOMINATION.

Assuming that the constitution of the new Council will be similar to that of Bengal, there will remain 24 seats at the disposal of the Governor of which not more than 17 may be officials and two experts who may be nominated by him in connection with any measures before the Council. This leaves 5 seats, of which one was assigned to planters, 1 to the Indian commercial community in West Bengal and the remaining three were filled by nomination by Government.

Planting community.—With regard to the seats by nomination the Government will have to consider whether a seat should continue to be assigned to the planting community when the bulk of that community would now be in Behar and Assam. There are no doubt some planters in the Darjeeling district but to assign one member to only one district would be unfair to the claims of other constituencies and communities. Besides Darjeeling has a large number of votes through its Municipality.

The Indian commercial community in East Bengal who were given a seat by nomination to the Eastern Bengal and Assam Council, should be given a seat in the new Council and this will have to be done without curtailing the representation of other larger communities.

Nominated non-official members.—As regards the three seats reserved by Government for nomination of non-officials the feeling of the educated community in the country is that they should be thrown open to the educated community by election.

REDISTRIBUTION OF ELECTORATES.

Now with regard to the 26 seats above-mentioned which are given by election we have to make some suggestions in accordance with the prevailing public opinion in the matter.

Municipal and District Board Seats.—One seat to each Division should be assigned to each of these constituencies and no difference observed between West and East Bengal such as is to be found in the present Eastern Bengal and Assam Regulations in this respect. Or in other words in all 10 seats should be assigned to the five divisions, five to the Municipalities and five to the District Boards. For reasons already stated the qualification of candidates should only be limited by the residential clause as in the Council Regulations under the Act of 1892. Should, however, past or present membership of any of the Municipalities or District Boards be retained as a qualification, the clause in the Eastern Bengal and Assam Regulations that a landlord may also offer himself as a candidate for election by the District Boards should be omitted. Because, in the first place there is no such provision in the Bengal Council Regulations; next, since the landholders have special electorates of their own, they should not be allowed to have further representation through the above constituencies which have been reserved for the professional and middle class people.

Landholders' seats.—While in Eastern Bengal two seats are given by rotation to three Divisions, in West Bengal one seat is given to the Presidency Division and one to the Burdwan Division. The landholders' seats in the Council should not on any account be increased. We would suggest that the four seats reserved for landholders should be given by rotation to the five Divisions. As Bengal is now one province no distinction should be observed between West and East Bengal.

MIDDLE CLASS LANDHOLDERS.

Further there is a very substantial and just grievance amongst the landholders of the middle class that under the present Regulations the franchise has been given only to the opulent zemindars who are not in touch with the general body of landholders and whose interests in many respects are opposed to those of tenure-holders and the landholders of the middle class. So the landholders in the Legislative Councils, both Provincial and Imperial, are not regarded by the public as representatives of the landholders but

as representatives only of their own selves. There is a strong feeling both in Eastern and Western Bengal that the electoral qualifications of landholders should be so modified as to enable the tenure-holders and the landholders of the middle class to vote and to elect at any rate some of the representives of the landholding classes from amongst them. In Madras all zemindars having an annual income of three thousand rupees may vote and are also eligible. Why cannot the same or similar qualifications be adopted in the new Regulations for the Presidency of Bengal. In Bengal the electoral qualification is the payment of Rs. 7,500 as Government Revenue or of Rs. 1,875 in cesses; in Eastern Bengal, land revenue of Rs. 3,000 or cesses, Rs. 750; in Surma Valley (including Sylhet which desires to be included in Bengal) it is, land revenue Rs. 500 or cesses, Rs. 125.

If the Madras Regulation is not adopted, the scale of Government revenue or cesses fixed for Sylhet may be adopted in order to enable the landholders of the middle class and tenure-holders to vote and to be eligible. In the interests of tenure-holders a moderate cess-limit should be fixed and such cesses when paid to zemindars should be considered as satisfying the electoral qualification.

Jute interest.—In the Eastern Bengal Regulations one of the seats was given to the Naraingunge Chamber of Commerce as representing jute interests. All the jute firms in Naraingunge have their offices in Calcutta. The Calcutta firms are represented in the Bengal Council through the Bengal Chamber of Commerce which has 2 seats in the Bengal Council. The Naraingunge Chamber got a separate representation in the Eastern Bengal Council because they and their Calcutta firms or representatives were placed under two separate administrations. Now that they are both placed under the same administration and the Bengal Chamber of Commerce has been given two seats, in the place of one under the old Regulations, to retain a separate representation for such a small and sectional body as the Naraingunge Chamber of Commerce would be unfair to other communities. This seat should be given to a general electorate, including the educated, trading and commercial classes.

In case the seat assigned to the planting community is retained the gap that will occur in respect of the seat that was assigned to the Indian commercial community in the E. B. & Assam Council may be filled up by making over the seat assigned to jute interest to them. In that case all the jute merchants at Naraingunge may also be included in the electorate. East and North Bengal is the home of jute and Indian merchants of these parts are no less interested in jute than the European jute merchants. So whether the seat be reserved for jute interest or thrown open to the general body of merchants in Eastern and Northern Bengal, in all common fairness the electorate should be re-cast by the inclusion of Indian merchants into the constituency.

Chittagong Port.—Should however European merchants in Eastern Bengal desire to be represented by a European constituency they might together with Chittagong Port Commissioners form one constituency. The Calcutta Port Commissioners do not form a separate constituency by themselves and why should Chittagong?

Mahomedan electorates.—We have always been opposed to all communal or special electorates. But since assurance has been given in Lord Hardinge and the Earl of Crewe's recent Despatches that the interest of the Mahomedan community, evidently in Eastern Bengal, would not be affected by the inclusion of Eastern Bengal within Bengal, we would not oppose the retention of special electorates for Mahomedans, although in the reconstituted province Hindus and Mahomedans are numerically almost equal. No better illustration can be found than here, that "the privileges of one community amount to disabilities of another." In common fairness therefore special electorates ought to be given to both. In any case, we do not think that it would be fair to assign to the Mahomedan community more than four special electorates in the Presidency.

In the Eastern Bengal and Assam, they have only four seats. In Bengal, Behar and Orissa, the seats reserved for them are also four. The effect of the changes is that Bengal *loses five* Divisions and *gains three* Divisions only from Eastern Bengal. The reconstituted Presidency of Bengal is not any larger than the Province of Bengal or that of Eastern Bengal and Assam. So this special electorate for the Presidency of Bengal should be limited to four. In no Presidency or Province in India is the Mahomedan electorate in excess of four and the assurances in the Delhi Despatch would be fulfilled if the Mahomedan electorate is limited to that number. These four seats may be given by rotation to the five Divisions. Further, the severance of Balasore and Cuttack, which are important Mahomedan centres, ought not to entitle Burdwan Division to retain one seat by itself. For, that would amount to adding to this special electorate and not maintaining the provincial limit in this respect as before. Burdwan may, therefore, be tacked on to Presidency Division for this purpose and both considered as one electorate.

GENERAL ELECTORATES.

The Reform Scheme will never be popular in the country unless at least one general electorate is formed in each Division in which people irrespective of class or creed may take part in the elections and choose representatives from amongst themselves by virtue of education and moderate

property qualifications. It will be for the Government to decide whether they would create these electorates by either increasing the statutory number or by carving them out of the seats now given by nomination and assigned to special electorates as has been pointed out by us above.

CONCLUSION.

The redistribution of seats in the Legislative Council of the Presidency of Bengal as suggested above will then be as follows :—

Calcutta Corporation ...	1
Calcutta University ...	1
Calcutta European Trade ...	1
Chittagong Port & Europ. Merchants	1
Bengal (Eur.) Chamber of Commerce	2
Indian Merchants East & West Bengal	2
Landholders	4
Mahomedan community ...	4
District Boards of the 5 Divisions	5
Municipalities of the 5 Divisions	5
Mixed Electorates of the 5 Divisions	5
Government officials ...	17
Experts by Government nomination	2
	50

OUR DUTY.

It is now the duty of the Government and of all communities in India to remember His Majesty's last appeal to them and to make every endeavour to ensure that "unity and concord may for the future govern the daily relations of our private and public life" under the enlightened rule of a most just, sympathetic and far-sighted Sovereign.

Reviews.

BRETT'S LEADING CASES IN MODERN EQUITY. *Fifth Edition. By J. A. Shea wood, Esq., and W. G. Hart, Esq., L. L. D. London: Butterworth & Co.; Calcutta, Butterworth & Co., (India), Ltd. 8-2, Hastings Street. 1911.*

Brett's Leading Cases in Equity has long been an invaluable hand-book for students of Equity. Its essential characteristic lies in being the exposition of what Sir George Jessel characterised as "Modern doctrines of Equity." For this purpose the learned author took illustrative cases exclusively from modern reports, referring in the notes to such old cases as had laid down principles which have been retained unmodified up to this date. In stating the facts and decisions of the cases the utmost brevity was the aim of the author and the principles were illustrated at greater length in the notes by copious extracts from judgments in the leading case as well as other cases. The subsequent editions of the work led to an overburdening of the notes to an extent inconsistent with the original object of the work. The present editors have however reverted to the old model by polishing off the notes, by excluding cases which since the first edition have become a little out of date and altogether giving the work that conciseness and lucidity which would best serve the interests of the students.

The mode of treatment of the cases in this book is extremely helpful to students who are very often not used to reading complicated reports of cases. The relevant facts and the decision thereon are shortly stated. Then follows the exposition of the principles illustrated by the case and in this the editors not only give, so far as we have been able to examine the work, almost all the relevant passages from the judgment in the principal case but also short statements of facts of other important cases as well as important extracts from other judgments. The result has been a fairly comprehensive and thoroughly up-to-date account of the Equity law, so far as possible in the words of the judges. We only wish that the editors in their anxiety to make the work an exposition of modern Equity law had not so rigorously excluded old cases merely because they are old. *Huguenin* v. *Basely*, *Allcard* v. *Skinner*, *Stapilton* v. *Stapilton*, *Fox* v. *Macketh*, *Howe* v. *Earl of Dartmouth*, *Penn* v. *Baltimore* and several other cases of a similar character, which despite all changes still continue to be leading authorities on the subject have, we notice, received but scanty attention. Yet a student of Equity can hardly afford to do without a good knowledge of those cases.

THE INDIAN DECISIONS (OLD SERIES). *By T. A. Venkasawmy Row. Vol. II, Supreme Court Reports, Bengal. Madras: The Law Printing House, Mount Road. 1911.*

This is the second volume of the series of reprints of the reports of cases decided by the Supreme Courts and Sadar Dewanny Adawluts in India, the first volume of which we have already noticed in these columns. In this volume appear cases reported in 1847 and 1848 in George Taylor's Reports, between 1849 and 1853 in the three volumes of Taylor and Bell's Reports, and Gasper's reports of Small Cause Court cases determined by the Supreme Court of Calcutta between 1850 and 1859, with a general index for all the cases contained in the above reports. That this cheap reprint of these not easily available reports will be useful goes without saying.

Notes of Cases.

ENGLISH LAW COURTS.

CHANCERY DIVISION.—*Staffordshire and Worcestershire Canal Navigation* v. *Bradley.* Before MR. JUSTICE EVE. 15th November 1911.

Right of fishing, if appurtenant to land and can it be leased—Fishery in gross—Extent of profit à prendre.

This was an action for a declaration that the Defendant had no right to fish from any of the Plaintiffs' towing-paths. The defence was that the Defendant was a member of a club to which the rights of fishing had been leased by the Earl of Shrewsbury. Three questions arose for determination, namely, (1) whether the right to fish carries with it the right to enter on the towing-path, (2) whether those rights were vested in the Earl of Shrewsbury, and (3) whether those rights could be the subject of the lease.

The learned Judge found the first in the Defendant's favour, but the second against him. He accordingly decreed the suit. He said

As to the second point it is necessary to ascertain what was the right conferred by sec. 74. It was a right to take fish from the canal. Is that a right capable of being made appurtenant to the land? The answer to that question is to be found in *Chesterfield* v. *Harris* ([1908] 2 Ch. at p. 410), where the Master of the Rolls says: "I think our law does not allow such a *profit à prendre*. It is claimed as a right in gross, but as a *profit à prendre* in a *qua* estate or in other words as appurtenant to land. Apart from authorities the very idea of a *qua* estate seems to involve some relation between the needs of the estate or its owner and the extent of the *profit à prendre*. A right in an indefinite number of people to take a *profit à prendre* without stint and for sale must tend to the entire destruction of the property."

Now here the only relation between the owner and *profit à prendre* is the area determined by the frontage to the canal. That is not the sort of relation referred to by the Master of the Rolls. I think therefore that this fishery was a fishery in gross, and not appurtenant or reputed to be appurtenant to the land. Was Lord Shrewsbury clothed with this right? It is said that it was swept in by the general words of the deed of 1845. I cannot hold that the right passed under that deed. The chain therefore of the Defendant's contentions breaks at the second point, and that really disposes of the case.

Assuming, however, that the grant was capable of being made appurtenant and capable of passing under the deed of 1845, was Lord Shrewsbury capable of granting a licence to members of the Angling Society to fish? I do not see why he should not do so. It is said if the members were very numerous it would cast a serious burden on the company. But the members would be limited by the amount to fish to be caught, and the right to fish must be exercised so as not to prejudice or obstruct the towing-path. The result is that the Defendant cannot justify his entrance on the towing-path, and that the Plaintiffs are entitled to a declaration and injunction with costs.

Messrs. Lawrence, K. C., and Moore for the Plaintiffs.

Messrs. Sanderson, K. C., and Sandars for the Defendant.

B. D. *Claim allowed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CIVIL REVISIONAL JURISDICTION. Before JENKINS, C. J., and N. R. CHATTERJEA, J. CIVIL RULE NO. 4600 OF 1911. NARENDRA NATH BOSE, Petitioner *v.* ABDUL HAMID MUNSHI AND OTHERS, Opposite Party. 19th December 1911.

Time allowed to put in deficit Court-fee—Last day Court-holiday—Deposit on following day, if valid.

This Rule was obtained on behalf of the Petitioner on 14th August 1911.

The facts of the case are shortly as follows:—

The Plaintiff brought a money suit against the Defendant. The Court-fee being insufficient the Court passed the following order on the 18th March 1911:—"Plaintiff to pay deficit Court-fee Rs 4-13 within 10 days." The 28th March being a Court-holiday the Plaintiff deposited on the next day, *i.e.*, on the 29th March. Ultimately the suit was dismissed on the ground that as the deficit Court-fee was deposited after the expiry of 10 days, *i.e.*, after the 28th September 1911 the suit was barred by limitation.

The Plaintiff moved the High Court and obtained this Rule.

Babu Surendra Chandra Sen for the Petitioner submitted that if the law or a Court directs a thing to be done within a fixed period and it is found impossible of performance on the last day so fixed for no laches on the part of the party required or directed to do that act, it will be taken as properly done if it is done on the next day it is possible of performance. He cited in support of his argument, 10 C. W. N. 535, 8 C. L. J. 339, 8 W. R. 223, 21 Mad. 385, 22 Mad. 179, 18 Cal. 231.

[THE CHIEF JUSTICE enquired what would have been the case if the time was fixed by contract.]

Held—Having regard to the case reported in 10 C. W. N. 535, the Rule must be made absolute.

H. C. *Case remanded.*

[PRIVY COUNCIL.]

[APPEAL FROM ALLAHABAD.]

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.

1911,
Heard,
3, November.
Judgment,
22, November.

THAKURAIN LEKHRAJ KUNWAR, Plaintiff, Appellant,
v.
THAKUR HARPAL SINGH and others, Defendants, Respondents.

Impartible estate—Will, contest as to validity of, ended by compromise—Subsequent admission of will to probate—Rights of parties, if determined by compromise or by will—Impartibility, whether put an end to or not—Construction of compromise.

An application by the widow for probate of the will of a deceased owner of an estate S. M. was contested by S. the next in the line of heirship according to the rule of primogeniture which prevailed in the family so far as this estate was concerned. S. also brought a separate action against the widow for recovery of the property upon declaration of the invalidity of the will, and in this action the parties entered into an agreement of compromise by which (according to the construction put on it by the High Court) it was provided that subject to the enjoyment by the widow for life of the income and profits, the estate would devolve upon S. as an impartible estate. After this compromise the will was admitted to probate :

Held—(*Approving of the High Court's interpretation of the compromise*), *that the question whether the property went to S. with or without the incident of impartibility, depended upon the construction of the compromise and not upon the validity or otherwise of the will—the very thing which the agreement of compromise was made to avoid.*

That the impartibility of the estate having been preserved by the compromise, the rights of S. under it was not affected by the subsequent admission to probate of the will.

This was an appeal from a judgment* and a decree of the High Court of Allahabad, dated the 29th of May 1908, which set aside a decree of the District Judge of Jaunpur, dated the 24th February 1906, and dismissed the suit of the Plaintiff, the present Appellant.

The main question for determination in the appeal was as to the effect of a compromise, dated the 25th April 1896, and the nature of the estate passed under it.

The circumstances out of which the appeal arose were as follows :—

A valuable estate, known as the Singra Mau estate, situated in the district of Jaunpur, in the North-Western Provinces of India, was admittedly, up to the time of the death of Rai Randhir Singh, the last male owner, an impartible estate.

On the 15th of December 1894, Rai Randhir Singh executed a will by which he devised his entire estate to his wife, Thakurain Sonao Kunwar, to the exclusion of his nephew, Thakur Sheopal Singh. The testator died on the 4th January 1895, and on his death a dispute arose as to the right of succession.

On the 1st of April 1895, the Collector of Jaunpur placed Sonao Kunwar, the widow of the deceased, in possession of his estate, and thereafter on the 28th of March 1895 Sheopal Singh brought a suit in the Court of the Subordinate Judge of Jaunpur to have it declared that the will was void and to obtain possession of the estate of Randhir Singh. In the course of his plaint he stated the following :—

"Rai Randhir Singh was the occupant

* Reported in I. L. R. 30 A 405 (1908).

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of the *gaddi* and in possession of the estate in accordance with the old custom and usage. The said Randhir Sing under the old practice and on account of the nature of the property and also because a co-sharer of a joint property had no right to transfer the joint property, was not competent to execute any deed of transfer.

"Rai Randhir Singh as a matter of fact on account of old age, weakness, seriousness of the illness which threatened his death, was quite incapable of entering into any contract or of understanding any transaction; nor did he execute any formal document after considering the exigency and consequence of the transaction."

The principal Defendant in this suit was Sanao Kunwar, and on the 25th of April 1896 she entered into a compromise with Sheopal Singh. The material terms of the compromise are stated in their Lordships' judgment.

Sheopal Sigh died on the 27th July 1899, leaving a widow, the present Appellant, and a daughter but no son. He predeceased Sonao Kunwar, who died on the 20th of June 1904. On the 6th of July, the Collector of Jaunpur ordered that the name of Harpal Singh, the Respondent, should be entered in the revenue records in the place of that of Sonao Kunwar and, on appeal, this order was confirmed by the Commissioner of the district.

The Appellant then brought the present suit in the Court of the Subordinate Judge of Jaunpur, and in her plaint, dated the 24th of August 1904, prayed for possession of the estate valued at one lakh on the ground that it was the self-acquired property of Sheopal Singh whom she represented as his widow. She contended that under the will of Randhir Singh his widow, Sonao Kunwar, acquired an absolute estate which passed from the family of Randhir Singh. The nature of the property and the rules of inheritance became changed and no member of the family of Randhir Singh had any right left to it. The Plaintiff also contended that, by virtue of compromise and the decree based thereon the personal representative of Sheopal Singh acquired the absolute estate on the death of Sonao Kunwar.

The Defendant alleged (*inter alia*) that the estate of Singra Mau had always been an impartible estate, and according to the custom of primogeniture descended to the eldest son of the eldest branch, that Randhir Singh became the owner of the estate in accordance with the custom, that under the will executed by Randhir Singh, his widow Sonao Kunwar acquired merely a life-interest, that Sheopal Singh acquired by the deed of compromise no right to the estate except the right to receive an annuity of Rs. 12,000 a year of maintenance, that as he predeceased Sonao Kunwar his widow acquired no right on the death of Sonao Kunwar, that in no way did the estate become the personal and self-acquired property of Sheopal Singh nor by the execution of the will and compromise did the nature of the family or of the estate undergo any change, that if Sonao Kunwar, who had only a life-interest, made any grant of land to Sheopal Singh by the deed of compromise the grant was *ultra vires* and could not prejudice the Defendants.

The District Judge to whose Court the case was transferred for trial from the Court of the Subordinate Judge, framed several issues of which the following are material :—

Under the ordinary rules of Hindu law, did the Will executed by Randhir Singh,

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on the 15th December 1894, convey to Musammat Sonao Kunwar an absolute title to the entire estate?

If an absolute estate was devised to Musammat Sonao Kunwar, did it become her self-acquired property? Did it not retain a special custom of succession? And its impartible character?

Under the same supposition, did the deed of compromise and the decree create a vested interest in Thakur Sheopal Singh? Was this vested interest his self-acquisition? Did it not in his hands retain a special custom of succession?

Were the compromise and decree of April 1896 between Sonao Kunwar and Sheopal Singh a compromise of doubtful rights between members of the same family, and did Plaintiff take an absolute estate as a beneficiary under the arrangemen ?

The District Judge upon the several issues held—

(a) That Sonao Kunwar acquired an absolute alienable estate under the will dated the 15th December 1894.

(b) That the estate devised by the said will became the self-acquired property of Sonao Kunwar and that it lost its character as an impartible estate and that the special custom of descent which governed its devolution till then was no longer applicable to it.

(c) That under the compromise of the 25 h of April and the decree of the 27th of April 1896 based thereon, an estate in remainder vested in Sheopal Singh.

(d) That the said estate in remainder was his self-acquisition divested of impartibility and special custom of descent.

(e) That under the ordinary rules of Hindu law the Plaintiff was entitled to succeed to the estate against the Defendants.

Dissatisfied with the decree of the District Judge Thakur Harpal Singh, the first Defendant, filed an appeal to the High Court at Allahabad. The appeal was heard by Stanley, C. J., and Banerjee, J., who, on the 29th of May 1908, delivered their judgment* and decree by which they set aside the decree of the District Judge and ordered that the suit of the Plaintiff should be dismissed. In the course of their judgment they said:—

"We must advert to another point which has been made upon the compromise by the learned Counsel for the Plaintiff-Respondent and that is this. These words are to be found in it. 'After the death of Musammat Thakurain Sonao Kunwar, I, Thakur Sheopal Singh, or any representative of mine who may be living at the time will be the absolute owner of all the moveable and immoveable properties possessed by Rai Randhir Singh and will occupy the *gaddi*.' It is contended that the words 'any representative of mine' mean the personal representative of Sheopal Singh and that the intention was that the estate should devolve on Sheopal Singh in case he survived Sonao Kunwar, but that in case of his predeceasing her it should devolve on his personal representative. The translation of the words 'or any representative of mine' does not accurately express the vernacular words used. The words in the vernacular are *kaem makam*, that is one who takes the place of another, *i.e.*, a successor. The word which denotes personal representative is *waris*. Translating the words *kaem makam*, as 'successor' they would be quite appropriate words to use to denote the successor to an impartible estate whether that successor happened to be a son or a more distant rela-

* Reported in I. L. R. 30 All. 406 (1908).

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tive. As the representative was also to be his successor on the *gaddi* he could not have intended that his widow would be included in that term. The words seem to be used as words of limitation marking out the estate which Sheopal Singh was intended to take, namely, an absolute estate just as the word 'heirs' in English law in, for example, a grant to a man and his heirs denotes a fee-simple estate. We do not think therefore that there is any force in this argument.

"The learned District Judge appears to us not to have correctly apprehended the meaning and effect of the compromise. At the time it was entered into, the position was this. Sonao Kunwar claimed the estate of her husband under his will. Sheopal Singh disputed the will and claimed the estate as the successor to Randhir Singh. If the will were established Sonao Kunwar would be entitled to the estate; otherwise Sheopal Singh was entitled to it. A clear issue was knit between them and there was undoubtedly a good fighting case." Then after referring to the cases of *Rani Mewa Kunwar* v. *Rani Hulas Kunwar* (1), *Gobind Krishna* v. *Abdul Qayyam* (2), *Bachhe Kunwar* v. *Dharam Das* (3), *Ram Shankar* v. *Ganesh Prasad* (4) and *Wahid Khan* v. *Nuran Bibi* (5), their Lordships concluded as follows :—

"It appears to us clear upon the true interpretation of the compromise entered into between Sheopal Singh and Sonao Kunwar that Sheopal Singh took an absolute vested estate in the property, the enjoyment of it being postponed during the life of Sonao Kunwar. We also think that upon the language of the compromise it is not possible to hold that the character of the estate as it had been handed down from father to son for generations was changed. As an impartible estate Sheopal Singh laid claim to it and the compromise provided that as an impartible estate it should devolve upon him. The concession made to Sonao Kunwar by him was that she would enjoy it for her life and sit upon the *gaddi* as *gaddinashin*, his occupation of the *gaddi* being postponed. On the death of Sheopal Singh therefore the estate in our opinion devolved according to the rules of primogeniture governing impartible estates and did not pass to his widow as an estate governed by the ordinary rules of Hindu Law."

Hence this appeal.

Sir E. Richards, K. C., and *Mr. Bhugwandin Dube* for the Appellant submitted that she was entitled under the Hindu Law to succeed to the estate. Rai Randhir Singh had power to devise it, and he did so by his will to Sonao Kunwar. He made her *malik* or absolute owner of the property. Thenceforward the estate ceased to be governed by the law of primogeniture. It was lost to the family and what Sheopal Singh got under the compromise was his self-acquired property. Even if it continued impartible it descended to his widow under the Mitakshara Law. Reference was made to *Sartaj Kuari* v. *Deoraj Kuari* (6), *Surajmani* v. *Rabinath* (7), *Wahid Khan* v. *Nuran Bibi* (5) and *Katama Natchier* v. *Raja of Sihvagunga* (8).

(1) L. R. 1 I. A. 157 (1874).
(2) I. L. R. 25 All. 546 (1903).
(3) I. L. R. 28 All. 347 (1906).
(4) I. L. R. 29 All. 451 (1907).
(5) L. R. 12 I. A. 91, 100 : s. c. I. L. R. 11 Cal. 597 (1885).
(6) L. R. 15 I. A. 51 (1888).
(7) L. R. 35 I. A. 17 (1907).
(8) 9 Moo. I. A. 549 (1863)

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[LORD MACNAGHTEN.—Sheopal Singh impugned the will of Rai Randhir Singh. Its validity was left undetermined by the compromise.]

The will was finally admitted to probate.

[LORD MACNAGHTEN.—Sheopal Singh's case was that he succeeded to the *gaddi*—that the estate was impartible and descended by the law of primogeniture. How can it be said that the estate in his hands became his self-acquired property ?]

Under the will of Rai Randhir Singh the estate went out of the family to his wife. Sheopal Singh spent his own money in prosecuting the suit, and what he recovered under the compromise became his self-acquired property under the Mitakshara Law. The compromise provided for the succession of Sheopal Singh's personal representatives. In any case his widow was entitled to the estate.

Mr. L. DeGruyther, K. C., and *Mr. Ross* who appeared for the Respondent were not heard.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by Thakurain Lekhraj Kunwar (the Plaintiff) from the decree of the High Court of judicature for the North-Western Provinces of India, dated the 29th of May 1908, which set aside the decree in the Plaintiff's favour of the District Judge of Jaunpur, and dismissed the Plaintiff's suit and certain objections which had been filed by her.

In the suit in which the decree now under appeal was made, the Plaintiff, who was the widow of Sheopal Singh, claimed proprietary possession of the *riasat* of Singra Mau in the District of Jaunpur, and mesne profits. The Defendants to the suit, who are Respondents to this appeal, are Thakur Harpal Singh, a distant cousin in the male line of Sheopal Singh, Shamsher Bahadur Singh, a younger brother of the father of Thakur Harpal Singh, Raghuraj Bahadur Singh, and Rampal Singh, minors, sons of Shamsher Bahadur Singh, and Thakurain Janki Kunwar, the widow of Rudarpal Singh, who was a brother of Sheopal Singh, and had died without male issue. The last common ancestor of Sheopal Sing and Thakur Harpal Singh was Dammar Singh.

The District Judge of Jaunpur gave the Plaintiff, Thakurain Lekhraj Kunwar, a decree for possession as a Hindu widow, and decreed mesne profits. From that decree the Defendants, Thakur Harpal Singh and Shamsher Bahadur Singh, on his own behalf and as guardian of his sons, Raghuraj Bahadur Singh and Rampal Singh, appealed to the High Court, and in that appeal the Plaintiff filed objections to the decree of the District Judge, claiming that she was entitled to a decree for possession of the Singra Mau estate as an absolute owner, and not merely for the estate of a Hindu widow. The Defendant, Thakurain Janki Kunwar, did not defend the suit ; she claimed no interest.

The question upon which this appeal depends is a short one. The estate of Singra Mau descended in the male line from Dammar Singh as an impartible estate to one Randhir Singh, who died without issue male in January 1895. In the family to which Randhir Singh, Sheopal Singh, and Thakur Harpal Singh belonged the rule of primogeniture applied so far as this estate of Singra Mau was concerned. The pedigree of the family will be found in the judgment of the High Court ; it is sufficient now to say

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that Sheopal Singh, who was the Plaintiff's husband, was the son of Jagurnath Singh, a younger brother of Randhir Singh, and and that on the death of Sheopal Singh without a son in July 1899, the Defendant Thakur Harpal Singh was, subject to the life-interest of Thakurain Sonao Kunwar under a compromise, the next member of the family who was entitled to the possession of Singra Mau, if the estate was then impartible. The question as to whether the estate had ceased to be impartible or had continued to be and was impartible on the death of Sheopal Singh depends upon the construction of an agreement of compromise of the 25th of April 1896, to which Sheopal Singh and Thakurain Sonao Kunwar, who was the junior widow of Randhir Singh, were the parties.

Randhir Singh, who was then 74 years of age, and in possession of the impartible estate of Singra Mau, made a will on the 15th December 1894, by which he left his entire estate and every kind of moveable and immoveable property of which he was then in possession to Thakurain Sonao Kunwar, his junior wife. It is admitted that if Randhir Singh was then of testamentary capacity he had power as the owner in possession of the impartible estate of Singra Mau to make that will, and by it to put an end to the impartibility of the estate, and to exclude his nephew Sheopal Singh from the succession, which was the effect of the will as it was executed. After the death of Randhir Singh his widow, Thakurain Sonao Kunwar, applied for a grant to her of probate of the will. Sheopal Singh and others filed objections to probate being granted; thereupon in March 1896 Sheopal Singh brought a suit in the Court of the Subordinate Judge of Jaunpur against Thakurain Sonao Kunwar and Thakurain Shankar Kunwar, the senior widow of Randhir Singh, a *pro formâ* Defendant, and Babu Soridat, also a *pro formâ* Defendant, in which Sheopal Singh alleged that when Randhir Singh was seriously ill and on the point of death, and quite incapable of entering into any contract or of understanding any transaction, the well-wishers of Sonao Kunwar and Shankar Kunwar, having colluded together, caused the will to be executed. Sheopal Singh further alleged in that suit that according to the old custom and nature of the property, and also on the strength of right of survivorship the right to occupy the *gaddi*, and to enter into possession of the entire estate devolved upon him on the death of Randhir Singh, and he prayed for a declaration that the will of the 15th of December 1894 was null and void as against him and the estate, and for a decree dispossessing Thakurain Sonao Kunwar and Thakurain Shankar Kunwar, and awarding absolute possession to him, Sheopal Singh, over the entire estate of Singra Mau, together with *imlaks*, moveable and immoveable property appertaining to the said estate.

On the 25th of April 1896, Sheopal Singh and Thakurain Sonao Kunwar entered into an agreement of compromise which was executed by them and was in the form of a petition to the Court of the Subordinate Judge of Jaunpur in the suit which had been brought by Sheopal Singh against Sonao Kunwar, Shankar Kunwar, and Babu Soridat. That petition was presented to the Court of the Subordinate Judge, and on the 27th of April 1896 the Subordinate Judge made a decree in the suit in accordance with the petition giving possession of the estate to Sonao Kunwar for her life subject to the terms of the compromise :—

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The petition of compromise was as follows :—

"1. The name of Musammat Thakurain Sonao Kunwar will continue to be recorded in the revenue papers in the same way in which it stands recorded; and she will remain in possession during her lifetime of all the moveable and immoveable properties, of which Rai Randhir Singh was in possession, exercising the powers of *gaddinashin* (occupant of *gaddi*) without the power to transfer or charge the estate in any way.

"2. I, Thakur Sheopal Singh, will take the sum of Rs. 12,000 a year at the rate of Rs. 1,000 per month from Musammat Thakurain Sonao Kunwar for all my expenses, and I, Musammat Thakurain Sonao Kunwar, will pay the same. I, Thakur Sheopal Singh, will not interfere with the estate in any way in the lifetime or Musammat Sonao Kunwar. After the death of Musammat Thakurain Sonao Kunwar, I, Thakur Sheopal Singh, or any representative of mine who may be living at that time, will be the absolute owner of all the moveable and immoveable properties possessed by Rai Randhir Singh, and will occupy the *gaddi*. In case of non-payment of the fixed annual allowance, I, Thakur Sheopal Singh, will have power to recover the same by instituting a suit and attaching the profits and moveable property belonging to Thakurain Sonao Kunwar.

"3. If I, Thakur Sheopal Singh, have to go to any member of the brotherhood, or any *rais* on the occasion of any ceremony or otherwise, I will have authority to take as much equipage belonging to the estate as I require, and when I go out for recreation, &c, I will take any conveyance I like for my use, Thakurain Sonao Kunwar will have no power to forbid me.

"4. If, on any particular occasion, any indispensible necessity arise in the estate, and it be necessary to take a loan, we, Thakur Sheopal Singh and Musammat Thakurain Sonao Kunwar will, in concurrence with each other, borrow five or ten thousand rupees, and repay the same gradually from the profits of the estate.

"5 I, Thakurain Sonao Kunwar, also accept all the aforesaid conditions. It is therefore prayed that the case may be struck off as a contested one on the basis of this compromise, and the costs incurred by the parties be charged against themselves. This compromise may be embodied in the decree, Musammat Thakurain Shankar Kunwar and Soridat, *pro formâ* Defendants, have been exempted."

Sheopal Singh died on the 27th of July 1899 without issue male, and without having made any disposition by will or otherwise of his interest in the Singra Mau estate. Thakurain Sonao Kunwar, who had been in possession of the estate under the compromise of the 25th April 1896, died on the 20th of June 1904, and thereupon Thakurain Lekhraj Kunwar and Thakur Harpal Singh respectively claimed possession of the estate. On the 6th of July 1904 the Collector of Jaunpur ordered mutation of names in favour of Thakur Harpal Singh ; from that order Thakurain Lekhraj Kunwar appealed to the Commissioner of Benares, who on the 2nd of September 1904 dismissed the appeal.

The District Judge of Jaunpur in his judgment in this suit held that the estate had descended to Thakurain Sonao Kunwar under the will of Randhir Singh by an entirely new title, and had thereby lost its character of impartibility, and was no longer subject to the special custom of descent. The District Judge further held that the estate which Sheopal Singh would have taken, had he survived Thakurain Sonao Kunwar, would be self-acquired by Sheopal Singh as arising out of the contract of compromise with Thakurain Sonao Kunwar. As the learned Judges in the High Court rightly observed, the District Judge went behind the compromise and held that the will was a valid will binding on Sheopal Singh, and determined what in his opinion were the rights of the parties before the compromise, the very thing the avoidance of which led to the compromise. The learned Judges in the appeal in the High Court held that the

rights of the parties to this suit depended upon the construction of the compromise, but not upon the will of Randhir Singh. With that conclusion their Lordships in this appeal agree. They also held that :—

"Upon the language of the compromise it is not possible to hold that the character of the estate, as it had been handed down from father to son for generations, was changed. As an impartible estate Sheopal Singh laid claim to it, and the compromise provided that as an impartible estate it should devolve upon him."

And they accordingly dismissed the suit.

Their Lordships consider that the High Court put the only possible construction upon the agreement of compromise. Sheopal Singh never admitted the validity of the will as against him, and never admitted that Thakurain Sonao Kunwar had obtained any title under the will. It is obvious from the terms of the compromise that Sheopal Singh consistently maintained that the will was invalid, and consequently that Thakurain Sonao Kunwar had taken no title under it, and that the estate as an impartible estate had vested in him on the death of Randhir Singh. By the compromise Sheopal Singh, reserving to himself an income of Rs. 12,000 a year out of the estate, gave to Thakurain Sonao Kunwar a bare interest for her life in his impartible estate. Sheopal Singh in the agreement of compromise carefully provided that on the death of Thakurain Sonao Kunwar, he or his successor should be the absolute owner of the estate and should occupy the *gaddi*; that on the occasion of any ceremony, or when he should go out for recreation, he should have the right to take as much equipage and any conveyance belonging to the estate for his use as he should require, and that Thakurain Sonao Kunwar should have no power to forbid him; and that should it be indispensably necessary to raise any money on the estate by way of loan, he and Thakurain Sonao Kunwar should in concurrence with each other borrow Rs. 5,000 or Rs. 10,000 and repay the same gradually from the profits of the estate. Under the compromise Thakurain Sonao Kunwar had no power to encumber the estate for any purpose, except in conjunction with Sheopal Singh. The terms to which their Lordships have referred are consistent only with the construction placed upon the compromise by the High Court, and there are no terms in the compromise which suggest any other construction. To these terms Thakurain Sonao Kunwar submitted. It may be mentioned that the Subordinate Judge of Jaunpur before making his decree of the 27th of April 1896, took the precaution of ascertaining that Thakurain Sonao Kunwar understood the terms of the compromise. The High Court rightly dismissed the suit of Thakurain Lekhraj Kunwar.

The fact that after the compromise the will of Randhir Singh was admitted to probate did not affect the rights of Sheopal Singh.

Their Lordships will humbly advise His Majesty that the judgment and decree appealed against should be affirmed and the appeal dismissed with costs.

Solicitors: *Messrs. T. C. Summerhays & Son* for the Appellant.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Respondents.

B. D. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 935 OF 1909.

JENKINS, C. J. N. R. CHATTERJEA, J. 1911, Heard, 23, November. Judgment, 29, November.	SOMARUDDI MOLLAH and anr., Plaintiffs, Appellants, *v.* THE PORT CANNING AND LAND IMPROVEMENT COMPANY, LD, Defendants, Respondents.

Contract—Unilateral mistake, not induced by fraud—More land included in lease than intended by lessor—Rectification, mistake when ground for—Contract, if may be repudiated—Second appeal.

Where as a matter of construction a certain plot of land was found to be included in a lease having regard to its terms and the character of the property, but the Court of Appeal below refused to give effect to this construction on the ground that the lessor did not intend to include this plot in the area leased:

Held—*On second appeal, that in the absence of fraud making the document inoperative as a title to the land in suit, or of failure through a common mistake to give correct expression to the common intention of the parties, such as would be a ground for its rectification, the contract as expressed could not be repudiated by the lessor and the lower Appellate Court erred in law in not giving effect to it.*

This was an appeal preferred on the 13th of May 1909, against a decree of Mr. F. Roe, District Judge of 24-Pergunnahs, dated the 31st of March 1909, reversing that of Babu Aghore Chandra Hazra, Subordinate Judge of Alipur, dated the 27th of July 1908.

The Plaintiffs-Appellants brought this action for recovery of *khas* possession of about 200 bighas of and after establishment of their *mourasi mokurari* title thereto. They alleged that in the year 1300, B. S., they took *mourasi mokurari* settlement from the Defendant Company of 1601 bighas of land and took possession of the same under an *amalnama*, that they reclaimed the land and made it fit for cultivation; that on the 2nd October 1901 the Defendant Company executed a registered *potta* in their favour but that subsequently in Pous 1311, B. S., the Company dispossessed them from the area in suit. The Subordinate Judge found that the disputed land was covered by the Plaintiffs' *potta* being situated east of Simultala khal which was stated in the *potta* to be the western boundary of the land demised to the Plaintiffs. He disbelieved the story of the Defendants' *mohurir*, Peari Lal Dutt, that he went with the Naib in 1300, B. S., to point out the boundaries of the Plaintiffs' *chak* and fixed a *pin* on the east of Simultala khal, which he stated was incorrectly put down in the *potta* as the western boundary. He found that the Plaintiffs had cleared the jungle and erected *bheris* on the disputed land and held possession of it through tenants and that the Defendant Company had dispossessed them. In the result he decreed the suit.

On appeal to the District Judge it was urged by the Defendant Company "that the Simultala khal was only followed a very short distance and that it was assumed that it ran due north parallel to the Plaintiffs' *bund* (which admittedly lay to the east of the khal), that it was therefore given as the western boundary of the land, though as a fact the western boundary was the Plaintiffs' *bund*." Both sides claimed before him to have brought the land under cultivation. But the learned Judge found that the "Plaintiffs did all the reclaiming in the *chak*," though "seeing

that they were the *gomastha* and *mohurir* of the Company, he was of opinion that their unresisted acts of possession raised no sort of presumption that they were not the acts of a trespasser." He was of opinion that in deciding the case it was necessary for the Court to keep itself firmly to a consideration of the question "what was the intention of the parties with regard to the area which the Plaintiffs were to cultivate?" Upon this question, the learned Judge held on the evidence that the story told by the Defendant Company "was a very probable story;" "that the settlement made in 1893 was that a *bund* was to be built due north from the mouth of the Simultala, that between 1893 and 1900, that *bund* was made and that in 1900 the Plaintiffs accepted the *bund* as their western boundary, and any acts of possession they exercised on the land to its west were acts of trespass, which again were not of a character to give rise to a title by adverse possession. In this view he reversed the decree of the Subordinate Judge and dismissed the suit with costs.

The Plaintiffs preferred this second appeal.

Dr. Rash Behary Ghosh and *Babus Mohendra Nath Roy* and *Chandra Kanta Ghosh* for the Appellant.

Mr. S. P. Sinha and *Babus Dwarka Nath Chuckerbutty* and *Debendra Nath Ghosh* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This second appeal arises out of a suit for khas possession. The Plaintiffs rest their claim to possession on a *mourasi mokurari* lease of the 2nd October 1901. By that lease the Defendant Company leased to Somaruddi Mollah "1601 one thousand six hundred and one standard bighas more or less of waste land in the Sunderbund Lot No. 130 belonging to the Company and known as Ram Chandra Khal. . . . .," the said piece or parcel of land being designated Somaruddi's chak and bounded as follows:—"West by Simultala khal belonging to the Company." The other boundaries are given in the document, but we have no immediate concern with them.

By cl. 12 of the lease it is provided, "that after the Bengali year 1307 the Company as well as the lessee shall have power to cause a survey of the land contained within the boundaries aforesaid, and if the quantity of land is found to be more than 1601 bighas the lessee shall be bound to pay for the excess land at the rate of 12 annas per bigha for ever, and if, on the other hand, the quantity of land be found to be less than 1601 bighas, the lessee shall have remission of rent for ever for the quantity found less at the rate mentioned above, namely, 12 annas per bigha."

The map in the case depicts the land admittedly included in the lease, and thereon marked A, as well as the land in dispute, marked B, which lies to the west of it.

The western boundary mentioned in the lease, the Simultala khal, is also shown on the map, and it will be seen that it lies immediately to the west not of A but of B.

If, therefore, regard be had to the boundaries named in the document, B is included in the lease, and this is what the Subordinate Judge decided. His decision has been reversed by the District Judge.

It has been conceded before us by counsel for the Defendant Company that as a pure matter of construction B would be

included in the lease, having regard to the terms of the lease and the character of the property, and no argument has accordingly been addressed us on this point. But it is urged that there are findings of fact by the lower Appellate Court which preclude us from giving effect to the document according to its natural construction.

Now this must mean that the document does not give expression to the common agreement of the parties or that it is otherwise vitiated. To the lower Appellate Court it seemed that the question was "whether the Defendants intended to lease both A and B or only A to the Plaintiffs."

But this cannot be accepted as correct.

Either it must be shown that the document should be rectified, or that it is inoperative as a title to the land in suit. But rectification requires common mistake, and a failure to give correct expression to the common intention of the parties: but no such case was made nor is there a finding of fact to that effect.

To render the lease otherwise inoperative as a basis of the Plaintiff's title in the circumstances of this case fraud would have to be established, but no case of fraud has been raised or found. We, in second appeal, are not entitled to come to findings of fact and the case must therefore be determined on the construction of the lease. But as I have already indicated, it is not disputed that as a pure matter of construction the Simultala khal as depicted on the map must be taken to be the western boundary and we hold this to be the true view. And if that be so, the Plaintiffs' title to the land in suit is made out.

We must therefore reverse the decree of the lower Appellate Court and restore that of the first Court with costs throughout.

N. R. CHATTERJEA, J.—I agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 924 OF 1909.

COXE, J. N. R. CHATTERJEA, J. 1911, 14, December.	GANGADHAR DAS and ors., Plaintiffs, Appellants, *v.* BHIKARI CHARAN DAS and anr., Defendants, Respondents.

Revenue Sale Law (Act XI of 1859), secs. 6, 33—Sale within 30 days of service of sale proclamation, if nullity or only irregular—Question if one of due service—Act VII, B. C. of 1868, sec. 8—Second appeal—Finding of irregularity and inadequacy of price—Sale if must be held bad as matter of law.

The fact that the proclamation of sale was affixed in the Collectorate less than 30 days before the date of sale, in contravention of the provisions of sec. 6 of Act XI of 1859, does not make the sale a nullity. The sale in such a case is a sale under the provisions of the Act and the restrictions imposed by it on the right of the defaulter to have the sale set aside apply.

LALA MOBARAK LAL *v.* THE SECRETARY OF STATE (1) *held not binding by reason of the decisions in* TASADDUK RASUL *v.* AHMAD HUSAIN (2) *and* GOBIND LAL *v.* RAMJANAM (3).

Where the Court of Appeal below found (1) that the sale proclamation was affixed in the Collectorate within less than 30 days

(1) I. L. R. 11 Cal. 200 (1885).
(2) I. L. R. 21 Cal. 66 (1893).
(3) I. L. R. 21 Cal. 70 (1893).

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of the sale; (2) and that the price realised at the sale was inadequate; (3) but that there was no evidence to connect the inadequacy of the price with the irregularity, and dismissed the suit to set aside the sale:

Held—*That it was not open to the High Court in second appeal to hold as a matter of law that the inadequacy of the price was the consequence of the irregularity, and the appeal was concluded by the findings of fact of the lower Appellate Court.*

Semble: *Per* COXE, J.—*The question whether notice of the proclamation was served in time is part of the larger question whether it has been duly served within the meaning of sec. 8 of Act VII of 1868 B. C.*

JANHAVI v. SECRETARY OF STATE (4), SHEIKH MOHAMED AGA v. JADUNANDAN (5), SHEO RUTAN v. NET LAL (6) *doubted.*

This was an appeal preferred on the 11th of May 1909, against the decree of Babu S. C. Ganguli, Subordinate Judge of Zillah Cuttack, dated the 3rd of February 1909, confirming that of Babu Trailokhya Nath Shome, Munsif of Cuttack, dated the 5th of August 1907.

The suit out of which this appeal arose was instituted by the Appellants for the setting aside of a revenue sale upon various grounds of which the principal was that the notices under sec. 6 of Act XI of 1859 were not duly served. With regard to this it was alleged that the proclamation of sale was affixed in the Collectorate on the 6th April 1906 and the sale took place on the 9th April 1906, clearly in contravention of sec. 6 of the Act, that the sale in consequence was wholly illegal and liable to be set aside, that owing to this irregularity as also to the fraud of a co-sharer of the Plaintiffs who colluded with the auction-purchaser, the property was sold at a very inadequate value. The Court of first instance held that the notice under sec. 6 "was really duly served at the proper time in a conspicuous part of the Collector's office as provided by law," though the date was erroneously recorded as the 6th April 1906, that the sale was not brought about by fraud, nor was the price fetched inadequate. He accordingly dismissed the suit. On appeal the Subordinate Judge held that the sale notice appeared to have been posted in the Collectorate on the 6th April 1906, and the Defendant on whom the onus lay failed to establish that it was in fact posted more than 30 days before the sale; that the price fetched at the sale was inadequate, but that there was no evidence to show that this was in consequence of the irregularity in connection with the service of the sale proclamation. He affirmed the Munsif's findings on the question of fraud and in the result dismissed the appeal.

Plaintiffs then preferred this second appeal.

Babus Provas Chunder Mitter and *Susil Madhub Mullick* for the Appellants.

Babu Troylokhya Nath Ghosh for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

COXE, J.—This was a suit to set aside a revenue sale. The sale took place on the 9th April 1906, and the date on which the proclamation is said to have been affixed in the Collectorate was recorded as the 6th April. The Munsif considered that this was a clerical mistake; but the

(4) 7 C. W. N. 872 (1902).
(5) 10 C. W. N. 137 (1905).
(6) I. L. R. 30 Cal. 1: s. c. 6 C. W. N. 688 (1902).

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lower Appellate Court took a different view, and found that the Defendant had failed to prove that the notice was affixed in the Collectorate one month before the date of the sale. He held that this was an irregularity, and he also held that the price realised at the sale was inadequate. But he was unable to find that there was any evidence to connect the inadequacy of the price with the irregularity, and accordingly dismissed the suit.

The Plaintiff appeals to this Court.

The first point taken on behalf of the Plaintiff is that the omission to post the proclamation of sale in the Collectorate one month before the date of sale (a point on which we are concluded by the decision of the lower Appellate Court) amounts to more than an irregularity, and makes the whole sale entirely null and void whether the Plaintiff was injured or not. This is an argument that has very frequently been used in dealing with these revenue sales, and finds expression in the Full Bench decision in the case of *Lala Mobarak Lal* v. *The Secretary of State* (1). In that case the learned Judges held that failure to comply with the provisions of sec. 6 of Act XI of 1859, amounted to more than an irregularity and to an entire illegality, and that consequently the provisions of the Act imposing restrictions upon the rights of persons whose property was sold to relief in the Civil Courts had no application, inasmuch as in such a case there was really no sale at all. The learned Chief Justice thought that in that case the sale in question could not properly be said to be a sale for arrears of revenue within the meaning of the Act; and Mitter, J., held that it was null and void as not being a sale under the provisions of Act XI of 1859. They held,

(1) I. L. R. 11 Cal. 200 (1885).

therefore, that the sale in such a case was not a sale at all under the Act, and that the provisions of the Act which imposed restrictions on the right of the defaulter to have the sale set aside had no application.

It appears to me that the whole reasoning on which this decision was based is entirely swept away by the decisions in *Tasadduk Rasul* v. *Ahmad Husain* (2) and *Gobind Lal* v. *Ramjanam* (3). In the first case it was held that an irregularity under sec. 290, C. P. C., which greatly resembles the irregularity complained of in this case, did not make the sale a nullity: and in the second case their Lordships used these significant and emphatic words :—" In the opinion of their Lordships a sale is a sale made under the Act XI of 1859, within the meaning of that Act, when it is a sale for arrears of Government revenue held by the Collector or other officer authorized to hold a sale under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale or in consequence of some express provision for exemption having been directly contravened." It is clear, therefore, that in the opinion of the Privy Council a sale that was marred by an irregularity of this nature was none the less a sale under the Act, and that view appears to me to take away the whole foundation of the reasoning on which the decision in *Lala Mobarak Lal* v. *The Secretary of State* (1) was based. It is true that the decision in *Lala Mobarak Lal* v. *The Secretary of State* (1) has been followed in subsequent cases, namely, in *Janhavi* v. *Secretary of*

(1) I. L. R. 11 Cal. 200 (1885).
(2) I. L. R. 21 Cal. 66 (1893).
(3) I. L. R. 21 Cal. 70 (1893).

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State (4), *Sheikh Mohamed Aga* v. *Jadunandan* (5) and *Sheo Rutan* v. *Net Lal* (6). But in those cases the learned Judges were dealing only with the question whether sec. 6 of Bengal Act VII of 1868 applied to a case in which notice under sec. 6 of Act XI of 1859 had been served, but had not been served 30 days before the date of the sale, and they held that although the certificate of title given to the purchaser was conclusive evidence that notice had been served it was not necessarily conclusive evidence that the notice had been served in time.

I am myself inclined to think that the question whether the notice is served in time is part of the larger question whether it has been duly served and that notice cannot be said to have been duly served if it has not been served in time. It is not, however, necessary in the present case to come to any decision on this point: for even if the Respondent is not entitled to the benefit of sec. 8, still the Appellant will not be entitled to succeed unless he can show that he has been injured. The learned Judges who decided the cases to which I have referred certainly cited the Full Bench decision as being still in effect. But the only point they were dealing with was whether sec. 8 applied; and their decisions cannot, in my opinion, be taken as authority for holding that in their opinion that decision justified a person whose property had been sold in asking to have the sale set aside simply and solely on the ground that the sale was illegal by reason of the fact that the notice had not been served in time, without proof of injury.

(4) 7 C. W. N. 377 (1902).
(5) 10 C. W. N. 187 (1905).
(6) I. L. R. 30 Cal. 1 : s. c. 6 C. W. N. 688 (1902).

Secondly, it has been urged that the learned Subordinate Judge ought to have concluded, as a matter of law, that the inadequacy of the auction price was the consequence of the irregularity to which we have referred. I cannot see, however, that any question of law really arises in this connection. The learned Munsif deals with this matter at greater length and explains more fully why the irregularity could not have caused the insufficiency in the selling price. The learned Subordinate Judge's judgment is one of affirmance. It is not for us to say whether the evidence is or is not sufficient to justify the conclusion arrived at by the Subordinate Judge, but I certainly cannot possibly say that he was bound, as a matter of law, to conclude that the inadequacy of price was due to the alleged irregularity. I hold therefore that it is not sufficient for the Appellant to show that the notice was published less than thirty days before the sale, and that he is not entitled to have the sale set aside on that ground alone. As regards the question whether he has suffered by this irregularity we are, in my opinion, concluded by the findings of fact.

The appeal will accordingly be dismissed with costs.

N. R. CHATTERJEA, J.—I agree.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER No. 178 OF 1910.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard,
30, August.
Judgment,
5, September.

MOHAMED ABDUL HOSSAIN, Appellant,
v.
SARIFAN, Respondent.

Succession Certificate Act (VII of 1889), sec. 4—Deferred dower, suit by one of several heirs for a portion of her share—Certificate for the portion, if may be granted—Heirs' claims if joint or several—Severance of debt.

Where one of several heirs of a deceased Mahomedan lady sued her husband for a portion of the share of the deferred dower due by the Defendant to the deceased, relinquishing the balance,

Held—*That an application by the Plaintiff for succession certificate in respect of the amount claimed by her in the suit was properly granted.*

Sec. 4 of the Succession Certificate Act does not require that the certificate should cover the whole of the debt, if the heirs do not seek to realise the whole.

GHAFUR KHAN *v.* KALANDARI BEGAM (1) *dissented from.*

In respect of deferred dower, each of the heirs of the deceased has a distinct right enforceable by himself though all may jointly sue and it is open to each to relinquish a portion of the claim.

The Defendant husband being moreover one of the heirs, the debt, assuming it to be joint, is severed, and a certificate cannot in consequence be granted for the whole debt.

This was an appeal preferred on the 25th of April 1910, against the order of C. W. E. Pittar, Esq., District Judge of Zillah Patna, dated the 7th of March 1910.

(1) I. L. R. 33 All. 327 (1910).

The facts of the case will fully appear from the judgment.

Moulvi Syed Enait Karim for the Appellant.

Moulvi Mahomed Mustafa Khan for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal is directed against an order by which the Court below has granted a succession certificate to the Respondent in respect of a portion of a debt alleged to be due to her from the Appellant as the debtor of his deceased wife. The Appellant, Mohamed Abdul Hossain, was married to a Mahomedan lady by name Barfan, the daughter of the Respondent, Sarifan. The amount of the dower is said to have been fixed at Rs. 41,000, and the whole of it was deferred. The lady died on the 24th January 1907, and thereupon the dower debt became recoverable by her heirs, *i.e.*, her husband, her infant son, and her mother. The husband, it will be observed, was thus a creditor as well as a debtor. In 1909 the Respondent commenced an action against her son-in-law for recovery of Rs. 1,000. She alleged that her son-in-law was possessed of property worth not more than Rs 1,000, and that, although she was entitled to recover from him one-sixth of the dower debt, *i.e.*, Rs. 6,833-5-4, it would be infructuous to sue him for this large amount. She, therefore, abandoned her claim in excess of Rs. 1,000, and limited the demand to the amount. On the 21st December 1909, she applied for a succession certificate to the extent of Rs. 1,000 only. The son-in-law who appeared to show cause objected to the grant of the certificate on two grounds,

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namely, *first*, that no certificate could be granted in respect of the share of the debt due to one of the heirs only and, *secondly*, that no certificate could be granted to the Petitioner, because she had not asked for a certificate even in respect of the entire share of the dower debt recoverable by her. The District Judge has overruled both these objections, and granted a certificate to the Petitioner as prayed. In the present appeal by the objector, the order of the District Judge has been assailed on the two grounds just mentioned, and reliance has been placed upon the decision of a Full Bench of the Allahabad High Court in *Ghafur Khan* v. *Kalandari Begam* (1), in which it appears to have been ruled that no certificate could be granted to one of the heirs of a Mahomedan lady who had died leaving her dower debt unrealized for collection merely of a part of the dower debt of the deceased. The decision quoted appears at first sight to support the contention of the Appellant, but it is not stated whether the dower in that case was prompt or deferred; at any rate, there are observations as to the true construction of sec. 4 of the Succession Certificate Act which do tend to assist the Appellant. It has been argued, however, by the learned Vakil for the Respondent that the decision is open to criticism and ought not to be treated as a correct exposition of the law.

Sec. 4 of the Succession Certificate Act, 1889—we need quote only so much of it as is applicable to the case before us—provides that no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof, except on the production by the person so claiming of a certificate granted under the Act and having the debt specified therein. It has been contended on behalf of the Appellant that the section implies that one certificate is to be taken out for the payment of the whole debt due by the debtor of the deceased person, that if the deceased person has left more than one heir, it is not competent for one of the them to apply for a certificate in respect of the share recoverable by him, and that much less can one heir apply for a certificate for a part of his share of the debt. In our opinion, this proposition is too broadly formulated, and if we were to give effect to it the scope of the section would be needlessly restricted. It is to be observed that this section does not define the constitution of the suit for the recovery of the debt due from the debtor of the deceased person; we are not now concerned with the question whether one of several heirs of the deceased creditor is competent to sue for his share of the debt alone or whether he is bound to sue for recovery of the entire debt payable to himself and his fellow heirs joining the latter as Defendants if they are not willing to join as co-Plaintiffs. Whatever the proper constitution of a suit of this description may be, a question which can hardly be answered independently of the nature of the debt, it is clear that the suit need not include a claim for the whole sum due to the deceased at the time of his death, for instance, a portion of the debt may have been amicably paid to the heirs jointly, or amounts paid to different heirs in proportion to their known shares in the inheritance; in such a case it would be unmeaning to hold that the claim must include the whole of the amount due to the deceased creditor. To take another illustration, there is no reason

(1) I. L. R. 33 All. 327 (1910).

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why the heirs should not relinquish, if they so choose, a portion of the claim. If, therefore, a suit for the recovery of the debt need not include the whole of the sum due to the deceased at the time of his death, the question may very well be asked, on what principle can the view be maintained that the application for a certificate must include the whole of the amount due. A certificate is needed to afford protection to the party who pays the debt to the representatives of the deceased person ; but to facilitate the collection of debts on succession in this manner does not require that the certificate should cover the whole of the debt if the heirs do not seek to realise the whole. We are, therefore, not prepared to accept the construction placed upon sec. 4 of the Act by the learned Judges of the Allahabad High Court in *Ghafur Khan* v. *Kalandari Begam* (1). It cannot be disputed that the construction adopted may lead to complications and hardship which could never have been intended by the Legislature. To take one illustration, cases may arise where, as here, one of the creditors stands in such a relation to the debtor (son and father) that he may not be willing to sue at all to enforce his right. On what principle can the other creditor be compelled to take out a certificate for the entire debt ? He has admittedly no right to the whole of the debt, and he cannot, under sec. 6 (1) (*d*), state the right in which he claims the portion in excess of his share. Again he may be quite prepared to furnish security for his own share under sec. 9, but he may not be able, certainly not willing, to furnish security for the sum in excess of his own share which he is by no means anxious to recover by suit. Then, again, one of the creditors as here may be an infant, and he may have a much longer period allowed to him by law for the enforcement of his rights, than to the adult creditor. Why should the latter be compelled to take out a succession certificate in respect of the share of the debt claimable by the infant ? If he institutes a suit for this purpose, he may very well be met by the objection that the infant has a legal guardian who is competent to safeguard his rights. It would, therefore, be only reasonable to hold that a person in this situation is entitled to apply for a certificate for the amount which he seeks to recover. In fact, the argument which underlies the contrary view overlooks the fact that in proceedings for grant of the certificate we are not concerned with the frame of the suit in which the claim is to be asserted. We are concerned only with the representative character of the claimant, and by a summary investigation the Court has to determine whether that character has been established. The grant of the certificate does not constitute proof of the debt, nor does it determine the frame of the suit in which the claim has to be enforced. The certificate only renders unnecessary the trial of the question in the regular suit, whether the claimant is entitled to maintain it as the representative of the deceased. In view of these principles, there can be no room for controversy as to the validity of the order of the District Judge.

In the present case, upon the death of the lady, the dower debt due from the husband became payable to her heirs. The nature of the right of the heirs was explained by this Court in the case of *Mahomed Ishaq* v. *Akramul Huq* (2). It was there pointed out by Brett, J., that

(1) I. L. R. 33 All. 327 (1910).

(2) 6 C. L. J. 558 : s c 12 C. W. N. 84 (1907)

in the case of deferred dower, a right accruing to a single person from a covenant in her favour does not devolve on her death on two or more of her heirs in several shares ; it is not a case in which the cause of action which resided in one person, is by operation of law transferred to a number of parceners who constitute one heir. As the right to the deferred dower becomes enforceable on the death of the wife, the agreement must be taken to be one between the husband and the wife under which the former undertakes to pay over to the heirs of the latter the money which becomes due after her death. The inference is therefore irresistible that each of the heirs is entitled to sue in respect of his share of the dower debt ; in reality, each has a distinct right enforceable by himself though all may jointly sue, because each obtains a share of the whole debt. This view is consistent with what has been recognised as the settled rule almost since the establishment of the British Courts in this country ; see, for instance, *Ali Buksh* v. *Kaieem Beebee* (3) decided by the Bengal Sudder Court so far back as 1804, where, upon the death of a Mahomedan woman, one of her heirs was allowed to maintain an action for the recovery of her share only of the dower debt. In the case before us, the Petitioner has instituted such a suit ; she has further relinquished a considerable portion of her claim because she asserts that as the objector has properties worth only Rs. 1,000 it would be fruitless to obtain a decree against him for a larger sum. It would, in our opinion, be as unreasonable to hold that she is bound to take out a succession certificate for the whole sum as to hold that she was bound to sue for recovery of the entire amount. It has been suggested, however, by the objector that if a decree is obtained in a suit so framed, the infant son who is entitled to a share of the dower debt may be prejudiced. But as already explained, we are not concerned at this stage with the suit for the recovery of the money. The guardian of the infant may, if he so chooses, apply for a succession certificate in respect of his share of the dower debt, and institute a suit on his behalf. But because he omits to do so for obvious reasons, the Petitioner cannot be deprived of her right to recover the money, neither can she be compelled to enforce not merely her own rights but also those of the infant. We may further point out that a certificate cannot in this case be granted for the whole of the dower debt. It is not disputed that the husband united in himself the character of debtor and creditor in respect of his share, therefore, the debt must be deemed to have been extinguished. To put the matter briefly, even if the dower debt was treated as a joint debt there has been a severance, and there is no good reason why in this contingency the interest of the different creditors may not be deemed to have been severed. The view we take is supported by the judgment of Chamier, J., in *Akbar Khan* v. *Bilkisara Begum* (4) and of Aikman, J., in *In re Indaiman* (5), though that view is possibly inconsistent with the decision in *Muhammad Ali Khan* v. *Puttan Bibi* (6). We may add that it has not been disputed before us that a succession certificate is necessary in a case of this description, as laid down in *Abdul Karim Khan* v. *Muqbul-un-nissa* (7), which dissented from the case of *Nem-*

(3) 1 Mac. S D. Sel. Rep. 110 (1804)

(4) All. W. N. for 1901, p. 125.
(5) I. L. R 18 All. 45 (1895).
(6) I. L. R. 19 All. 129 (1896).
(7) I. L R 30 All. 315 (1908).

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dhari Roy v. *Bissesari Kumari* (8) subsequently overruled by a Full Bench in *Bancharam Muzumdar* v. *Adyanath Bhattacharjee* (9).

The result, therefore, is that the order of the District Judge is affirmed, and this appeal dismissed with costs. We assess the hearing-fee at one gold mohur.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2944 OF 1908.

WOODROFFE, J. CARNDUFF, J. 1911, Heard, 20, April & 4, May. Judgment, 4, May.	TARAN CHANDRA GHOSE, Defendant, Appellant, *v.* GANENDRA NATH ROY and others, Plaintiffs, Rspondents.

Landlord and tenant—Encroachment by tenant—Adverse possession for over twelve years—Tenant if bound to pay additional rent—Bengal Tenancy Act (VIII of 1885), sec. 52.

A tenant is entitled to hold* khas *land of his landlord upon which he has encroached as part of his original holding, if more than twelve years before the landlord's suit he denied the landlord's right to any separate rent from him in respect of the land and has forcibly in assertion of his claim appropriated the entire crop and continued in possession. The landlords, apart from sec. 52 of the Bengal Tenancy Act, cannot recover additional rents in respect of such land.

ISHAN CHANDRA MITTER *v.* RAJA RAMRANJAN CHAKRAVERTY (1) and RAKTOO SINGH *v.* SUDHRAN AHIR (2) *referred to.*

(8) 2 C. W. N. 594 (1898).
(9) I. L. R. 36 Cal. 936: S. C. 13 C. W. N. 966 (1909).
(1) 2 C. L. J. 125 (1905).
(2) 8 C. L. J. 557 (1908).

This was an appeal preferred on the 22nd of December 1908, against the decree of Babu Narendra Krishna Dutta, Additional Subordinate Judge of Zillah Burdwan, dated the 22nd of September 1908, modifying the decree of Babu Akhoy Kumar Bose, Additional Munsif of Katwa, dated the 29th of June 1907.

The material facts of the case will appear from the judgment.

Babus Bepin Behari Ghose II, and *Mohini Mohun Chatterjee* for the Appellant.

Bubus Ram Chandra Majumdar, *Tarakeswar Pal Choudhuri* and *Sarat Chander Dey* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

CARNDUFF, J.—In the case out of which this appeal arises, the Plaintiffs are some of the co-sharer landlords of Mouzah Begun Kola and the 1st Defendant is one of the tenants. The Plaintiffs' case is that the *khas* lands of the mouzah were partitioned and that the land in dispute is an accretion to the portion allotted to them, on which this Defendant has encroached and is a mere trespasser. In these circumstances the Plaintiffs seek to eject the first Defendant, or failing in that, to recover from him a fair rent for the land encroached upon. The defence is that the disputed land is a reformation on the site of the first Defendant's original holding, for which he has all along been paying a total annual rental of Rs. 82 to the whole body of landlords, that he has occupied it as part of that holding ever since its reformation 18 or 20 years ago, and that he is therefore not liable to pay any additional rent in respect of it, much less to be evicted therefrom.

The Munsif found that the land in suit

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appertained to the first Defendant's original holding as alleged, and that in any event the claim was barred by limitation, because the Plaintiffs had never been in possession of it since its reappearance, whereas the Defendant had for more than 12 years held and openly asserted the right to hold it as a part of the six *jamas* for which he was paying a fixed rent. The suit was therefore dismissed in the Court of first instance.

On appeal, the learned Subordinate Judge reversed the Munsif's decision and gave the Plaintiffs a decree declaring their right to a fair and equitable rent and awarding them mesne profits in the shape of such rent, the rate of which he directed should be determined in execution proceedings. He has found that "there is no reliable evidence, or any evidence worth the name, to show that the disputed land was the alluvion of diluviated lands" of the Defendant's original *jamas*, and, as a consequence, apparently that it was an accretion to the Plaintiffs' lands. On the other hand, the Plaintiffs have, according to his judgment, failed to show that they were ever in *khas* possession of the lands to which the disputed land is said to have accreted, and they are, therefore, not entitled to eject the first Defendant; and he has declined to go into the question of limitation, holding that it does not arise, "as the Defendants No. 1 held the land as a tenant."

It appears to me that the lower Appellate Court was in error in thus holding that no question of limitation could arise between a landlord and a tenant in a suit of this kind. If, as was found by the Munsif, the first Defendant more than 12 years before suit denied the landlords' right to any separate rent from him in respect of the disputed land, over and above that already paid by him for his six *jamas*, and forcibly in assertion of his claim, appropriated the entire crop and thereafter continued in possession, he would, although a tenant, thereby clearly have a right to hold the alluviated plot as part of the original holding; and the Plaintiffs' suit became barred by limitation. In this connection reference may be made to the cases of *Ishan Chandra Mitter* v. *Raja Ramranjan Chakraverty* (1) and *Raktoo Singh* v. *Sudhran Ahir* (2). The first Defendant might, perhaps, be sued by all the landlords under sec. 52 of the Bengal Tenancy Act of 1885 for enhanced rent on the ground of excess land actually held by him: but that is another matter, and the evidence in the present suit was not directed to it.

The decree of the lower Appellate Court must therefore be set aside and the case remanded for a further finding on the question of limitation as stated above. The remand is also necessary for another reason, for I think that if the suit is not barred by limitation and a fair rent is to be allowed to the Plaintiffs, that rent must be determined by the Court in the suit and not in the execution proceedings. The costs of remand will be costs in the appeal.

As regards the cross-appeal, it is admitted that it rests on the facts, and the learned Vakil has not pressed it. It, therefore, stands dismissed with costs.

WOODROFFE, J.—I agree.

(1) 2 C. L. J. 125 (1905).
(2) 8 C. L. J. 557 (1908).

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 393 OF 1911.

MOOKERJEE, J.
TEUNON, J.
1911,
13, February.

In re HARA KUMAR CHATTERJEE.

Legal practitioner, dismissed for misconduct—Reinstatement on proof of good conduct.

Case in which a legal practitioner who when yet a comparatively young man had been dismissed from the rolls for misconduct was after five years re instated on his furnishing certificates showing that during the interval his conduct has been so irreproachable that notwithstanding his previous delinquency he could be entrusted with the affairs of clients and admitted to an honourable profession without that profession suffering degradation.

In re ABIRUDDIN (1) *followed.*

This was an application by a legal practitioner whose name had been removed from the rolls for misconduct, for re-instatement. Their Lordships allowed the application.

Mr. B. Chakraburty and *Babu Gunada Charan Sen* for the Petitioner.

Babu Ram Charan Mitter for the Crown.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This is an application for re-instatement by a pleader who was suspended from the practice of his profession, on the 20th December 1905, and subsequently removed from the rolls, on the 8th March 1906, by an order of this Court. The circumstances under which the order in question was made may be briefly narrated. The Petitioner applied to this Court for enrolment as a candidate for appointment in the Provincial Judicial Service. He annexed to his application the certificate of his having passed the Entrance Examination of the Calcutta University, from which it appeared that his age at the time of admission to the examination was 10 years and 3 months. Upon enquiry it was ascertained that his age of that time was 18 years and 3 months, and that the entry in the certificate had been fraudulen ly altered. The result was that his name was removed from the rolls as stated. At the original hearing, he did not deny that he had been guilty of gross misconduct, and he placed himself entirely at the mercy of the Court. The gravity of the offence, however, was such that the Court declined to make any order short of absolute removal from the rolls, and no suggestion has been made to us on the present occasion that, under the circumstances disclosed, any other order could have been appropriately made. Since the date of that order, however, the Petitioner has been employed as superintendent and manager of the estates of different zemindars; and on the 29th August 1909 he applied to this Court for re-instatement. To the application was annexed a number of certificates by some of the leading pleaders of this Court as also by legal practitioners in the mofussil and zemindars under whom the Petitioner had served, to the effect that since his removal from the rolls he had conducted himself honourably. But the Court declined to entertain the application at that time, on the ground that it was premature; at the same time, it was stated that if the Petitioner so desired, he might renew his application with additional materials after the lapse of five years from the date of suspension. Hence, the present application, to which additional certificates have been annexed; one of these certi-

(1) 15 C. W. N. 357: S. C. 12 C. L. J. 625 (628) (1910).

In re HARA KUMAR CHATTERJEE.

ficates, given by a zemindar of considerable respectability under whom the Petitioner has served, states that his character and conduct have been entirely satisfactory. Under these circumstances, the learned Counsel who has appeared on his behalf has invited the Court to make an order for re-instatement. As pointed out by this Court in the case of *In re Abiruddin* (1), "the test to be applied to cases of this description is whether the sentence of exclusion, however right, has had the salutary effect of awakening in the delinquent a higher sense of honour and duty, and whether in the interval his conduct has been irreproachable so that notwithstanding the delinquency in early life, he may be safely entrusted with the affairs of clients and admitted to an honourable profession without that profession suffering degradation." In view of the certificates which have been produced and also in view of the fact that when the original offence, although of great gravity, was committed, the Petitioner was a comparatively young man, we think it right to make an order of re-instatement. The result, therefore, is that the application is granted, and the name of the Petitioner restored to the rolls.

Application allowed :
Name restored to the rolls.

(1) 15 C. W. N. 357 : s. c. 12 C. L. J. 625 (628) (1910).

[CRIMINAL APPELLATE JURISDICTION.]

APPEAL NO. 432 OF 1911.

HOLMWOOD, J.
N. R. CHATTERJEA, J.
1911,
25, July.

PAIMULLAH and others, Appellants, *v.* THE KING-EMPEROR, Respondent.

Indian Penal Code (Act XLV of 1860), secs. 392, 411, 395—Charge, amendment by Sessions Judge before hearing evidence—Criminal Procedure Code (Act V of 1898), sec. 227—Evidence Act (I of 1872), secs. 25, 27—Pointing out places where stolen articles were concealed, if evidence of guilt—Police deposing to admission of guilt by accused, impropriety of.

Where the Appellants were committed to the Court of Sessions on a charge of dacoity, and the Sessions Judge without assigning any reason, at the commencement of the trial amended the charge to one of robbery :

Held—*That it was improper for the Sessions Judge to thus alter the character of the charge before hearing evidence.*

That under the circumstances of the case the fact that the Appellants pointed out the places where some of the articles stolen in a robbery were found, was not sufficient evidence to convict them under sec. 392, I. P. C., or even under sec. 411, I. P. C.

QUEEN-EMPRESS *v.* GOBINDA (1) *followed.*

Where the Police Sub-Inspector in his deposition before the Court stated that one of the accused admitted before him his guilt and that from the statement of that accused he (the Sub-Inspector) could understand the exact nature of the offences committed by the accused,

Held—*That the Sub-Inspector ought never to have been allowed to make such statement before the Assessors whose minds must have been considerably prejudiced thereby.*

(1) I. L. R. 17 All. 576 (1895).

PAIMULLAH *v.* THE KING-EMPEROR.

There was an appeal presented on the 26th of May 1911 by the above-named accused against the conviction and sentence passed upon them by Mr. S. P. Sen, Sessions Judge of Dinajpur, under sec. 392, I. P. C., on the 22nd of April 1911.

The facts of the case are briefly as follows: The complainant, Nil Mahamed Pramanik, was a resident of village Khalilpur, within Thana Parbatipur. He was a cultivator but appears to be in tolerably good circumstances in life. He lost his wife in the month of Kartick last, leaving a little son about 3 or 4 years old. He had no other member of his family living with him at his house. On the night of 23rd January 1911 while he was lying down in his bed with his child, he noticed some one striking a light in the verandah of his hut. He enquired who the man was. At that very moment two men sprang upon him seized him and overpowered him. They covered his eyes by a blanket, so that he was unable to see anything.

After the robbers had decamped he noticed that they had left behind three lathies, had broken his padlock and taken away some articles belonging to him. A Sub-Inspector who investigated into the case caught hold of three men, the Appellants in the case, who made certain self-incriminating statements to him, and then pointed out to him certain places where some of the stolen articles had been kept concealed. These 3 men with three others were sent up to the Magistrate on a charge of dacoity who discharged the latter for want of evidence against them but committed the 3 Appellants to the Court of Sessions on a charge of dacoity. The Sessions Judge however altered the charge to one of robbery under sec. 392, I. P. C., and sentenced them to 5 years' rigorous imprisonment.

Babu Probodh Chandra Chatterjee for the Appellants.

Moulvi Sultan Ahmed, Officiating Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal from the judgment and sentence of the learned Officiating Sessions Judge of Dinajpur, who agreeing with both the assessors convicted the accused persons under the sec. 392, I. P. C, and sentenced them to five years' rigorous imprisonment each.

It appears that certain persons entered the house of the complainant at night and having used great violence carried away his money, documents and jewelleries. The complainant told the Police that he only saw three persons. The Police after making investigation held that there had been dacoity in which at least six persons were concerned and they sent those six persons, among whom were the three present Appellants, up to the Magistrate for trial preliminary to commitment under sec. 395, I. P. C. The learned Magistrate discharged three of these accused for want of evidence and committed the three Appellants to the Sessions under sec. 395 that is for being concerned in dacoity. The learned Sessions Judge without assigning any reason amended the charge to one of robbery, thereby, before hearing the evidence, changing the character of the charge altogether; and now that we know that the presumption that the Appellants were dacoits or robbers rests solely on the finding of stolen property in places pointed out by them, it is very apparent how the Appellants must have been prejudiced by this unauthorized amendment; for granted that there were six persons engaged in this affair and that only three of

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them entered the house the fact that these Appellants knew where the property stolen was hidden is obviously not sufficient to convict them of being concerned in robbery. Indeed it could not be sufficient to convict them under sec. 411, for as was held by the Allahabad Court in the case of *Queen-Empress* v. *Gobinda* (1), where the sole evidence against the person charged with an offence under sec. 411 consisted of the fact that the accused had pointed out the place where some of the stolen properties were concealed in the field of another person, this was not in itself sufficient evidence to support a conviction under sec. 411, I. P. C. With that ruling we are in entire agreement and particularly in the circumstances revealed in this case; for it appears that the junior Sub-Inspector, a very energetic young man anxious to distinguish himself, had been told on the night of the 30 h January by a man named Gopi, who was himself one of the persons sent up for dacoity that the property would be found at the places apparently where the three accused pointed it out on the 30th January, and it was he who named these three accused as persons who could point out the place where the property was. That is all these persons did on the next day. The Sub-Inspector of Police has been very improperly allowed to state in his evidence that one of these persons admitted his guilt, and he makes a further statement that "from the statement of this accused Paniulla I could understand the exact nature of the offence committed by the accused." This ought never to have been allowed to go before the assessors and must have prejudiced their minds considerably.

Be that as it may, there is no reason to doubt that these three Appellants did know where Gopi and his accomplices, persons probably who committed the robbery, had hidden these articles. But that is not in itself sufficient to convict them even under sec. 411, far less is it any evidence that they took any part in any robbery or dacoity. There being no other evidence to connect them with the crime unless it be the statement of Umardi who made some enquiry about the jewellery of the complainant's deceased wife shortly before the occurrence—and we do not think that this in itself would carry the case any further—it would be wholly unsafe to uphold the conviction in this case, and certainly it would not be our duty to order a retrial to be held under sec. 395, where the circumstances show that there is really no evidence that these persons committed dacoity at all.

As we have already pointed out they cannot be convicted under sec. 411 on the evidence on the record, and the conviction aud sentence passed upon them under sec. 3)2 being set aside they must be acquitted and released.

Appeal allowed:
B. C. *Accused acquitted.*

(1) I L. R. 17 All. 576 (1896).

THE

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Contents.

NOTES.

THE DELEGATION BILL WHICH WAS INTRODUCED into the Supreme Legislative Council last autumn at Simla and referred to a Select Committee on the 10th of January last is a measure of far-reaching consequences and involves questions of policy of the greatest magnitude. The Bill purports to be a general Delegation Act empowering the Government of India to delegate executive powers or duties to any other authority or class of authority by notifications. This is a method of departmental legislation which is of comparatively recent growth and which has been condemned in England by legal and public opinion alike.

IF THIS METHOD OF LEGISLATION IS UNSUITABLE in any other connection it is hardly defensible in connection with a measure involving such wide issues as the decentralisation of the executive powers of the Government of India or any of the local Governments. Decentralisation is a matter which cannot be profitably discussed in the abstract. Whether it would be for good or evil can only be discussed with reference to the details, as to what powers are sought to be given away and to whom, what safeguards are provided against abuse of those powers, what constitution is laid down for the authorities who are entrusted with those powers and such other matters. Yet it is exactly these questions which go to the essence of the subject that are left to be decided by the executive and to be promulgated by them by notification. Barring a few reservations which are claimed by the Hon'ble the Law Member to secure the safety of the rights and liberties of the subject, the whole subject is entrusted to the judgment of the executive. What the members of the Legislative Council are now called upon to decide is whether it is necessary that some unknown powers should be delegated to some unknown subordinate authorities with equally unknown reservations and safeguards. As the utmost importance attaches to the particular powers sought to be transferred and upon the details of the mode in which those powers ought to be exercised, such matters ought not to be decided except under the full blaze of public discussion.

THE SCHEME OF LEGISLATION NOW ADOPTED HAS no doubt one important element apparently differentiating it from other measures of such summary legislation in that the notification would, previous to its coming into operation, be circulated amongst members of the Council who will have the opportunity of bringing the whole matter before the Council by way of a resolution. This however does not mean much. The notification will represent the settled opinion of the executive and it is very little likely to be unsettled by a discussion in the Council which would naturally take the form of a criticism. And even if a resolution is passed by the Council it has no more force than a recommendation. There is a great deal of difference between deciding on a complicated measure and then throwing it open to criticism and introducing such a measure in Council tentatively where friendly criticism and well-founded arguments are more likely to carry conviction.

IN THIS VIEW OF THE MATTER WE CANNOT regard the safeguard provided in this matter as quite sufficient. And, reading through the entire speech of the Law Member, we cannot find any convincing reason for adopting this course in carrying through such an important administrative measure. To frame an elaborate Bill would no doubt be a difficult task, and its discussion wearisome to some Hon'ble members, but that is no reason why a responsible work of such magnitude

should be so summarily disposed of. If patience and labour is wanted it should be ungrudgingly bestowed on the work by all concerned and no plausible excuses sought for shirking the responsibility to the public. The strain upon the secretariat, upon which the learned Law Member dwelt, is what the magnitude of the work certainly demands. And we should think that the best way of proceeding in this matter would have been to entrust the drafting of the Bill to a special Committee just as was done in the case of the Civil Procedure Code. We are not sure that that course may not even now be adopted with advantage.

WE INVITE ATTENTION TO A VERY INTERESTING article on the Historical Boundaries of Bengal which we publish below. In this connection, it may be added that according to the Mahabharata, the Mahanandá formed the boundary between the kingdom of Anga on the west and Pundra or Paúndravardhana, the country of the Pods, whose capital was at Mahásthán in Bogra District. In the beginning of the thirteenth century the south of the district is said to have constituted part of the kingdom of Lakshman Sen whose capital was at Nadia (see *Imperial Gazetteer*, *Ed. 1908*, *Vol. XX*, *p. 414*). Purnea originally belonged to Bengal, the river Kosi was the eastern boundary of the sub-province of Behar. (See *Ibid*, p. 413).

LOOKING AT THE MAP OF THE DISTRICT, THE River Mahananda may afford a suitable eastern boundary of the district, instead of the river Nágar which forms its present eastern boundary to a considerable extent, that is, dividing the district of Purnea from the district of Dinajpur. This river upon leaving Purnea proceeds towards Maldah, and from that point to the southern limit of the eastern boundary of Purnea there is no river or any other natural line of demarcation separating the district from Maldah. If the linguistic test be applied, it will be found that the majority of the people inhabiting the part of the country east of the Mahananda is Bengali speaking. The major portion of the people within the jurisdiction of thana Manibasi, and a considerable portion of those living within the jurisdiction of thanas Gopalpur, Kasba and Ranigunj, are Bengali speaking, while the people of the eastern part of the country lying within the jurisdiction of thana Kishanganj speak a corrupt form of the Bengali language.

TO INCLUDE AREAS WHICH ARE PRACTICALLY Bengali speaking, the new eastern boundary line may follow the Mahananda from the point where it leaves the Darjeeling district down to a convenient point towards the west of Ranigunj: from there, a suitable line may be drawn running in a south-easternly direction and meeting the river Panar and thence following that river for some distance and thence, leaving it, following a line passing through the neighbourhood of Saifgunj to the river Sowrah and then following that river to its point of confluence with the Ganges. Roughly speaking, this line may be taken as the line of division. But there are Pergunnahs through which it is possible this line may pass, and it is expected that necessary modifications will be undertaken in order to avoid the splitting of a Pergunnah belonging to one zemindar, into two, one portion remaining in one Province and the other in another. If it is possible to mention a complete Pergunnah as practically wholly Bengali speaking. Pergunnah Kankjole may be mentioned as such. It lies on the north bank of the Ganges, commencing from Maldah.

HISTORICAL BOUNDARIES OF BENGAL.

I. PURNEA:—(*a*). Purnea a frontier Province in pre-Mahomedan times partly Anga and partly Pundra with the Mahanadi forming the boundary between the two. "The earliest inhabitants of the District of Purnea are believed to have been Angas to the west . . ." who "are generally grouped with the Bengal tribes in the epics."—*Bengal District Gazetteer* (*1911*), *Purnea*, *p. 32*.

"The earliest inhabitants of the District of Purnea are believed to have been Pundras to the east . . . The Pundra land appears to have been bounded on the west by the modern Mahananda which separated it from Anga. On the east by the river Karatoya" which runs through the present District of Rungpur and Bogra.—*Bengal District Gazetteer* (*1911*), *Purnea*, *p. 32*.

(*b*). Purnea also a frontier province in Subah Bengal during the Mahomedan rule, the Kosi forming the boundary between the Subahs of Bengal and Bihar:

"During the Moghul rule Purnea formed a great military frontier province under the rule of a Faujdar . . . subordinate to the Subahdar" (of Bengal). "The old Kosi . . . was at this time the boundary between Bengal and Bihar and continued to be the boundary till the 18th century."—*Bengal District Gazetteer* (*1911*), *Purnea*, *p. 35*.

The District "formed in fact the northernmost sarkar of that province (*i.e.*, Bengal) under Moghul rule, the river Kosi . . . being the boundary between it and the sub-province of Bihar."—*Bengal District Gazetteer* (*1911*), *Purnea*, *p. 1*.

(*c*). The "eastern portion" of the District "more properly belongs to Bengal."—*Bengal District Gazetteer* (*1911*), *Purnea*, *p. 1*.

II. BHAGALPUR:—(*a*). In pre-Mahomedan

period, the portion of the Bhagalpur District south of the Ganges formed part with the District west of the Mohananda (*i.e.*, western Purnea) of the kingdom of Anga which formed a buffer state between Pundra and Banga on the one hand and Mithila and Magadh on the other, the western portion of the present Monghyr District formed the eastern-most boundary of the kingdom of Magadha, while the portion of the District of Bhagalpur north of the Ganges formed part of the ancient kingdom of Mithila.

"At the dawn of history the district west of the Mahananda apparently formed part, with Bhagalpur, of the kingdom of Anga."—*Bengal District Gazetteer (1911), Purnea, p. 33.*

"Of the portion south of the river some parts were comprised within the limits of the old Hindu kingdom of Anga."

"North of the river Ganges the kingdom of Mithila lay, the old boundaries of which were on the east, the Kosi river."—*Bengal District Gazetteer (1911), Bhagalpur, p. 26.*

"At the dawn of history, the present site of the town of Monghyr was apparently comprised within the old Hindu Kingdom of Anga, the capital of which was at Champa near the modern Bhagalpur, while a portion of the west of the present District Monghyr was included within the limits of the kingdom of Magadha."—*Bengal District Gazetteer (1909), Monghyr, p. 28*

(*b*). In Mahomedan times Bhagalpur more or less corresponded with the area where *Chika-Chheki* is spoken (*viz.*, most of the present District of Monghyr, Santhal Parganas and Bhagalpur south of the Ganges): essentially a frontier and military province between Subahs Bengal and Bihar, extending west to east from the western portion of District Monghyr to the Rajmehal Hills.

"In 1765 A. D. when the East India Co. was invested with the Dewani Bhagalpur District was a huge tract in the east of Sarkar Mungir, Subah Bihar, lying altogether to the south of the Ganges except the Parganah of Chari. The boundaries were rather indeterminate on the south and west."—*Bengal Gazetteer (1911), Bhagalpur, p. 1.*

"In 1580, the military revolt of Bengal against Akbar commenced" and the contending parties were encamped at Monghyr and Bhagalpur.—*Bengal District Gazetteer (1911), Bhagalpur, p. 1.*

"Akbar's troops are known to have marched through Bhagalpur when invading Bengal and in the 2nd war against the Afghans Man Singh made Bhagalpur the rendezvous of all the Bihar contingents . . . The town was subsequently made the seat of an imperial Fouzdar or military Governor."—*Imperial Gazetteer of India (1909), Bengal, Vol. II, p. 165.*

(*c*). Even in early British times an unsettled frontier province south of the Ganges between Bengal and Bihar and subject to inroads of hill tribes: Formal transfer of the District from Subah Bihar to Bengal: Subsequent changes of jurisdiction, gradually dismembering the District towards west, south and east in order to form the separate District of Monghyr and Sonthal Parganas and enlarging it towards North; the present limits are purely artificial.

"In 1765, the country to the south and west was . . . unsettled owing to the inroads of hill tribes."—*Imperial Gazetteer of India (1909), Bengal, Vol. II, p. 165.*

"It was alleged that in 1765 the Parganas of Bhagalpur, Colgong and Chari had been transferred from Subah Bihar to Subah Bengal" but "in 1773 the District was formally severed from Subah Bihar and annexed to the Dewani lands of Bengal."—*Bengal District Gazetteer (1911), Bhagalpur, p. 137.*

In the "adjustment of the zilla and city jurisdictions of the entire provinces under the Bengal presidency in 1806." Bhagalpur was included within the jurisdiction of the provincial and circuit court of Murshidabad and not of Azimadabad or Patna.—*See Fifth Report of the Select Committee on the affairs of East India Co, p. 41.*

"The area of the district was 8225 square miles at the time of Buchanan Hamilton's survey (1812 A. D.) including as it did then, most of the modern district of Monghyr and the Sonthal Parganas south of the Ganges; since then the southern portion has been greatly restricted in area and the northern portion has been greatly extended." As to the details of these changes, vide *Bengal District Gazetteer (1911), Bhagalpur, pp. 1-2,*

"The District as it at present exists is the outcome of many changes, its limits being purely artificial."—*Bengal District Gazetteer (1911), Bhagalpur, pp. 1 and 26.*

III. SONTHAL PARGANAS:—Sonthal Parganas made up partly of the *Chhika-Chheki* area of ancient Bhagalpur and partly of purely Bengali areas of Birbhum and Murshidabad.

Large portions of the District of Murshidabad were severed from it in 1787 and included in Birbhum.—*Imperial Gazetteer of India (1909), Bengal, Vol. I, pp. 440-441.*

"In 1765, the District of Birbhum was more than double its present size . . . . some years later considerable tracts to the west were cut off and now form part of Sonthal Parganas.—*Imperial Gazetteer of India (1909), Bengal, Vol. I, p. 279.*

"Until the formation of the District of Sonthal Parganas in 1855, the northern half formed part of Bhagalpur, while the southern and western portions belonged to Birbhum."—*Imperial Gazetteer of India (1909), Bengal, Vol. II, p. 219.*

IV. MANBHUM AND DHALBHUM:—Early history uncertain; in Mahomedan time part of Jharkhand

or forest tract; up to 1805 estates contained in the present district were attached some to Birbhum and some to Midnapore.

"Manbhum District forms the first step of a gradual descent from the table-land of Chota Nagpur to the Delta of Lower Bengal. The undulation so characteristic of Chota Nagpur becomes pronounced and level tract of considerable extent are of frequent occurrence."—*Imperial Gazetteer of India (1909), Bengal, Vol. II, p. 375.*

"We have no authentic records of this part of the country till Mahomedan times, when it was regarded as part of Jharkand or forest tract."

"The territory comprised in the present District Manbhum was acquired by the British with the grant of the Dewani of Bengal, Bihar and Orissa in 1765. Up to 1805 the estates contained in it were attached, some to Birbhum and some to Midnapore," when "they were formed with a few others into a separate District called the Jungle Mehals." In 1835 the District of Jungle Mehals was broken up "and portions were transferred to Burdwan while the remainder with the estate of Dhalbhum, detached at the same time from Midnapore, were formed into the District of Manbhum." In 1846, "Dhalbhum was transferred to Singhbhum."—*Imperial Gazetteer of India (1909, Bengal, Vol. II, p. 378.*

Dhalbhum was originally part of Midnapore."—*Imperial Gazetteer of India (1909), Bengal, Vol. II, p. 397.*

V. North Balasore:—Once a part of Midnapore, the two together forming the Mahomedan division known as Sarkar Jaleswar.

"Midnapore District nearly coincides with the Mahomedan division known as Sarkar Jaleswar which had for its capital the town of that name now situated in Balasore District."—*Imperial Gazetteer of India (1909), Bengal, Vol. I, p. 301.*

"The southern portion of the District of Midnapore, now the Tamluk and Contai Sub divisions, was at first administered by a Salt-Agent and Collector at Hizili. Tamluk was transferred to Midnapore in 1789. But Hizili remained a separate Collectorate up to 1836, when a quarter of it was amalgamated with Midnapore and the rest with Balasore."—*Imperial Gazetteer of India (1909), Bengal, Vol. I, p. 302.*

VI Goalpara:—"Little is known of the history of the earlier Hindu dynasties. After the English obtained the Dewani of Bengal in 1765, Goalpara continued to be a frontier outpost." "The permanently settled portions of Goalpara originally formed part of the District of Rungpur." The Eastern Duars portion of the District "was ceded to the British after the Bhutan war of 1865." "In 1867, the whole of what is now Goalpara District was included in the Commissionership of Cooch Behar." "The District was transferred to Assam in 1874."—*Imperial Gazetteer of India (1909), Eastern Bengal and Assam, pp. 515-516.*

(VII). Sylhet:—"The District was at one time divided into 3 petty kingdoms two of which were included in Bengal when the British obtained the Dewani of that Province in 1765. The District originally formed part of the Dacca Division of Bengal, but in 1874 it was placed under the charge of the newly appointed Chief Commissioner of Assam."—*Imperial Gazetteer of India (1909), E. B. and A, pp. 420-421.*

VIII. The Plains of Cachar:—The two portions of Cachar, *viz*, the plains and the hills are as different from each other as possible. The plains portion where Bengali is spoken by 66 per cent. of the population came under the British Government in 1830 up to which it was owned by Hindu Kings.—*Imperial Gazetteer of India (1909), E. B. and A, p. 442.*

B. K. Lahiri.

SCHOOLS OF LAW IN THE DEVELOPMENT OF HINDU LAW.

To Sir Henry Maine amongst European scholars must be given the credit of having first drawn prominent attention to the importance of schools of law based on literary fosterage in the history of the development of all laws and notably of Hindu law. "No one treatise," he says, referring to the Hindu Smritis, "and still less the aggregate of treatises, is the production of an individual man or an individual mind. The literature is the gradual growth of schools of learned Brahmins which are still found in India." [Early Law and Custom, p. 13] A consideration of the leading Smriti works leaves little doubt that they were the works of different schools dealing with an originally identical set of authorities to which have been added from time to time changes in laws and customs as they took place.

The course of history anterior to the Smriti is veiled in a great deal of obscurity. Theoretically all law is deduced from Sruti. But the Vedas and Brahmanas afford but very scanty materials for law. And it is more likely that the reference to the Vedas was meant not to the extant Vedic texts but to a hypothetical Eternal Word which must embrace all knowledge actual and possible. In the early stages of society law was not only given as divine command but was very likely believed to be such. The Themistes of Homer were not deliberate frauds but may well have been believed to have been momentary inspirations. As society developed further, the existence of a body of divine law regulating human affairs must have been received as a ruling hypothesis, and when Smriti text-books or the Mimansa aphorisms refer to Sruti as the source of all law they very likely referred

more to this hypothetical body of laws than to the extant revealed literature.

A privileged class which was the repository of this revealed law gradually grew up everywhere and the schools of Rishis in India were in this respect analogous to the College of Pontiffs in Rome and the Brehon Law Schools in Ireland referred to by Maine. [Early History of Institutions, p. 242]. But the fact of these schools being repositories of law was no fiction. They must have had traditional accounts of the law amongst themselves and they alone had access to a knowledge of the indicia by which the divine law had to be ascertained in a case of difficulty. These rules gradually got reduced into text books which were looked upon with as sacred veneration as the divine law itself and passed off as recollections (Smriti) of divine law communicated to the historic or traditional saints and recorded by, sometimes, a remote successor to whom it was handed down through a succession of teachers. Once so recorded these text-books became a new starting point for law.

But the function of jurisconsults was not yet at an end. On the other hand their position in the administration of divine law had become so well established that the Smritis give them a definite function in the administration and development of law.

It is natural to expect that once the written law came into vogue each school should come forward with its own manual of "Remembered Law" (Smriti). We must in this connection recollect that by the time the Smritis were compiled the Aryan race had spread over a great part of the Gangetic valley and there was not one great empire, but a number of independent kingdoms at constant war with each other. Within each kingdom too, in those days of constant annexations and conquests, many different peoples may have lived governed by different laws and customs. While these divergences led to the promulgation of many codes of law from many schools, each having authority within its own sphere of influence these very facts must have ultimately led to a limitation of the Smritis. It would not be difficult to suppose that each of these codes had authority somewhere at some time. Schools of Pontiffs must have been largely scattered about. And people anxious to know the law would very likely repair to the nearest one. Thus definite localised spheres of influence of different schools would tend to grow up. We have instances of such influence within historic memory. In pre-British days and even for a great part of the British rule it was usual in cases of difficulty in Western Bengal to go to the Pundits of Navadwip, while Eastern Bengal people usually referred to Vikrampur. Similarly there was a Maithil school drawing its inspiration from the scholars of Mithila and a Benares school drawing its inspiration from Benares. Even to this day in matters of ritual and social regulation which have not been taken up by our law Courts these centres of learning are sometimes referred to, though the change in the times has greatly affected the authority of these scholars and the facilities of communication greatly interfered with their local authority. It is thus not at all unlikely that before the promulgation of the codes the schools of law had each a more or less definite sphere of influence. When the codes were issued, therefore their authority may easily have extended to the original sphere of influence of the schools which originated them.

But when different bodies of revealed law came to be followed in different parts of the same kingdom, there was naturally a tendency to a fusion of the rules by reason of each of the codes being a body of divine law preserved by tradition. There would be a natural tendency to refer to one code to supplement the deficiencies of another and gradually to the equal reception of all codes. This required interpretation to reconcile texts where possible and to lay down an order of precedence in the codes. The age of codes would thus be followed by the age of interpretation—and it is to the work of interpretation that we find the later schools of law addressing themselves. A necessary preliminary of such work would be a law of citations similar to the Valentinian Law in Rome and we already find in the later Smritis an attempt to enumerate the authoritative text-writers and also to settle their order of precedence.

Two other sources of new law which were in operation even before the Smritis were promulgated and which must have had important influence on the development of law must here be noticed. These are the decrees of the King and the regulations of village or caste communities. We can trace the legislative power of the King in its origin as well as its decay in the Smritis. Manu's code bear ample evidence that the King's legislative power was yet new [Manu VII, 3—13]. After this it evidently went on growing.

But the growth of this legislative power of the King was effectually checked at an early stage partly owing to the peculiar circumstances of ancient Indian society when the King had always to be on the look out for military occupations, and partly by the growth of the power of Brahmins who had the most complete control over the administration of justice. At first the King was no doubt the sole judge. But he soon took into his counsel the Brahmin assessors (सभासदः) who knew the law. Later on the administration of justice was entirely relegated to Brahmin officials called *Pradvivaks* so much so that Narada could lay down that even when the King administered justice he should follow the decision of the *Pradvivak* (प्राड्विवाकमते स्थितः). When this

stage was reached Smriti law as interpreted by persons versed in the law became absolutely supreme and King-made law held a very subordinate place, except where masterful monarchs like Chandragupta could enforce them against the Brahmins. The Pontiffs of ancient India thus regained their old influence in the administration of law in the cities.

It would be well to remember that the law of the Smritis was mainly the law of cities. Outside the cities law and justice was entirely in the hands of the people. The King's officers were there no doubt for the purpose of protecting property and generally exercising police functions, but for the rest all matters rested with the people themselves. Caste and trade guilds as well as village corporations made their own rules which the King and his officers respected and violation of those rules was punished by the King [Manu VIII, 219, 220; Yajn. II, 183]. In later times the regulation of these communities was entrusted to particular individuals versed in law, preferably Brahmins (Yajn. II, 191). So that outside the cities and in caste communities within the city itself all judicial and law making power ultimately vested in these jurisconsults.

Thus we find that at the end of the age of the Smritis, the practical legislative power had vested in a body of professional lawyers who interpreted the law and to whom people as well as the King referred questions of law. The Smritis attempted to incorporate in themselves all laws and customs actually in force in the country. For the rest it was left to be determined, when matters came to a law suit, by the lawyer Judge (प्राड्विवाक) and the Brahmin assessors, and in other cases by the Brahmins in whom had vested the regulation of affairs of a community. But these did not exhaust the authorised interpreters of law. In the Smritis themselves we find provision for private persons giving authoritative opinions on points of law. "A body of four persons versed in the Vedas and Dharma," says Yajnavalkya, "or a body of persons knowing the three Vedas is a *Parshat*. What a *Parshat* says is law; so even is what is said by one supremely learned in spiritual lore (अध्यात्मवित्तमः)." (Yajn. I, 9).

Here we find the entire foundation of the history of later Hindu law. Schools of law were in all cases of difficulty referred to for their solution. These schools were also those from which the assessors of the King's courts might be recruited. They gave authoritative opinions on all questions of law, customs or ritual. Gradually there happened in India exactly what happened in Rome. The jurisconsults began to write connected treatises on law instead of contenting themselves with giving opinions on particular matters. These works in their turn were used by the lawyers of respective localities and gradually came to be counted as authoritative text-books in the localities within the sphere of influence of that particular school. Some even obtained a wider celebrity. Soontimes came when these text-books came to be cited as authorities rather than the Smritis just as much as Roman jurists were cited in Rome in later days. The age of Nibandhas and Commentaries definitely displaced that of the Smritis.

The authority of schools of law which thus culminated in the promulgation of authoritative text-books of law received an accession from private law being all but divorced from Sovereign authority during the Mahomedan rule over the greater part of India. The rulers did not care and the subjects did not appeal to them to regulate the civil rights of the people. Police and Revenue were the two chief civil functions of the Pathan and Moghul Sovereigns of India. And if in the chief cities the power of the *Kazi* ever made itself felt on the private law of the Hindus, outside them there was not the faintest influence exercised by Mahomedan sovereignty over Hindu law. This remarkable fact is aptly illustrated by the fact that while Arabic terms permeate the land laws, the usages and tenures as well as the prædial relations of the people not one Arabic term is to be found in the rest of the Hindu private law. In the Hindu law as now administered in British India, which took its start from the law as the English found in vogue at the beginning of the administration, there is no trace of Mahomedan influence except in the doubtful case of Wills which may possibly have to some extent been prompted by Mahomedan Law.

During the whole of the Mahomedan rule the schools of jurists at the great centres of learning held unabated sway over the people. They were however the last Court of Appeal resorted to only when local resources failed. Besides them there were scattered all over the country Pundits, maintained by liberal grants of land or other income by the opulent people of the locality, who solved legal problems for the people for the asking and whose *vyavasthas* accepted by the great semi-feudal landlords settled most disputes. At times learned Pundits would travel all over the country, enter into disputations with all learned men in the locality and if possible come out with a countrywide renown as having defeated all scholars everywhere. On these occasions as well as on others there would be meetings in which questions of law, philosophy logic, &c., were settled and academic problems discussed.

All this kept alive the traditions, knowledge and influence of the Brahmin Pundits and they maintained their power as the sole expositors of Hindu law till the British Government took over

the administration of Hindu law. They developed the law as well as interpreted and applied it. The Hindu law which is now applied in British Indian Courts is the law as moulded by these great scholiasts and not the law as laid down in the Smritis.

Thus from its very inception Hindu law has been developed and moulded by a number of schools of law whose influence was unbounded and whose traditions were uniform. The influence of the schools of law in the development of Hindu law has been greater than has generally been supposed and it may be safely asserted that the history of Hindu law is the history of these schools.

N. S-G.

Review.

THE INDIAN REPORTS. *By the late T. V. Sanjiva Row, M. Subramaniam and M. V. Krishnaswamy. Vols. IV & V. The Law Printing House, Mount Road, Madras, South India. 1910 & 1911.*

In these volumes the compilers have been trying to complete the series of reprints started by the late T.V. Sanjiva Row and interrupted before completion by his death. In the first of these volumes which is designated "Supplement to Moore's Indian Appeals" all the decisions of the Privy Council in cases from India up to the end of 1872 and not reported in Moore's Indian Appeals Series, and some decisions of 1873 have been collected from various reports including Acton, Knapp, Moore's P. C. Series, etc. A consolidated subject index for all four volumes of Privy Council decisions appears in this volume. The index virtually constitutes a digest of the legal propositions laid down in the cases reported, and should prove very useful. In the 5th volume appear decisions of the Allahabad High Court reported between 1866 and 1868 in the Agra High Court Reports, Vols. I to III.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CIVIL APPELLATE JURISDICTION. Before CASPERSZ, AND D. CHATTERJEE, JJ. APPEAL FROM APPELLATE ORDER NO. 530 OF 1910. SHUHURUDDIN CHOWDHRY, Appellant *v.* RANI HEMANGINI DEBI AND OTHERS, Respondent. Heard, 28th November. Judgment, 5th December 1911.

Occupancy holding, non-transferable—Sale in execution of a money decree—Consent by co-sharer landlord.

The decree-holder applied for the sale of a non-transferable occupancy holding in execution of a money decree on the allegation that the landlords had given their consent. The raiyat judgment-debtor objected and the Munsif found that the consent was not by all the landlords but by co-sharers to the extent of 15½ annas only; and made an order for the sale of that share of the holding. That order was affirmed by the lower Appellate Court.

Held—That the orders of the lower Courts were correct.

Babu Mohini Mohun Chuckerbutty for the Appellant.

Babu Priya Sanker Mojumdar for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before COXE and N. R. CHATTERJEA, JJ. APPEAL FROM ORIGINAL ORDER NO. 264 OF 1911. DIBAKAR CHATTERJEE AND OTHERS, Appellants *v.* HAZARI MUL BABU, Respondent. 13th December 1911.

Civil Procedure Code (Act V of 1908), Or. 21, r. 2—Adjustment—Estoppel against provision of law.

The Opposite Party was a decree-holder, who obtained an instalment decree against the Petitioners. Instalments were to be paid twice a year, from 1314 to 1325; and there was also a stipulation that if a certain estate, called Lat Chandrabati, was sold out of Court at an adequate price, the sale-proceeds should be paid to the decree-holder and credited against the decretal amount. The two instalments due in 1310 were not paid in full.

Held—That the meaning of the parties was, that if two instalments were not paid in full, that is to say, if any portion of those two instalments remained unpaid, the decree-holder should be entitled to execute his decree.

On default being made, the decree-holder took out execution against all the property covered by the decree and for the whole balance due to him. The judgment-debtor made no objection, but he asked that Lat Chandrabati only might be sold. This request was agreed to by the decree-holder. Lat Chandrabati was sold, and the sale-proceeds, amounting to Rs. 10,000, were credited against the decretal amount. The decree-holder then took out execution against the remaining property. The judgment-debtor objected to the execution and he said that he made those two defaults in 1310 in collusion with the decree-holder; that it was arranged between the parties that he should make those two defaults, in order to give the decree-holder an opportunity of executing his decree, so that Lat Chandrabati, instead of being sold out of Court, according to

the stipulation in the compromise, should be sold in execution.

The Subordinate Judge held that the judgment-debtor was not entitled to put forward the agreement at all; and he rejected the objection and allowed execution to proceed. The judgment-debtor appealed to the High Court.

Held—That an arrangement of this kind was an adjustment of the decree in part to the satisfaction of the decree-holder within the meaning of Or. 21, r. 2 of the Code of Civil Procedure; it was incumbent on the parties to certify it to the Court. As it was not certified it could not be recognized by Court.

Quære—Whether a mere agreement to grant time would be an adjustment within the meaning of Or. 21, r. 2 of the Code of Civil Procedure.

There could be no question of estoppel against the precise terms of a provision of the Code.

Babus Ram Chunder Mojumdar and *Karunamoy Bose* for the Appellants.

Babu Sashi Sekhar Bose for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before COXE AND N. R. CHATTERJEA, JJ. APPEALS FROM ORIGINAL ORDERS Nos. 167 and 279 OF 1908. RAMDEO PROSHAD SINGH, Appellant *v.* MUSST GOPI KOERI AND OTHERS, Respondents. 14th December 1911.

Mitakshara—Debt—Decree for mesne profits against grandfather and father—Interest, liability for—Decree-holder's remedy.

The Respondent obtained a decree against Ajodhya and Damodar, the grandfather and father respectively of the Appellant, for recovery of possession of land, with mesne profits, costs and interest. The mesne profits were subsequently ascertained and decreed in 1902 against Damodar and Ajodhya. At that time all three members of the family were in existence. The Respondent took out execution of the decree; and the case ultimately came up to High Court in appeal. The Court below had excluded certain evidence and the case was remanded in order that an opportunity might be given to the Appellan to show that the debt with respect to which execution was sought was not one for which he was liable. On remand the Court below came to the decision that the Appellant was liable and his finding was returned to the High Court.

Held—That the decree-holder was entitled to interest, as the decree was both against the father and grandfather.

That the decree-holder need not proceed first against what was the share of father and grandfather in the ancestral property at the time of the decree.

Babus Umakali Mukherjee and *Ganesh Dutt Singh* for the Appellant.

Babu Kulwant Sahai for the Respondents.

A. T. M. *Appeals dismissed.*

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE AND CARNDUFF, JJ. APPEAL FROM ORDER No. 515 OF 1911. RAJBANS SAHAY, Appellant *v.* SURJU LAL MARWARI, Respondent. 21st and 22nd December 1911.

Civil Procedure Code (Act V of 1908), sec. 104 (c)—Appeal from order—Modifying an award.

The Respondent brought a suit in the Court of the Subordinate Judge of Gaya for recovery of money due on handnotes and *bahikhatas* from the Appellant. By consent of parties the dispute was referred to three pleaders of Gaya Court for arbitration. The arbitrators gave their award in favour of the Plaintiff and also allowed him costs against the Defendant, who preferred objection to the award on various grounds alleging amongst others fraudulent suppression of facts, and misconduct on the part of the arbitrators; but all his objections were overruled excepting that the Subordinate Judge held that the arbitrators had no authority to award cost to the Plaintiff and that the award should be modified to that extent. The Subordinate Judge however himself awarded costs to the Plaintiff by the same order by which he modified the award (under sec. 13, Sch. II, C. P. C.). Against the order of the Subordinate Judge the Defendant preferred the above appeal to the High Court challenging the award on the merits. On the application of the Respondent the appeal was set down for early hearing and a preliminary objection was taken that no appeal lay from the order except as to the costs.

Held—Under sec. 104 (c), appeal only lay against the order of the Court below so far as it modified the award only, and no appeal lay against the order so far as it confirmed the award. The appeal as regards granting costs was also dismissed.

Babus Jotish Chandra Hazrah and *Debendra Nath Koer* for the Appellant.

Babus Umakali Mukherjee and *Kshetra Mohun Sen* for the Respondent.

A. T. M. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 388 OF 1906.

COXE, J.
TEUNON, J.
1911,
Heard, 27, 28
29, June.
Judgment,
11, July.

RAJA JYOTI PROSHAD SINGH DEV, Plaintiff, Appellant,
v.
GEORGE MATHEW DARBY and others, Defendants, Rspondents.

Mineral rights—Permananent tenures, grant of, if conveys underground rights—Mogali Brahmottar *grants—Proof of permanency—Original tenure split up—Character of tenancy if altered.*

When certain tenures which were described as Mogali Brahmottar *were shown to have existed since before the permanent settlement and it appeared that the same rents had always been paid for them and that they were freely transferable :*

Held—*That the tenures were at least permanent tenures.*

That it was not correct to view such tenure-holders as owners of the land subject to a rent charge.

The holder of a permanent tenure in the absence of all evidence of the terms of the lease should not be presumed to own the underground rights.

ABHIRAM *v.* SHYAMA CHARAN (9), SHYAM CHAND *v.* RAM KANAI (11), SHAMA CHURN *v.* ABHIRAM (12), MEGH LAL *v.* RAJ KUMAR (13), BROJANATH BOSE *v.* DURGA PROSAD (2), SRIRAM *v.* HARI NARAIN (14) *referred to.*

Where the original grant was that of a permanent tenure, the fact that subsequently the tenure was merely split up into more than one would not affect the permanent character of the tenancies.

UDOY CHANDRA KARJI *v.* NRIPENDRA NARAYAN BHUP (1) *distinguished.*

This was an appeal preferred on the 10th of November 1906, against the decree of Babu Gopi Krishna Banerjee, Subordi-Judge of Zillah Burdwan, dated the 6th of May 1906.

The facts of the case will appear from the judgment.

Dr. Rash Behary Ghose, Babus Mohendra Nath Roy and *Lalit Mohun Ghose* for the Appellant.

Messrs. S. P. Sinha, B. Chuckerbutty, Babus Umakali Mukherjee and *Joy Gopal Ghose* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The case for the Plaintiff was that the village in suit was a *mal* village of his zemindari which was held by Defendants Nos. 5 to 35 as ordinary tenants. They leased it to the Defendants Nos. 2 to 4, who again leased it to the Defendant No. 1, the Lachipur Coal Company. It was contended that the mineral rights did not belong to the tenants but remained in the Plaintiff and therefore this suit was brought in which the relief claimed was, generally that the Plaintiff's rights to the minerals, &c., should be declared and that the Defendants should be prevented from exercising any such rights. The defence is briefly that the village is a *mogali brahmottar* village given to the predecessors of the Defendants long before the permanent settlement and that the mineral rights belonged to the *brahmottardar.*

(1) I. L. R. 36 Cal. 287 : s. c. 13 C. W. N. 410 (1909).

(2) I. L. R. 34 Cal. 753 : s. c. 12 C. W. N. 198 (1907).

(9) I. L. R. 36 Cal. 1003 : s. c. 14 C. W. N. 1 (1909).

(11) 15 C. W. N. 417 (1911).

(12) I. L. R. 33 Cal. 511 : s. c. 10 C. W. N. 738 (1906).

(13) I. L. R. 34 Cal. 358 : s. c. 11 C. W. N. 527 (1906).

(14) I. L. R. 33 Cal. 54 : s. c. 10 C. W. N. 425 (1905).

RAJA JYOTI PROSHAD SINGH DEV *v.* GEORGE MATHEW DARBY.

The suit was dismissed by the learned Subordinate Judge and the Plaintiff appeals.

The two principal points for decision are whether the *brahmottardars* are at least permanent tenure-holders and, secondly, whether, if so, the mineral rights belong to them or to the Rajah of Pachete, the Plaintiff in the case.

The learned Vakil for the Appellant lays great stress on the evidence that the rent has varied. It cannot be disputed that the land was granted to the Brahmins before the permanent settlement. It seems to us to be of little importance whether there were originally three grants or one. If there was originally one grant, it was certainly divided into three before the memory of any of the witnesses. But this would not in any way affect the permanent character of the tenancies. The case of *Udoy Chandra Karji* v. *Nripendra Narayan Bhup* (1) to which reference has been made proceeded on the special wording of sec. 50 of the Tenancy Act and can have no application to a tenancy which had been divided long before that enactment. Nor is this a case to which sec. 50 can have any application. Nor do we think the fact that the Brahmins pleaded in certain rent suits that the rent had been split up of any importance. The vital point for decision is whether a permanent tenure was given to the Brahmins and it makes little or no difference whether the whole village was originally given by one grant or lease or by three.

The first piece of evidence on which the Respondent relies to prove variation of the rent is Ex. 1 filed by the defence. This was a statement filed by the then Rajah in 1197 (1790—91) showing the villages and their *jamas* in his chakla. This showed 27 *mal*, 12 *talabi debutter*, 45 *talabi brahmottar* and some other villages. Against Panchgechia, the village in suit, the jama is shown as Rs. 25-2-0. It is argued that this is the rental due to the Rajah from the villagers. This argument is grounded on the facts that the Rajah has only been able to recover Rs. 14-12 as rent from Nowdiha, a village appearing in Ex. 1 a little below Panchgechia with a jama of Rs. 14-12-0; and, secondly, on a statement by one of the Brahmins, Ramdhan Misra, to the effect that as the Rajah had filed the paper himself it must represent the actual rents of the village. It seems to us, however, that there can be no doubt that the jama mentioned is the revenue payable to Government. The Appellant has by consent filed three other papers, a *goshwara* of 1201 (1794—95) filed by the Rajah, revenue sale-proclamation of 1797 and a Civil Court sale-proclamation of 1807. The first two show the sadar jama, that is to say, the Government revenue of Panchgechia to be Rs. 26-3-15; and clearly this could not be so if the rent receivable from the tenants was only Rs. 25-2-0. The rent of Rs. 14-12-0 decreed with respect to Nowdiha must probably be due to some mistake, while as to the statement of Ramdhan Misra, it is clear that his opinion as to what these papers show is quite valueless.

The three papers above referred to show however that the rents received by the Rajah from the villages amounted in the case of Panchgechia to Rs. 39-3-10 and it is urged that this at any rate shows that the rent, which is now Rs. 60-14-0, has been altered. But we are unable to accept this argument. The statements relate to nearly 100 villages in Pargana Shergarh but, throughout, the sadar jama bears a steady

(1) I. L. R. 36 Cal. 287 : s. c. 13 C. W. N. 410 (1909).

RAJA JYOTI PROSHAD SINGH DEV *v.* GEORGE MATHEW DARBY.

proportion of two-thirds to the rental, with inconsiderable variations of a few annas. This shows beyond doubt that there is some definite relation between the figures of the two columns. And as the rental cannot possibly have been assessed according to the Government revenue it follows either that the revenue was assessed on the rental, or that the column of the rental was filled up so as to correspond with the revenue without any regard for the actual facts. The first supposition is obviously the most probable and it follows that as the Government revenue, for which the Rajah would be responsible, bore a direct proportion to the rental, the Rajah had the strongest inducements to estimate the latter as low as possible. In these circumstances it seems to us impossible to hold that these statements by the Rajah are conclusive evidence against the Brahmins, who had nothing to do with them, of the rent then payable by them. Another document on which reliance is placed is a *thoka*, said to be of 1218. This is a loose page of zemindari accounts showing the rent due from the 6 annas share which is said to be the share of Moniram Upadhya. This document does not appear to us convincing. It purports to be signed at the top righthand corner by Moniram. But the whole body of the document seems to be in the same handwriting, including an agreement by one Sobharam to pay a part of the rent due; though why the tenant should write his landlord's account is by no means apparent. There is no other evidence worthy of detailed consideration to show that the rent has varied.

It is however for the Defendants to show that the rent has not varied and their evidence on this point must be considered. Their case is that the tenure is divided into three parts, *viz.*, the seven annas with a rental of Rs. 24-6-0, the six annas with one of Rs. 31-8-0 and the three annas with one of Rs. 5. As regards the rental of the 6 annas they rely on a receipt of 1817, and another of 1825 which show the rent to be Rs. 29-9-0, a sum which would in the present coinage amount to Rs. 31-8-6. The first receipt may not be of much value but the second seems to us a trustworthy document. It purports to be granted by a *krok sazawall*; that is to say, a revenue-officer in the position probably of a nazir or bailiff placed in charge of an estate when it was under attachment or sequestration for default in payment of revenue. There are three witnesses and the appearance of the document is in its favour. The learned Subordinate Judge has accepted this document as trustworthy and we think rightly.

As regards the seven annas share the Defendants rely principally on an old judgment of 1808. This is a copy produced by the Defendants which bears undecipherable seals and is dropping to pieces. It is argued that it is not shown to be a certified copy and that no attempt has been made to produce the original. It appears from the judgment in *Brojanath Bose* v. *Durga Prosad Singh* (2) that no old records of the District of Manbhum are extant and we do not think that the absence of the original is fatal. The Subordinate Judge did not believe that this document was forged and we think he was right. The document shows that the rent of the 7 annas was 22-8-0 sicca or Rs. 24 in currency, that 26 had been paid and that the tenants of the 7 annas were entitled to a refund of 3-8-0. It is suggested that this document and Ex.

(2) I. L. R. 34 Cal. 753 at p 775: s. c. 12 C. W. N. 193 (1907).

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K, above referred to, even if genuine may be and probably were records of collusive transactions intended to create evidence. There is nothing however to show that the Defendants were under any necessity to create evidence until more than half a century later.

As regards the 3 annas share there is no old evidence on either side except the *thoka* of 1218 to which we have referred.

It cannot be disputed that in 1879 the above rents of 24-6-0 and 31-8-0 and 5 were definitely raised in a suit between the parties and accepted by the Munsif, and that since then the same rents have been paid. That gives a period of 23 years before the cause of action in this suit during which the Plaintiff has apparently been compelled to acquiesce in these rents. If he were now to bring a suit under the Tenancy Act for an enhancement of rent, sec. 50 of the Act would render it almost impossible for him to succeed. That section does not, of course, apply to a suit like the present, which is not under the Act, but the conduct of the Plaintiff in allowing his right of enhancement under the Tenancy Act to be extinguished for all the practical purposes of that Act, justifies the inference that he knew that that supposed right had no real existence or in other words that the rent was fixed in perpetuity.

Although much evidence has been given, that described above appears to us to be all that has much probative force on the question whether the rent has varied, and on it we feel no doubt that the rent has always been the same.

It is not disputed that the interest of the Brahmins has been transferable. They have dealt with it as their own and their transferees have been recognised by the landlord. This fact too is a strong indication that the tenures are permanent.

Taking these facts into consideration, namely, that the tenures are described as *mogali brahmottar*, that they have existed since before the permanent settlement, that the rents have always been the same, and that the tenures are freely transferable, we have no doubt that the Brahmins were at least permanent tenure-holders. This being so the next question that arises is whether they are entitled to the mineral rights. It appears to be well-settled in England that a tenant for life or for years has no right to work unopened mines, *Clegg* v. *Rowland* (3), *Campbell* v. *Wardlaw* (4); and this despite the case of *Messrs. Gordon, Stuart & Co.* v. *Tikaituni Scoba Koware* (5) has been accepted as good law in India in *Prince Md. Buktyar Shah* v. *Rani Dhojamoni* (6). See also *Titu-ram Mukerjee* v. *Cohen* (7). The question remains whether the position of a tenant in perpetuity is any better in this respect than that of a tenant for life or for years. It was held in *Kallydas* v. *Monmohini* (8) that the landlord continues to have a reversion in the property and this was cited with approval in *Abhiram* v. *Shyama Charan* (9). Nor does the fact that the tenure would escheat to the Crown in default of heirs [*Sonet Kooer* v. *Himmut Bahadoor* (10)] really negative the supposition that such a reversion subsists. If this is so it is difficult to see why there should be any difference in principle

(3) L. R. 2 Eq. 160 (1866).
(4) 8 A. C. 641 (1883).
(5) [1864] W. R. 370.
(6) 2 C. L. J. 20 (1905).
(7) I. L. R. 33 Cal. 303 : s. c. 9 C. W. N. 1073 (1905).
(8) I. L. R. 24 Cal. 440 (1897).
(9) I. L. R. 36 Cal. 1003 : s. c. 14 C. W. N. 1 (1909).
(10) I. L. R. 1 Cal. 391 (1876).

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between the lessee for years and the lessee in perpetuity, when nothing is known or can be inferred about the intentions of the parties at the time of the inception of the lease. If the opening and working of new mines in the case of a lessee for years is waste, it would seem to be the same ultimately in the case of a lease in perpetuity, though the injury is more distant. In either case the tenant might destroy the whole subject of the tenancy so that when the landlord came to sell it for arrears of rent, he might find that there was nothing to sell. It has been argued that the effect of *Abhiram* v. *Shyama Charan* (9) has been weakened by the decision in *Shyam Chand* v. *Ram Kanai* (11), but the former case is still binding upon us. Reliance has been placed on the decisions in *Shama Churn* v. *Abhiram* (12), *Megh Lal* v. *Raj Kumar* (13) and *Brajanath* v. *Durga Prosad* (2). The first case does not help the Respondents much. It contains an observation, rather than a considered opinion, that a permanent lease, including "all rights of various kinds" would transfer minerals. There are no words of that kind here and the decision was reversed on appeal though on other grounds. In the next case it was held that a permanent lease of land *mai huq haquq* would transfer the minerals. This is much more in the Respondents' favour, as the vague and general words *mai huq haquq* add really but little to the effect of the lease. Still there is nothing here but a permanent tenure without those words or any words, and therefore the case is not really a decisive authority. In the third case it was held that certain Digwars were permanent tenants, and therefore were entitled to the mineral rights in the absence of express reservation. This case no doubt goes the whole length of the Rospondents' contention but we are informed that it is under appeal. Moreover the learned Judges relied principally on the decision in *Sriram* v. *Hari Narain* (14), which has now been reversed on appeal to the Privy Council.

It has been argued that the Brahmins are more than tenure-holders, that they are absolute owners subject to a rent charge, that the transfer to them was not a lease but gift burdened with a condition such as the Hindu law recognises. The distinction seems to us too fine to be appreciated. We know nothing as to what the intentions of the parties were at the inception of the tenancy. But in times within our knowledge they have been treated as tenants and sued for rent and cesses, and here apparently made no objection.

A great deal of evidence has been given to show that other persons in the position of the Defendants have been dealing with the mineral rights as their own, without apparently any objection by the Rajah. This evidence is open to the obvious objection that we do not know exactly what the position of the executants of these sales and leases was. It may conceivably be the case that they had *sanads*, which showed that all the rights in the land had been transferred to them. Still no doubt this mass of evidence cannot

(2) I. L. R. 34 Cal. 753 : s. c. 12 C. W. N. 193 (1907).
(9) I. L. R. 36 Cal. 1003 : s. c. 14 C. W. N. 1 (1909).
(11) 15 C. W. N. 417 (1911).
(12) I. L. R. 33 Cal. 511 : s. c. 10 C. W. N. 738 (1906).
(13) I. L. R. 34 Cal. 358 : s. c. 11 C. W. N. 527 (1906).
(14) I. L. R. 33 Cal. 54 : s. c. 10 C. W. N. 425 (1905).

be put aside so easily. It is not likely that many holders of *brahmottar* villages are in a better position than the Defendants in this suit with regard to the possession of title-deeds, while it does seem clear that many of them have been dealing freely with the underground rights, and some of the leases go back to 1860 and one to 1858. This undoubtedly gives the impression that the *brahmottardars* generally have been dealing with the underground rights but it is impossible to base a definite conclusion on an impression of this nature. Even in Panchgechia, where the evidence of such transactions goes back to 1880, the Sub-Judge finds that although the Defendants from time to time gave leases to speculators in coal the enforcement of the leases was too casual and intermittent to justify an inference of adverse possession with sufficient continuity and publicity. We do not know in how many other cases the state of affairs might be found to be the same and it may be that in most of the villages covered by the leases, etc., it may still be open to the Rajah to claim the underground rights. Accepting therefore the fact that the *brahmottardars* of the villages of the zemindari have been dealing with the mineral rights as their own for some time, we do not think that in reality that fact greatly affects the question of law that we have to decide, namely, whether the holder of a permanent tenure in the absence of all evidence of the terms of the lease should be presumed to own the underground rights.

It appears from the evidence of Haradhan Sarkar that in 1877 the then Rajah of Pachete bought the subsoil rights in the village of Kultara from certain *mokuraridars* under the holders of the village. The witness says that a quarter of the village was *mal* and three quarters *bhatottar*. It is urged that *bhatottar* land stands in exactly the same position as *brahmottar* land, a Bhat being a species of Brahmin. It is argued therefore that this purchase amounts to an admission that the mineral rights belong to the Brahmin tenants. But here too we do not know if the Bhats had any *sanad*, showing what had been leased to them. The village Kultara does not appear in the *goshwara* papers and the argument rests on the unfounded assumption that every tenancy of a Brahmin in the Pachete Raj is necessarily of the same nature and extent. Moreover the question whether permanent tenants without written leases are entitled to the minerals is a point of law quite doubtful enough to take all value out of the admission. Even if it be held that the minerals belonged to the Rajah, he might very prudently have fortified himself by a purchase of whatever rights the tenants might have.

On the other hand, it appears from Ex. I that in 1858 the Bengal Coal Co. executed an agreement in favour of the Assistant Commissioner at Purulia agreeing to pay rent for their coal land. Apparently the Pachete Estate had then come under the management of Government. This is evidence, so far as it goes, that the landlord was also recognised as having the right to dispose of the minerals: and probably the fact is that the Coal Co. thought it prudent to take settlement from both sides.

It has been faintly argued that the Pachete Raj is impartible and that at the time that these tenures were granted it was generally understood that an owner of an impartible estate could not alienate. But it is not proved that the estate is

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impartible [*Anand Lal* v. *Gurood Narain* (15)], and it is impossible to contest the alienation on that ground when it is clear that more than 50 villages in a single Pargana were alienated in this way in the 18th century, and the validity of the alienations has never been questioned.

It appears to us that the mineral rights must be regarded as the property of the Rajah. The appeal will accordingly be allowed. The Plaintiff will get a decree declaring his title to the mineral rights and for an injunction restraining the Defendants from working mines in Panchgechia. He will be entitled to his costs of both Courts.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 221 OF 1909.

COXE, J.
TEUNON, J.
1911,
Heard, 27, July.
Judgment, 18, August.

KEDAR NATH SAMANTA, Defendant, Appellant,
v.
MANU BIBI and others, Respondents.

Specific performance of contract—Contract executed in exercise of power given by will—Will found false—Enforcement against executant as heir—Delay in suing, not amounting to waiver or acquiescence, if bar to relief.

The widow of the deceased owner jointly with another who as executor had obtained probate of a will alleged to have been left by the deceased executed an agreement for sale of land, the widow purporting thereby to exercise a power given by the will to assent to conveyances executed by the executor. The probate subsequently having been revoked,

Held—***That the contract was specifically enforceable against the widow to the extent of her interest.***

HORROCKS *v.* RIGBY (1) *relied on.*

Delay which did not amount to waiver, abandonment or acquiescence and in no way altered the position of the Defendant did not disentitle the Plaintiff to sue for specific performance.

KISSEN GOPAL SADANEY *v.* KALI PROSONNO SETT (2) *followed.*

MOKUND LAL *v.* CHOTAY LAL (3) *referred to.*

In the special circumstances of the case specific performance of the contract was refused.

This was an appeal preferred on the 20th of May 1909, against the decree of Babu Sri Hari Lahiri, Additional Subordinate Judge of Zillah Hughly, dated the 29th of April 1909.

The material facts of the case will appear from the judgment.

Dr. Rash Behary Ghose, *Babus Dwarka Nath Mitra* and *Bijoy Kumar Bhattacharyya* for the Appellant.

Mr. B. C. Mitter, *Babus Joy Gopal Ghose* and *Provas Chandra Mitra* for the Respondents.

The JUDGMENTS OF THE COURT were as follows:—

COXE, J.—This appeal arises out of a suit for the specific performance of a contract to sell certain land and buildings for Rs. 2,500. The contract was executed on the 19th February 1905 by the 1st and 2nd Defendants. The 1st Defendant is the widow of one Madhab Ghose and the 2nd Defendant was named as executor in a will said to have been made by Madhab

(15) 5 Moo. I. A. 103 (1853).

(1) 9 Ch. D. 180 (1878).
(2) I. L. R. 33 Cal. 633 (1905).
(3) I. L. R. 10 Cal. 1061 (1884).

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Ghose, of which at the time of the contract the 2nd Defendant had obtained probate. The probate however was subsequently revoked. It is said that on the 1st April the Plaintiff paid Rs. 12 to have the document registered and Rs. 20 to a pleader to identify the 1st Defendant. The sum of Rs. 20 however was returned and it was said that the document could not be registered on the 1st April for want of time; and before it could be registered the 1st Defendant on the 3rd April executed a registered conveyance of the property in favour of the 4th Defendant, who is the servant and is said to be the *benamdar* of the 3rd Defendant. The Subordinate Judge has accepted the Plaintiff's evidence of payment of Rs. 1,551 and has given a decree directing that the 1st Defendant shall execute a conveyance in his favour on his depositing Rs. 949 the balance of the purchase-money. The Defendant No. 4 appeals. It is perfectly clear however that the 3rd Defendant is really the contesting Defendant and Appellant in this case and that the 4th Denfendant is a mere name. The learned Vakil for the Appellant also informs us that he does not urge that he had no notice of the Plaintiff's contract. The only point therefore that has to be decided is whether the nature of the contract is such that it ought to be specifically enforced.

The first point taken is that as this contract was executed by both Defendants, and was executed by the 1st Defendant as exercising the power given to her by the will to assent to a conveyance by the executor, it cannot be enforced against her as the widow of a Hindu intestate. But it seems to us perfectly clear that this contention cannot prevail and that if the contract ought to be specifically performed, it can be enforced against her to the extent of her interest. There is no case exactly in point, but that of *Horrocks* v. *Rigby* (1) quoted in Fry on Specific Performance certainly lends support to this view, and reference may also be made to sec. 15 of the Specific Relief Act, 1877.

Next it is argued that the Plaintiff is disentitled to specific performance by reason of his delay. But it is quite evident that there has been nothing in his conduct that could possibly be regarded as evidence of waiver, abandonment, or acquiescence and that the Defendant's position has been in no way altered by the delay. That being so, we think, that the delay is immaterial, following *Kissen Gopal Sadaney* v. *Kali Prosonno Sett* (2) cited by learned Counsel for the Respondent. The decision in *Mokund Lal* v. *Chotay Lal* (3) on which reliance is placed for the Appellant is not in our opinion inconsistent with this view.

Next it is urged that a certain alteration in the agreement was fraudulently interpolated and is fatal to the agreement. The alteration consists of the words 'or severally' in the covenant that the executants will jointly or severally execute a conveyance. The words have been added between the lines and do not appear in the draft of the agreement. The witness, Naresh chandra Mitra, a pleader of the Alipur District Court, however swears that these words were inserted before the execution of the document, and the learned Subordinate Judge evidently regards him as quite a trustworthy witness. This being so we are not prepared to differ from the learned Subordinate Judge's view of the matter.

But with regard to the payment of the

(1) 9 Ch. D. 180 (1878).
(2) I. L. R. 33 Cal. 633 (1905).
(3) I. L. R. 10 Cal. 1061 (1884).

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sum of Rs. 1,500 out of the consideration, we are not prepared to agree with the learned Subordinate Judge. This payment is not supported by the evidence of Nares Mitra and it appears to us quite irreconcilable with the Plaintiff's deposition in the criminal case, which followed after the execution of the Defendant's *kobala*. It is not likely that the Plaintiff would be willing to advance so large a sum before the execution of the conveyance and on the whole evidence we feel no doubt that this money was never paid.

The only point that remains is whether the contract should be specifically enforced under the circumstances of the case. It was suggested at the close of the argument that the first Defendant, being a *purdanashin* woman, was entitled to special protection. In my opinion this point ought not to be allowed now. It was never suggested in the pleadings, the issues, or the grounds of appeal, nor was any argument upon it addressed to us in the course of the opening speech of the learned Vakil for the Appellant. The first Defendant has not appealed and the Appellant's defence in the former suit was that she had plenty of well-wishers and advisers. Moreover in the former suit the 1st Defendant was financed and supported by the Plaintiff. No doubt this assistance was not disinterested but when the 1st Defendant accepted his assistance in her suit knowing that that assistance was given on the ground of her contract with him, she is hardly entitled now to plead that that contract was not explained to her. Nor indeed is there any reason to suppose that she desires to raise any such plea. That being so, it seems to me unjust to allow the Appellant to raise it at the eleventh hour for his own benefit.

At the same time I am inclined, though with some hesitation, to agree with the view which is strongly held by my learned brother that the contract ought not to be specifically enforced. There can be no doubt that the 1st Defendant was in the greatest straits when she made it and although the evidence of the value of the land seems to me too indefinite to justify a decided conclusion that the consideration was inadequate, yet it is difficult to believe that the sum of Rs. 2,500 is a fair price for 35 bighas of land with two houses in Howrah. And the false plea of the Plaintiff that he had paid Rs. 1,500 disentitles him to any consideration. I agree, therefore, that the appeal should succeed and accordingly it will be decreed and the suit dismissed, the parties bearing their own costs throughout.

TEUNON, J.—In so far as the first four points taken in this appeal are concerned it is unnecessary for me to add anything to the judgment delivered by my learned brother.

On the remaining question whether in the circumstances of the case the contract should be specifically enforced it is to be observed that the Plaintiff admits and indeed comes into Court with the assertion that the Defendant No. 1 is a *purdanishin* lady. That being so, even in the absence of any specific issue, on the general issue now under consideration it was in my opinion incumbent upon the Plaintiff to give strict proof of good faith and to show that in the transaction he seeks to enforce, the widow had competent and independent advice, and that the terms of the bargain are fair and equitable. Now the husband of Defendant No. 1 had died in May 1904 and on the 19th of February 1905 when the agreement on which the Plaintiff relies was executed all the properties left by the hus-

band were under attachment in two suits brought against the widow. The claims in these two suits amounted to some Rs. 8,000. One, it appears, having been originally disposed of *ex parte* has been revived and is still pending. The other was found to be false and vexatious and has been finally dismissed.

The agreement recites the difficulties in which the widow was placed, states that by reason of the suits no one can be found to purchase the properties or any portion thereof at a fair price, and that being thus helpless she in order to defray the expenses of the litigation and for the benefit of her husband's estate agrees to sell the whole of it to the Plaintiff for the sum of Rs. 2,500.

In such circumstances it was in my opinion essential that any one dealing with this widow should satisfy himself and show that she had taken competent advice both as to the manner in which she should meet the suits and also as to the provident character of the arrangement she proposed to enter into. But the evidence shows that while the Plaintiff had the advice and the assistance of a learned pleader of the Alipur Bar this illiterate or semi-illiterate *purdanishin* widow, then under the influence of Defendant No. 2, was left to rely upon the advice of this layman who it has been shown was not a faithful or loyal guardian of her interests.

When we next proceed to enquire into the prudence of the arrangement she was making we find that while professedly seeking to save the estate of her husband she sells the whole of it, and even the burden of defending the pending suits is not undertaken by the purchaser but is thrown upon the widow.

The estate proposed to be sold consists of some 35 bighas mainly garden or orchard land situate in Sulkea, a suburb of Howrah. On two of the plots stand pucca buildings and some 20 bighas constitute lakheraj or rent-free holdings. Defendant No. 4 swears that the land is worth Rs. 10,000 and that a portion has been sold for Rs. 3,000. There is no rebutting evidence and it is significant that Plaintiff whose own garden adjoins one of the plots finds himself compelled to say that he knows nothing of the value of land in Sulkea or of this land in particular. He made, he says, no inquiries about the price obtainable for these properties in the open market and has not even now ascertained their true value. This evidence coupled with the recitals in the agreement leaves no doubt that the consideration offered by the Plaintiff is grossly inadequate.

I am thus satisfied that in the transaction which he seeks to enforce the Plaintiff-Respondent was not acting in good faith and took improper and undue advantage of the difficulties of the 1st Defendant.

Moreover he has come into Court with the false allegation that he has paid the bulk of the purchase-money.

For these reasons I am of opinion that the contract set up by the Plaintiff is not one which should be specifically enforced in his favour and further that he is not entitled to the refund of the Rs. 51 actually paid and I therefore agree in the order proposed by my learned brother.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2897 OF 1909.

CHATTERJEE, J. N. R. CHATTERJEA, J. 1911, Heard, 4, July. Judgment, 20, July.	SHAIKH SAMARADDI, Defendant No. 1, Appellant, *v.* SHYAMA CHURN SEN and ors., Plaintiffs, Respondents.

Joint property, exclusive possession by a co-sharer—Where possession wrongful at its inception, co-sharers if may recover joint possession.

The Defendant was in wrongful occupation as a tenant of a plot of land belonging to the Plaintiffs and other co-sharers. Subsequently the Defendant purchased the share of one of these co-sharers and thus became interested in the land as a proprietor. In a suit by his co-sharers for joint possession of the land in suit,

Held—*That the Plaintiff's occupation being originally wrongful the subsequent acquisition of joint title did not entitle the Defendant to resist the Plaintiff's claim for joint possession.*

WATSON & CO. *v.* RAM CHUND DUTT (1) *distinguished.*

This was an appeal preferred on the 3rd of December 1909, against the decree of Babu Umesh Chandra Sen, Subordinate Judge of Zillah Dacca, dated the 8th of September 1909, confirming the decree of Babu Bepin Behary Das Gupta, Munsif at Naraingunge, dated the 1st of March 1909.

The facts of the case will appear from the judgment.

Babu Jyotish Chandra Sarkar for the Appellant.

Babu Surendra Chandra Sen for the Respondents.

(1) I. L. R. 18 Cal. 10 (1890).

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit by the Plaintiffs to recover joint possession of a small plot of land which originally formed part of the bed of a tank. Some of the Defendants held a jote as tenants under the Plaintiffs and their co-sharers, and they encroached upon the land in dispute in 1306, B. S., and it is found that they did so notwithstanding the protests of the owners. The Plaintiffs are the owners of 15 as. 17½ gundas and 3¾ krantis share. The Defendant No. 1 in 1312 acquired a very small share (2¼ gs. and ¼ kt.) of the taluk to which the disputed land appertains. He did not deny the title of the Plaintiffs in the present suit but pleaded that he has been in occupation of the land only since his purchase of the share of the taluk and that as he is a co sharer the Plaintiffs cannot obtain *ijmali* possession. Both the Courts below have found that the Defendant No. 1 did not come into possession of the land for the first time since he became co-owner as pleaded by him but that he and the other Defendants had encroached upon the lands long before he became a co-owner, and decreed the suit. The Defendant No. 1 has appealed to this Court.

Upon the findings arrived at it must be held that the Defendants were holding the lands as trespassers until the Defendant No. 1 purchased the share of the taluk in 1312. They were in possession for only 6 years before 1312 and therefore could not have acquired the right of a tenant by prescription. Nor could they force themselves upon the landlord as tenants against the wishes of the landlords. The Defendants do not claim the land as tenants. Their possession at its inception was wrongful, and having regard to the finding that they took possession not-

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withstanding the protests on the part of the owners, their possession must be taken to have been in denial of the title of the owners. The question is whether under these circumstances the Defendant No. 1 can resist joint possession on the part of the Plaintiffs merely because he has now acquired a small share in the taluk. The learned pleader for the Appellant has contended on the authority of the case of *Watson & Co.* v. *Ram Chund Dutt* (1), that as he is a co-sharer in occupation of the land without denial of the Plaintiff's title, the Plaintiffs are not entitled to joint possession: We think, however, that, that case is distinguishable from the present case. In that case Watson & Co. were in rightful possession of the lands as tenants under leases from all the co-owners. After the expiry of the leases granted by some of the co-owners (the Plaintiffs in that case) they went on cultivating indigo on the *khas* lands as they had been doing during the continuance of all the leases. The Plaintiffs who were co-owners gave notice and attempted to enter upon the land to carry on operations inconsistent with the work already being carried on by Messrs. Watson & Co., and were resisted and prevented by them from such attempted entry. It was held by their Lordships of the Privy Council that the Plaintiffs were not entitled to a decree for joint possession or for injunction because the "resistance was made by the co-sharer in occupation simply with the object of protecting himself in the profitable enjoyment of the land in good husbandry and not in denial of the other's title." They also held that "where land was held in common between the parties and one of them was in the act of cultivating a part of the land, which was not actually used by the other, it would not be consistent with the rule of justice, equity and good conscience to restrain the former from proceeding with his proper cultivation."

In the present case there was no peaceful taking of possession by a co-sharer. The Defendants took wrongful possession as trespassers notwithstanding the protests of the Plaintiffs and their co-sharers, and want to retain it because the Defendant No. 1 has subsequently become a co-sharer. The Plaintiffs could undoubtedly have turned out the Defendants from the land had the suit been brought before the Defendant No. 1 became a co-owner. Under the circumstances would it be consistent with the principles of justice, equity and good conscience to allow the Defendants to keep the Plaintiffs out of joint possession? We think not. Had the Defendant No. 1 taken possession of the land peacefully after he had become a co-sharer as pleaded by him the case would have fallen within the principle of the case of *Watson & Co.* v. *Ram Chund Dutt* (1). As it is, we are unable to hold that the decrees of the Courts below awarding joint possession to the Plaintiffs are wrong and we accordingly dismiss the appeal with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 563 OF 1909.

MOOKERJEE, J.
CARNDUFF, J.
1911,
17, May.

ABDULLAH, Plaintiff, Appellant,
v.
KUNJ BEHARI LAL and others, Defendants, Respondents.

Evidence Act (I of 1872), secs. 11, 13, 32, cls.

(1) I. L. R. 18 Cal. 10 (1890).

ABDULLAH *v.* KUNJ BEHARI LAL.

(2) *and* (3)—*Deeds not* inter partes, *admissibility —Description of boundaries in sales and mortgages of adjoining plots—Statements against pecuniary interest.*

In a suit to eject the Defendants as trespassers, the latter set up title as tenants in occupation of the land :

Held—That recitals of boundaries in deeds of sales and mortgages executed by owners of adjoining plots of land and describing the disputed land as the tenanted land of the Defendants or their predecessors were relevant under sec. 32 (3) of the Evidence Act, though not under sec. 32 (2) or 11, or 13 of that Act.

SHEONANDAN SINGH *v.* JEONANDAN DUSADH (1), NINGAWA *v.* BHARMAPPA (2), HAJI BIBI *v.* AGA KHAN (4), ABDUL AZIZ *v.* EBRAHIM (5) *referred to.*

This was an appeal preferred on the 6th of April 1909, against the decree of Mr. A. Mellor, District Judge of Zillah Durbhanga, dated the 3rd of February 1909, reversing that of Babu Thakur Dayal, Additional Munsif of Samastipur, dated the 27th of April 1908.

The material facts will appear from the judgment.

Moulvi Mahomed Yusuf, Babus Dwarka Nath Mitter and *Moulvi Mahomed Mustafa Khan* for the Appellant.

Babus Umakali Mukherjee, Shoroshi Charan Mitter, Jotindra Nath Bose and *Chandra Sekhar Banerjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal on behalf of the Plaintiff in an action in ejectment. The case for the Plaintiff is that the Defendants are trespassers and are consequently liable to be ejected. The claim is resisted on the ground that the Defendants have an occupancy tenancy in respect of the disputed land and are not liable to be ejected so long as that tenancy continues in operation.

The Court of first instance negatived the defence and decreed the suit. Upon appeal the District Judge has reversed that decision. He has found upon the evidence that the second Defendant is an occupancy tenant of the land in suit and is therefore not liable to be ejected.

The Plaintiff has now appealed to this Court and on his behalf the decision of the District Judge has been assailed as erroneous in law because founded upon evidence not legally admissible against the Appellant. This evidence consists of recitals in four documents, namely, first, a deed of sale executed on the 15th January 1856 by the proprietor of the land towards the east of the disputed land in which he described the western boundary of his parcel as the tenanted land of the predecessor of the present second Defendant, Gopal Tewari : secondly, a mortgage deed executed on the 21st November 1892 in which the proprietor of the land towards the east and south of the disputed land described the western and northern boundaries of his parcel as the tenanted land of Gopal Tewari : thirdly, a conveyance executed on the 4th July 1903 by the proprietor of the land towards the north of the disputed land in which he described the southern boundary of his parcel as the tenanted land of Gopal Tewari : and, fourthly, a conveyance dated the 1st September 1862 which contains a similar recital. The District Judge has found

(1) 13 C. W. N. 71 (1908).
(2) I. L. R. 23 Bom. 63 (1897).
(4) 11 Bom. L. R. 409 (1908).
(5) I. L. R. 31 Cal. 965 (1904).

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that these documents are genuine and he has relied upon these statements in support of the allegation of the Defendants that Gopal Tewari was in possession of the disputed land as tenant in respect thereof from 1856 to 1903. On behalf of the Plaintiff it has been argued that he is not a party to any of these deeds and that consequently the statements in question are not admissible in evidence as against him. On behalf of the Defendants-Respondents reliance has been placed upon secs. 11, 13, 32, cl. (2) and 32, cl. (3) in support of contention that the statements in question are admissible in evidence.

In so far as sec. 11 is concerned, we are clearly of opinion that it does not assist the Respondents. Stress is laid mainly upon the second clause of sec. 11 which provides that facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. Now the fact that the proprietor of a neighbouring piece of land in describing the boundary of his parcel stated that the land of Gopal Tewari was situated on that boundary is not relevant for the purposes of the present litigation. The Respondents cannot succeed unless they get the statement itself admitted in evidence, the mere circumstance that the statement was made would not be sufficient for their purpose. Consequently sec. 11 of the Indian Evidence Act is of no avail to the Respondents.

In so far as sec. 13 is concerned the Respondents are in a similar difficulty. That section provides as follows : "Where the question is as to the existence of any right or custom, the following facts are relevant :—

"(*a*) Any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence :

"(*b*) Particular circumstances in which the right or custom was claimed, recognised, or exercised, or in which its exercise was disputed, asserted or departed from."

Here the transactions evidenced by the four deeds mentioned were in respect of lands other than the land now in dispute. Consequently it cannot be suggested that there was any transaction or particular instance by or in which the right now in question was claimed, recognised, asserted or denied. Sec. 13, therefore, is of no avail to the Respondents.

The Respodents finally fall back upon the provisions of sec. 32. Here reference is made in the alternative to cls. (2) and (3) Now cl. (2) provides that when a statement has been made by a person of the character described in the opening sentence of that section in the ordinary course of business it is admissible in evidence. It has been contended that when a vendor executes a deed of sale or a mortgagor executes a deed of mortgage he is bound to describe the boundaries of the land transferred and that consequently when he describes the boundaries he may be taken to have made a statement in the ordinary course of business. This interpretation of the expression "in the ordinary course of business" is however opposed to the decision of this Court in *Sheonandan Singh* v. *Jeonandan Dusadh* (1), where the learned Judges followed the view accepted in the case of *Ningawa* v. *Bharmappa* (2). As at present advised, we see no reason to dissent from the view adopted in the cases just mentioned. We must

(1) 13 C. W. N. 71 (1908).
(2) I. L. R. 23 Bom. 63 (1897).

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consequently hold that the statement in question does not fall within cl. (2) of sec. 32 of the Indian Evidence Act. The question now arises whether cl. (3) is comprehensive enough to cover the present case. That clause provides that when a statement is against the pecuniary or proprietary interest of the person making it, it is admissible in evidence. It has been argued that this clause does not cover the statements in question, because they were made by persons who were in no way concerned with the land now in dispute and that consequently it was immaterial for those persons to know who was in occupation as tenant of the land stated to be lying on the boundary of the lands conveyed or mortgaged. In our opinion this contention is not well-founded. As pointed out by Sir Richard Couch in the case of *Raja Leelanund Singh* v. *Lukhpattee Thakoorain* (3) the statement must be taken as a whole. Now the statement in these deeds that the transferrer was owner of the land conveyed or mortgaged and that he was either extinguishing his interest in the land by an absolute sale or placing a restriction or it by way of a mortgage, was undoubtedly one against the pecuniary or proprietary interest of the person making it. Consequently the statement as a whole would be admissible in evidence. This view is supported by the case of *Ningawa* v. *Bharmappa* (2) which was accepted as good law in *Haji Bibi* v. *Aga Khan* (4). The case of *Abdul Aziz* v. *Ebrahim* (5) also points to the same conclusion, though the question there was simpler, because there the landlord of a property stated that there was a tenant in occupation of it, a statement clearly in derogation of his proprietary interest. We may add that the view we take may be supported from a somewhat different standpoint. When a person in the position of the vendor or the mortgagor in the deeds mentioned, transfers the property, and describes that the property conveyed or mortgaged is limited by certain boundaries he makes a statement as to the limited extent of that property. From this point of view it may fairly be contended that the statement is one against his proprietary interest because it is equivalent to an admission that his proprietary interest does not extend over any land outside the boundaries mentioned. In fact, to take a concrete illustration, in the event of a dispute between the transferee and the owner of the neighbouring land as to the boundaries between the two parcels, the statement made in the conveyance or the mortgage would be admissible in evidence as against the maker of it. From this point of view also, we think that the case is covered by cl. (*c*) of sec. 32 of the Indian Evidence Act. We are of opinion therefore that the decree of the Court below cannot be assailed as erroneous in law.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(2) I. L. R. 23 Bom. 63 (1897).
(3) 22 W. R. 231 (1974).
(4) 11 Bom. L. R. 409 (1908).
(5) I. L. R. 31 Cal. 965 (1904).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3175 OF 1909.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard, 20 and 21, November.
Judgment, 28, November.

NARSINGH NARAYAN SINGH, Appellant,
v.
AJODHYA PROSAD SINGH and anr., Respondents.

Arbitration—Award going beyond terms of reference, if valid—Party benefited if may repudiate award—Civil Procedure Code (Act XIV of 1884), sec. 525—Acceptance of award in part, if permissible.

The Plaintiff's right of passage along a pathway across the Defendant's land being disputed by the latter, the question of its existence was referred to an arbitrator who found that the pathway did in fact exist as alleged, but he laid out a new pathway in lieu of it, holding that if the thoroughfare was allowed to continue great inconvenience would be caused to the Defendant:

Held—*That although an arbitrator is allowed greater latitude than Courts of law in departing from rules of practice which Courts have adopted for general convenience, and an arbitrator's award is not open to review on the merits upon grounds of error of law as well as of facts, an arbitrator cannot go beyond the precise questions submitted.*

But even though the arbitrator may have exceeded his authority, it is not open to the party benefited by the award to take exception to it on that ground, and the Defendant therefore was bound by the award in this case.

In a proceeding under sec. 525, Civil Procedure Code (Act XIV of 1882), it is not competent to the Court to direct the award to be filed in part. If the award is bad in part, the Court should refuse the application to file it altogether.

This was an appeal against the decree of S. S. Skinner, Esq., District Judge of Gaya, dated the 30th of July, 1909, confirming that of M. W. Ahmed, Esq., Munsif, Gaya, dated the 22nd of March 1909.

The facts of the case will appear from the judgment.

Dr. Rash Behary Ghose, Babus Umakali Mukherjee and *Ganesh Dutt Singh* for the Appellant.

Babus Mohendra Nath Roy and *Chandra Sekhar Prosad Singh* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

This appeal is directed against a decree by which the Courts below have concurrently ordered the partial enforcement of a private arbitration award. The parties to the proceeding are related to each other, and had a dispute as to a pathway for passage from the land of the Plaintiff and his brother to a village towards the north of the property of the first Defendant. There were also disputes between the parties in respect of other matters to which detailed reference is not necessary for our present purpose. On the 16th July 1908, the matter in controversy which were set out in full detail in a registered instrument of submission, were referred to the arbitration of a gentleman by name Dilkeswar Singh. He made his award on the 31st August 1908. On the 14th September following, the Plaintiff applied under sec. 525 of the Code of 1882 that the award be filed in Court. The Defendants resisted the application on every conceivable ground; they questioned the validity of the submission, imputed misconduct and partiality to the arbitrator, alleged a revocation of the submission before the award

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was made, and contended that the award had determined a question not included in the submission. The Courts below have overruled all the objections, except one as entirely unfounded and have directed the award to be filed in part. The result has been that a modified decree has been made in favour of the Plaintiff. The Plaintiff has appealed to this Court, and on his behalf the decree has been assailed in so far as it modifies the award. The arbitrator found in substance that the pathway alleged by the Plaintiff and denied by the Defendants did as a matter of fact exist, but he held that if the thoroughfare was allowed to continue great inconvenience and injury would be caused to the first Defendant. In this view the arbitrator laid out a new pathway in lieu of the disputed thoroughfare. The Plaintiff was satisfied with the award in this respect but the Defendants objected that the award was in excess of the authority of the arbitrator, inasmuch as the matter covered by the submission was the existence or otherwise of the disputed pathway, and it was beyond the competence of the arbitrator to substitute in lieu thereof a new pathway. This view has found favour with the Courts below, and as we have already explained they have declined to direct the award to be filed in so far as the pathway is concerned. The propriety of this decision has been assailed before us on two grounds, namely, *first*, the award is not beyond the scope of the submission as upon a liberal construction thereof the whole question of a right of way must be taken to have been laid before the arbitrator, and, *secondly*, that in any view the Defendants were not competent to take exception to the award, as it was essentially in their favour.

In support of the first ground that the submission should be liberally construed so as to enable the arbitrator to do substantial justice, reliance has been placed upon the cases of *Knox* v. *Symmonds* (1), *Prosser* v. *Goringe* (2), *Delver* v. *Barnes* (3) and *Fuller* v. *Fenwick* (4). It may be conceded that the arbitrator is not bound by mere rules of practice which Courts have adopted for general convenience, and he has greater latitude than Courts of law to do complete justice between the parties according to equity and good conscience. In this view, Courts are never astute to entertain technical objections to awards. In other words as Lord Halsbury, L. C., said in *Adams* v. *Great N. S. Ry. Co.* (5), the Courts will not review awards upon the merits; they will not constitute themselves as Courts of appeal to examine whether or not the conclusion at which the arbitrator arrived was sound, both in point of law and in point of fact. This salutary doctrine, however, is subject to the fundamental rule that an arbitrator cannot go beyond the precise questions submitted: it will not do for him to determine any claims or demands though existing between the parties to the submission, save only those which they have agreed that he shall decide. This is sound on principle; the submission furnishes the source and prescribes the limits of the authority of the arbitrator. The arbitrator is inflexibly limited to a decision of the particular matters submitted; he cannot take upon himself an authority which the submissions does not confer, *Price* v. *Popkin* (6), *Pas-*

(1) 3 Brown C. C. 358; 1 Ves. 369 (1791).
(2) 3 Tanut 406 (1811).
(3) 1 Talunt 48; 9 R. R. 707 (1807).
(4) 3 C. B. 705 (1846).
(5) App. Cas. 31 (1891).
(6) 10 A. and E. 139 (1839).

coe v. *Pascoe* (7), *Baillie* v. *Edinburgh Oil Gas Light Co.* (8), *Buccleuch* v. *Metropolitan Board of Works* (9). In each case therefore where a question arises whether the arbitrator has exceeded his his authority and it is urged that the submission should be liberally construed and interpreted the question really reduces to this, whether the circumstances of the case bring it within the scope of the one or the other of the two conflicting principles we have formulated. In the case before us the terms of the submission are, in our opinion, against the contention of the Appellant. The matter in controversy submitted to the arbitrator was not whether the Plaintiff should have access to the northern village accross the land of the Defendants but whether he had a right of way over the specified strip of land. The arbitrator was bound to base his decision upon an investigation of the latter question and he had no authority to lay out a new path on a piece of land over which neither party alleged a right of way. *Walker* v. *Simpson* (10), *Wyman* v. *Hammond* (11), *Ross* v. *Linder* (12). We are therefore not prepared to accept the first contention of the Appellant.

In support of the second contention of the Appellant it has been argued that if the arbitrator has exceeded his authority, he has done so for the benefit of the Defendants and they at any rate are not entitled to assail the award which is really in their favour. In our opinion this contention is well-founded and must prevail. It is an elementary principle that only the party prejudiced by the exercise of excessive authority by the arbitrator is entitled to object to the award by reason of it; the party in whose favour the erroneous action of the arbitrator operates cannot be heard to impeach the validity of the award on this ground. In *Bradshaw's Arbitration* (13), where an award was assailed by one of the claimants. Lord Denman, C. J., observed that the error assigned was no matter of complaint for him, as it was in his favour and to his advantage. Similarly in *Moore* v. *Butlin* (14), the learned Chief Justice observed that the party in whose favour the mistake had been made could not avail himself of it to set aside the award [see also *Taylor* v. *Shuttleworth* (15)]. Again in *Syman* v. *Arnus* (16), a party objected to an award because it made certain deductions from demands presented against him by his adversary and assigned to himself certain goods and merchandise. In answer to the contentions that these acts were beyond the authority of the arbitrator, the Court said: "He has no right of complaint, it was in his favour." (*Galvin* v. *Thompson* (17). In the case before us the arbitrator found in substance that the pathway existed as alleged by the Plaintiff; in this view he ought to have made a decree accordingly. But as in his opinion the existence of a pathway at that particular spot would inconvenience the Defendants, he laid out another path for the use of the Plaintiff. This course was adopted for the benefit and convenience of the Defendants. It is difficult to appreciate upon what principle the Defendants can

(7) 3 Bing. N. C. 898 (1837).
(8) 3 Cl. and F. 639, (1835).
(9) L. R. 5 H. L. 418; L. R. 5 Exch. 221 (1872).
(10) 80 Maine 143; 13 Atlantic 580 (1888).
(11) 55 Maine 534 (1868).
(12) 17 South Car. 598 (1881).
(13) 12 Q. B. 562 (1846).
(14) 7 A. and E. 595 (1837).
(15) 6 Bing. N. C. 277 (1840).
(16) 5 Pickering 213 (1827)
(17) 13 Maine 367 (1836).

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be allowed to question the award on the ground that the arbitrator exceeded his authority: the position would have been intelligible if the Plaintiff had sought to assail the award in so far as it did not allow him a pathway in the precise place alleged by him. The second ground taken by the Appellant must therefore be allowed.

We may add that it was not competent to the Courts below in a proceeding under sec. 525 of the Code of 1882 to direct that the award be filed in part. The Court was bound to refuse the application if in its opinion the award was open to attack in part. *Dandekar* v. *Dandekar* (18), *Mana* v. *Mallichery* (19), *Thiruvengada* v. *Vaidinatha* (20), *Mustafa* v. *Phulja* (21). In the view we take, however, the question becomes immaterial.

The result, therefore, is that this appeal must be allowed and the decrees of the Courts below discharged. We direct that the award be filed in its entirety and a decree drawn up in accordance therewith. The Plaintiff is entitled to his costs in all the Courts from the Defendants.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 183 OF 1909.

HOLMWOOD, J. CHATTERJEE, J, 1911, Heard, 15 & 16, June. Judgment, 13, July.

RAJA BAN BEHARI KAPUR, Defendant No. 1, Appellant, *v.* KHETTERPAL SINHA ROY and others, Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 163, 164, 165—Decree for rent against tenant in possession if one under Bengal Tenancy Act—Irregular sale, effect of—Tenure if passes by sale not held strictly in accordance with the provisions of the Act—'Right, title and interest' in sale-proclamation, if may include the whole tenure—Mortgagee who purchases mortgage property in execution, if may fall back on mortgage to protect it against purchaser at rent-sale.

A decree obtained in a suit for rent against a person in possession who is also the legal representative of the last registered tenant is a decree for rent within the meaning of the Bengal Tenancy Act.

Where a tenure was sold in execution of a decree for rent, but on the first day the bidding did not come up to the decretal amount, and the property was sold notwithstanding, without any fresh proclamation and sale under sec. 165,

Held, *that as the sale could not in the circumstances be under sec. 164, it was not a sale under the Bengal Tenancy Act and did not operate to transfer more than the right, title and interest of the judgment-debtor.*

The special and stringent provisions of the Bengal Tenancy Act relating to sales is part of a public policy intended for the benefit of all parties concerned. If the landlord wants special results to follow from it under the Act, he must proceed strictly in accordance with its provisions.

Where a mortgagee of a tenure gets a decree and purchases the mortgaged tenure at a sale in execution of his mortgage decree, and the tenure is subsequently sold again in execution of a rent-decree against the original tenant, it is open to the mortgagor to fall back on his mortgage as a shield against the purchaser under the rent-sale, when that sale is not free from incumbrances.

(18) I. L. R. 6 Bom. 663 (1882).
(19) I. L. R. 3 Mad. 68 (1880).
(20) I. L. R. 29 Mad. 303 (1905).
(21) I. L. R. 27 All. 526 (1905).

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AKHOY KUMAR *v.* BEJOY CHAND (4) *not followed.*

BHAWANI KOER *v.* MATHURA PROSAD (5) *referred to.*

This was an appeal preferred on the 27th of April 1909, against the decree of Babu Srihari Lahiri, Additional Subordinate Judge of Zillah Hughly, dated the 29th of March 1909.

The facts of the case will appear from the judgment.

Babus Basanta Coomar Bose and *Shorosi Charan Mitra* for the Appellants.

Mr. S. P. Sinha, *Babus Dwarka Nath Chuckerbutty* and *Sarat Kumar Mitra* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

One Ballav Lal Barman was the holder of a permanent tenure under Defendant No. 1 and his predecessor-in-interest. In 1857 Ballav Lal executed a *kobala* in respect of this tenure in favour of his wife Radhamoni. Ballav Lal, however, continued as the registered tenant until his death in 1891 or thereabout. He was succeeded by his grandson, Shyama Prosad, who was a minor at the time living under the guardianship of his grandmother Radhamoni and mother Kalimoti. The collections in the mofussil were made in the name of Radhamoni and she mortgaged the tenure to the Plaintiffs on the 7th December 1894 for Rs. 1,499. About three weeks after this, on the 28th December 1894, Defendant No. 1 took from Radhamoni a *kistbandi* bond for the arrears due on the tenure. In this document Radhamoni described her title under the purchase of 1857 and it can hardly be argued that the effect of the acceptance of that document was not to recognise Radhamoni as the tenant of the mehal. On the 27th May 1896, Radhamoni executed another mortgage of the tenure in favour of the Plaintiffs who brought a suit upon the two mortgages against Shyama Prosad as heir and grandson of Radhamoni and in possession of her estate and obtained an *ex parte* decree on the 26th February 1902. Defendant No. 1 in April 1902 brought a suit for arrears of rent against Shyama Prosad stating that Ballav Lal was the recorded tenant and Shyama Prosad was in possession of the tenure, and obtained an *ex parte* decree on the 21st June 1902. The Plaintiffs executed their mortgage decree and purchased the mortgage property on the 15th September 1903 for Rs. 3,600. Defendant No. 1 executed his rent-decree and himself purchased the property in arrear on the 9th February 1904 for Rs. 809. The Plaintiffs applied for setting aside the sale on the ground of fraud and irregularities but were not successful. They bring the present suit on the ground that the decree itself was fraudulent as well as the sale, and pray for recovery of khas possession on the declaration that their rights were not affected by the sale.

The lower Court has given the Plaintiff a decree holding that the decree for rent was fraudulent and collusive. Defendant No. 1 has appealed and on his behalf it has been contended that the finding of fraud is not supported by the evidence in the case. It is quite clear that the findings of fact arrived at by the learned Judge do not make out any case of fraud against Defendant No. 1. It is not alleged or shown that there was no arrear due on the tenure and there is no evidence that Defendant No. 1 did anything in respect of the suit that he was not entitled to do

(4) I. L. R. 29 Cal. 813 (1902).
(5) 7 C. L. J. 1, 20 (1907).

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under the law. It does not also appear that he had any duty to perform towards the Plaintiffs, the breach of which would throw any discredit upon him. We think the finding of fraud is wrong and must be set aside.

The decree of the lower Court, however, has been supported on the ground that the decree obtained by Defendant No. 1 was not a rent-decree under the Bengal Tenancy Act and in any case the sale brought about by him was not in respect of the tenure but only the right, title and interest of Shyama Prosad, so that their rights as purchasers under the mortgage decree were not affected. It has been further contended that the mortgage lien exists notwithstanding the sale and as no notice under sec. 167 of the Bengal Tenancy Act has been served, the Raja, Defendant No. 1, was not entitled to khas possession.

With regard to the first point we have seen that Defendant No. 1 recognised Radhamoni as his tenant by accepting from her the instalment bond for rent. She was, therefore, his recognised tenant from 1301. Upon her death no one took any steps to register himself or herself as her representative. If her purchase was a *bonâ fide* one her daughter Lakhimoni who was alive at the time of the rent suit was her legal representative : if she was a *benamdar* for her husband then Shyama Prosad was the rightful heir. In any case Lackhimoni was not in possession and Shyama Prosad was sued as the party in possession and there is no dispute that he was really in possession. In fact no claim has been made on behalf of Lakhimoni and both the contending parties have treated Shyama Prosad as the tenant in possession and the question of *benami* has not been pressed by either party. The suit for rent was, therefore, rightly brought against Shyama Prosad who must be taken as the real tenant. It has been contended that as Shyama Prosad was not recognised as the tenant but was sued merely as he was in possession, the decree obtained is a money decree for compensation for use and occupation. That would have been a legitimate view to take if as a matter of fact Shyama Prosad had not been the real tenant. See *Ranee Lalunmonee* v. *Sonamonee* (1), *Surnomoyee* v. *Dinonath* (2). As it is however the decree was a good decree for rent.

As regards the second point, it appears from the order-sheet in the execution case in which Defendant No. 1 made his purchase that process of attachment and sale were issued simultaneously evidently under sec. 163, cl. 1 of the Bengal Tenancy Act. It may be presumed that cl. 2 (*a*) of that section was also complied with. As the sale took place on the first day of sale, the sale could be held under sec. 164 only subject to registered and notified incumbrances if the bidding were sufficient to liquidate the whole amount of the decree and the costs. The bidding, however, did not reach the level of the decretal amount and was in fact several hundred rupees less : so that the sale could not be held under sec. 164 and as there was no second proclamation and sale as contemplated by sec. 165, the sale cannot be taken as one held under the Bengal Tenancy Act. The provisions of the Bengal Tenancy Act regarding sales are very stringent and the results are generally destructive of various derivative rights belonging to third parties not before the Court. The State enforces its claims for revenue under the stringent provisions of the sunset law from the

(1) 22 W. R. 334 (1874).
(2) I. L. R. 9 Cal. 908 (1883).

zeminders and has enacted the stringent provisions of the Tenancy laws for enabling the zemindars and other landlords to realise rents from their tenants, providing safeguards for the protection of the tenants and those that deal with them. The special provisions for the sale of tenures are a part of a public policy intended for the benefit of all parties concerned. If the landlord wants the special results provided for by the Act, he must proceed strictly in accordance with its provisions. We think he has not done this in this case and he cannot, therefore, claim rights superior to those of an ordinary purchaser at a Civil Court sale. His sale certificate also supports this view as he is certified to have purchased the right, title and interest of the judgment-debtor. The learned Vakil for the Appellant has referred us to two cases in this connexion ; *Nazir Mohamed* v. *Girish Chandra* (3) and *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (4).

These cases are clearly distinguishable ; in the first case the property sold was described as the tenure and the proclamation was for the sale of the tenure under sec. 59 of Act VIII of 1869, B. C. The learned Judges say "the property advertised was the tenure and the property sold was the tenure according to the sale certificate, and the mere insertion of a statement that the sale was of the rights and interests of the judgment-debtors would not, we think, have the effect under the circumstances stated of limiting the sale to such rights and interests and not extending it to the tenure itself." In the second case the description of the property ended with the words "the said lot in arrears" so that the facts are not similar. It was argued in that case that the property should have put up first subject to registered and notified incumbrances and afterwards with power to avoid all incumbrances but this argument was met by the remark that the mortgage in question in that case was not a registered and notified incumbrance. The report does not shew under what section the sale took place or whether the amount of the bidding was sufficient to meet the decree with costs. Under the circumstances we do not feel in any way hampered by that decision.

As regards the third point the argument of the learned Vakil for the Respondent is that notwithstanding the decree and sale he is still entitled to fall back upon his mortgage lien to defend himself from the attack of Defendant No. 1 who claims to oust him. In the case of *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (4) hereinabove quoted, the mortgagee obtained his decree absolute in May 1892. The Maharaja brought his suit for arrears in 1893 and purchased the "lot in arrear" in 1893. The mortgagee then applied for executing his mortgage decree against the Maharaja as purchaser in 1901. The Maharaja then applied for the service of notice under sec. 167 and the learned Judges held that as this application was not made within the time limited by sec. 167 it was barred and the mortgagee was entitled to execute his decree against the mortgaged portion of the tenure. The result of this ruling is, that the encumbrance of the mortgagee was in existence notwithstanding the decree absolute on the mortgage. There is however an *obiter dictum* in the case that after the mortgage had culminated in a decree there would be no encumbrance

(3) 2 C. W. N. 251 (1897).
(4) I. L. R. 29 Cal. 813 (1902).

(4) I. L. R. 29 Cal. 813 (1902).

RAJA BAN BEHARI KAPUR *v.* KHETTERPAL SINHA ROY.

to annul under sec. 167. In the first place the learned Judges say it is not necessary to decide that question and in the second place that opinion is quite inconsistent with the decision on the point of limitation under sec. 167: for if there was no incumbrance there was nothing to annul and no application for annulment could be barred. In the case of *Bhawani Koer* v. *Mathura Prosad* (5), a revenue sale of an estate under sec. 54 of Act XI of 1859 took place after a mortgagee had purchased in execution of a mortgage decree of his own and after the sale had been confirmed. The revenue sale was subject to all incumbrances. The Court held that the mortgagee purchaser was entitled to fall back on his mortgage as a shield against the purchaser at the revenue sale. In the present case if the Plaintiff had not proceeded to sale before the purchase of Defendant No. 1, the latter would have been at best entitled to annul the Plaintiff's encumbrance under sec. 167: there is no reason why he should be in a worse position by reason of his diligence in proceeding to sale first. It is true he could have paid up the decree of the Defendant and saved himself from this tortuous litigation: but he was not bound to do that: he was not liable for the rent before his purchase and his remedy over if any against his mortgagor by way of contribution might be an illusory remedy after all. In any case he is entitled to rely on all defences legitimate to his juridical position and we think that the Raja Defendant was, even if he had taken all proceedings according to law, not entitled to oust him without annulling his encumbrance under sec. 167 of the Bengal Tenancy Act and this has not been done in this case.

Under these circumstances although we set aside the judgment of the Court below, we confirm the decree of the said Court, but without cost in either Court.

Appeal dismissed.

(5) 7 C. L. J. 1, 20 (1907).

[CRIMINAL APPELLATE JURISDICTION.]

No. 2 OF 1908.

STEPHEN, J.
HOLMWOOD, J.
1908,
6, May.

THE DEPUTY SUPERINTENDENT & REMEMBRANCER OF LEGAL AFFAIRS, Appellants,
v.
CHULHAN AHIR and others, Respondents.

Mischief—Intention—Motive—Cutting a channel through railway to let out water from fields.

Where tenants finding their fields flooded cut a channel through a railway in order to let the water run off their fields:

Held—*That the act having been intentionally done amounted to mischief, and it was no defence to say that their motive in doing it,* viz., *to free their fields from water, was an innocent one.*

This appeal was preferred on behalf of the Crown against the judgment of Mr. F. Mac Blane, Sessions Judge at Chapra, dated the 15th of November 1907, setting aside the conviction and sentences passed on the accused by Mr. Hashmat Hossain, Deputy Magistrate of Saran, on the 9th of October 1907.

The material facts appear from the judgment.

Mr. Orr, Deputy Legal Remembrancer, for the Crown.

Babus Joy Gopal Ghose and *Raghu Nath Singh* for the Accused.

The JUDGMENT OF THE COURT was as follows:—

In this case the accused were convicted

by the Deputy Magistrate of Saran of offences under secs. 144 and 427 read with sec. 149, I. P. C. Their convictions were set aside by the Sessions Judge on appeal, and the case now comes before us in appeal from his judgment.

The facts of the case are exceedingly simple and they are that the Appellants finding their fields flooded cut a channel through the railway to let the water run off their fields. The learned Sessions Judge has set aside their conviction on the ground that neither their intention nor the means employed by them to effect their intention were criminal. He holds that their intention was not to cause mischief but to cause the water to run off their fields. In this, however, he makes not altogether an uncommon error in confusing motive with intention. Their intention was to make a ditch through the railway. Their motive was to free their fields from water. There can be no doubt that what they did to the railway amounted to mischief and that they must have been fully aware of this fact. The learned Sessions Judge is also wrong in finding that the means employed by them were not criminal. It appears that about 50 men were present, some of whom carried spears. Of these some 10 or 15 only were engaged in digging. It, therefore, seems certain that the whole constituted an unlawful assembly, with the common object, as alleged, of damaging the railway.

On looking at the evidence it appears that the act of mischief and the unlawful assembly are very plainly proved. There is, however, no proof of an offence under sec. 144. There is clear evidence that some of the persons present were armed with spears, but there is no evidence that any of the accused were so armed. The conviction under sec. 144 is therefore improper.

Under these circumstances we set aside the judgment of the Sessions Judge and we also set aside the conviction under sec. 144, I. P. C., by the District Magistrate. We convict the accused of the offences under secs. 143 and 427 read with sec. 149, I. P. C.

In considering the question of sentence we have to bear in mind that the result of what offences the men did might have been most serious, as the accused must have known, and it is necessary that people should remember, that they are not to do anything on railways which may damage the life of people using them. As however we have set aside the conviction under sec. 144, I. P. C., we think it right that the sentence of six months' rigorous imprisonment under sec. 144 passed by the Deputy Magistrate should be reduced to four months' rigorous imprisonment. We do not regard a fine as a suitable punishment in this case. We, therefore, inflict no sentence of fine. We do not think it necessary to pass any sentence under secs. 427 and 149, the conviction now standing under sec. 143 instead of sec. 144, I. P. C. We have no power to order the accused persons to enter into bonds. We therefore make no order in respect of that.

Let a copy of this order be sent to the Sessions Judge and let the District Magistrate take steps to have the accused arrested and dealt with.

Appeal allowed.

THE

Calcutta Weekly Notes.

Vol. XVI.] MONDAY, JANUARY 29, 1912. [No. 10

Contents.

NOTES.

THE JUDGMENT OF JENKINS, C. J, AND WOODroffe, J., in the case of *Jarat Kumari* v. *Bissessur Dutt* (In the goods of Gopessur Dutt) which we report in this issue (p. 265), will, we expect, prove of great assistance both to the profession and to the judiciary in the presentation and determination of the real facts in issue, the examination of witnesses and weighment of evidence as to the probabilities and improbabilities of the case. The observations of His Lordship the Chief Justice in the course of his judgment will, we are sure, have a wholesome effect in keeping counsel within proper bounds in the examination and cross-examination of witnesses and in conducting their cases with due regard to their responsibilities to the public and to the Court. Apart from such questions this decision is sure to take rank as a leading case regarding the standard of proof required under law not merely in probate cases but in civil cases generally. The respective degrees of proof required by Courts in civil and criminal cases are also clearly indicated and it is in this connection, we would remind our readers, that the case was cited as an authority by Fletcher, J., in the Midnapore Damage Suit (16 C. W. N. 145).

WE NOTE WITH PLEASURE THAT ONE OF THE TWO judges recently appointed in Madras is an Indian member of the legal profession. These appointments have been made by the Governor-General in Council under the Indian High Courts Act of 1911 (see 15 C. W. N. cclxviii). Sec. 3 of which empowers the Governor-General in Council to make temporory appointments to the Bench subject to the provisions of sec. 2 of the Charter of 1861 as regards numbers and qualifications. This latter provides that of the total number of Judges in any of the Chartered High Courts not less than one-third should be barristers, not less than one-third should be members of the Indian Civil Service but the remaining one-third is not so earmarked. We believe that the recent appointments made on the Bench of the Madras High Court brings up the number of Indian Judges to one-third of the total number. We hope that the same policy will be followed in making the appointments to the High Court Bench in Calcutta which for some time past have been urgently called for. Should the policy of the Government from now be that at least one-third of the Judges should be Indians, we would urge that the limit in this respect should be so fixed irrespective of the claim of Indian barristers to come in as well amongst the minimum of one-third reserved specially for this branch of the profession in the Charter of 1861.

WE UNDERSTAND THAT PUBLIC OPINION IN Orissa and Chota Nagpur is strongly opposed to any Provincial High Court being set up at Bankipur and we are also informed that the landholders, bankers and business men generally of the new Province, outside Bankipur, do not entertain with much favour the idea of a small High Court at Bankipur or of one or more Appellate Benches of the Calcutta High Court being sent there. The people of Orissa and Chota Nagpur object on the ground of distance and various other inconveniences that they would be put to from any such change. In common with them some of the substantial men in Behar urge that in either of the above cases they would not be able to get on there without the help of experienced and well-trained lawyers from Calcutta and that they will then be put to much greater expense and trouble in prosecuting their appeals at Bankipur than at Calcutta under existing arrangements. They seem to think the idea of a new High Court or of Circuit Courts would only serve to hold out cheerful prospects to lawyers in both Provinces.

BE THAT AS IT MAY, AS FOR OURSELVES, WE ARE not at all keen on a Circuit Court. Nor are we opposed to the setting up of a separate High Court provided there is a general demand for it from all parts of the new Province. Since there is no such general demand we would prefer to postpone all discussions on the subject till the new administration is properly organised and the opinion of the component members of the new Province has been definitely ascertained. When this has been done it would be the duty of the Imperial Government not merely to ascertain public opinion but also to consult the balance of convenience of all the component parts of the new Province before coming to any decision on the question.

WE PUBLISH A LETTER FROM MOZUFFERPUR IN which the writer considers that the Beharis cannot and do not object to the whole of the Bengali-speaking people being brought under one administration. But the writer thinks that the Beharis are entitled to compensation by way of transfer of some of the adjoining districts from the United Provinces of Agra and Oudh, since the latter is larger than either Bengal and Behar or the two Provinces taken together. But this is a question on which we cannot hazard any opinion; and besides we do not think that there is any occasion at present to enter into a discussion of any question not strictly within the scope of the Delhi Despatch.

THERE SEEMS TO BE SOME MISAPPREHENSION with regard to the articles regarding the linguistic, historical and geographical boundaries of Bengal and Behar which are being published in our columns. Our articles purport only to collect and present to the authorities and the public materials from the most reliable and authoritative sources for delimitation of boundaries between Bengal and Behar on the one hand and Bengal and Assam on the other. As between Behar and Bengal the case for Dhalbhum, Manbhum and the greater portion of Sonthal Pergunnahs, which are all Bengalee-speaking and which for the most part not very long ago formed part of the Burdwan Division of Bengal, being included within the Bengal Presidency is indeed very strong. Similar considerations are also strong in favour of Purneah to the east of Mahananda and the Bengali-speaking portion of Goalpara being included in the Rajshahye Division and Sylhet, in the Chittagong Division. We do not think that simply because a section of less advanced population differs ethnologically from the Ben- . population of Manbhum and the Sonthal [illegible]unnahs, these portions should be severed from Bengal. These parts have long been under the civilizing influence of the Bengalis and should therefore remain with Bengal. As for the extension of the Chota Nagpur Tenancy Act to Manbhum it was done recently and against the wishes of the people. The Rent Act (X of 1859) was in force in Manbhum until recently and public opinion there has all along been in favour of the extension of the Bengal Tenancy Act to Manbhum.

LINGUISTIC (A) & HISTORICAL (B) BOUNDARIES OF BEHAR & CHOTA NAGPUR.

(A) (I) North of the Ganges was "Mithila, also called Tirhutia . . . bounded . . . on the east by the Kosi."—*Bengal District Gazetteer (1911), Bhagalpur, pp. 45-46.*

In the portion of the District Bhagalpur north of the Ganges and west of the Kosi "the vernacular spoken is the Maithili dialect of Behari."—*Imperial Gazetteer of India (1909), Bengal, Vol. II, p. 167.*

N. B.—To the east of the Kosi is Purnea. "The dialect of central and western Purnea is Maithil Bengali. Towards central Purnea this dialect shows a distinct tendency towards Bengali. The dialect of Eastern Purnea is a variety of Bengali."—*Grierson's Seven Grammars of the dialects and sub-dialects of the Bengali language, Part VIII.*

(II) In the District of Monghyr the "vernacular in the north of the District is Maithili and in the South Magadhi dialect of Behari."—*Imperial Gazetteer of India (1909), Bengal, Vol. II, p. 150.*

N. B.—In the part of the Monghyr District "south of the Gogri Thana and the eastern portion of the Monghyr Sub-Division south of the Ganges" the *chhika-chhiki* is spoken as is also done in the South Bhagalpur and Western Santhâl Parganas.—(*Bengal District Gazetteer, Vol. XVII, p. 53*).

(III) The tract known as Chota-Nagpur Division has from ancient times been "the home of numerous Non-Aryan tribes who were never completely subjugated either by the early Aryan invaders or by the Pathan and Moghul emperors or indeed by any outside power until the advent of the British." —*Imperial Gazetteer of India (1909), Bengal, Vol. II, p. 325.*

In the District of Hazaribagh which forms the "north-eastern District in the Chota Nagpur Division" and which is bounded "on the east by the Santhâl Parganas and Manbhum" "the Maghai dialect of Behari is spoken by the majority of the population."—*Imperial Gazetteer of India (1909), Bengal, Vol. II, pp. 326, 330.*

(IV) The District of Ranchi in the Chota Nagpur Division is bounded "on the east by Manbhum." The language of the people is "Hindi . . . . Nagpuria dialect . . . . also Munda . . . and Dravidian languages."—*Imperial Gazetteer of India (1909), Bengal, Vol. II, p. 352.*

N. B.—In the District of Manbhum however which lies to the east of the Districts of Hazaribagh and Ranchi "the prevailing vernacular is the western dialect of Bengali, known as Rârhi Boli." —*Bengal District Gazetteer (1911), Manbhum, p. 72.*

(V) The District of Singhbhum has for its eastern portion the Pargana of Dhalbhum and is bounded "on the east by Midnapore." "Of every 100 persons 18 speak Bengali."—*Imperial Gazetteer of India (1909), Bengal, Vol. II, pp. 391, 398.*

N. B.—"Bengali is current in the Dhalbhum Pargana of Singhbhum."—*Gait's Census of India (1901), Vol. VI, Part I, p. 315.*

"The Court languages are Bengali for Dhalbhum and Hindi for the rest of the District." "The written language is . . . Bengali in Dhalbhum."—*Bengal District Gazetteer (1910), Vol. XX, p. 51.*

(B) "The Province of Behar is known from very early times."

(i) In HINDU TIMES it consisted of

(1) The "Kingdom of Magadha" which "comprised the country now included in the Districts of Patna, Gaya and Shahabad." "A portion of the west of the present District (Monghyr) was (also) included within the limits of the Kingdom of Magadha."

(2) The Kingdom of Videha or Mithila which was "north of the Ganges" and "included the modern Districts of Darbhanga, Champaran and north Mozufferpur:" "The Kosi formed the easternmost boundary of the Kingdom."

(3) The Kingdom of Vaisali which comprised "the south of the Mozufferpur District."

Imperial Gazetteer of India (1909), Bengal, Vol. I, p. 18.

Bengal District Gazetteer (1909), Monghyr, p. 28.

Bengal " " (1911), Bhagalpur, p. 26.

N. B.—In ancient times Bengal consisted of

(1) The Kingdom of Pragjyotisha which stretched from Assam on the East to the Karatoya river on the west.

(2) The Kingdom of Pundra which extended from the Karatoya to the Mahananda and Rajmehal Hills.

(3) Banga lay east of the Bhagirathi and south of Pundra.

(4) Karna Suvarna was west of the Bhagirathi (*i.e.*, Burdwan, Bankura, Murshidabad and Hughly).

Imperial Gazetteer of India (1909), Bengal, Vol. I, pp. 19, 20.

(ii) During MAHOMEDAN TIMES Subah Behar was "divided naturally into two nearly equal portions of territory north and south of the river Ganges." The northern portion was "on the east . . . . . . wholly bounded by the District of Purneah in Bengal, which properly, until the year 1732, extended on that side no further than the river Cossa (Kosi)." The southern portion was divided "from Bengal on the east by a branch of the southern hills which curving to the north forms the boundary pass of Telliagurry on the confines of Rajmehal."—*Fifth Report on the affairs of the East India Co., Vol. I, p. 502.*

B. K. LAHIRI.

Correspondence.

[TO THE EDITOR OF THE "CALCUTTA WEEKLY NOTES."]

DEAR SIR,—Since you have taken upon yourself the noble task of pleading the cause of Bengal proper in order to get all the Bengalee-speaking tracts and people placed under one and the same administration, *i.e.*, the Governor of Bengal and in order to further that object you have published the letter of Mr. B. K. Lahiri suggesting that some portions of Purnea, Maldah, Bhagulpore, Sonthal Pergunnahs, Manbhoom and Pergunnah Dhalbhoom in Singbhoom be taken away from the newly created Province of Behar and added to Bengal proper, it is just and fair for you to take up the cause of Behar also because so long as there is one High Court for both the Provinces, your journal is deemed to be the mouth-piece and organ of both the Provinces and expresses weighty opinions and is valued for its opinions by the Government people and the judicial officers alike, as your journal is not a political paper but a legal journal. Considering these things in my mind I want to lay a few suggestions before you for publication so far as concerns the interest of the New Province. Also your journal and other leading papers of Bengal have been urging that (1) a portion of Purnea east of the Mahananda River, (2) a major portion of Maldah, (3) a small portion of Bhagulpore, (4) a part of Sonthal Pergunnahs, (5) the Pergunnah Dhalbhoom in Singbhoom district and (6) the Manbhoom district in its entirety be taken away from the New Province and added to Bengal proper on the ground that people living therein are all Bengalee-speaking. These tracts taken together will be equal to three big districts and almost as big as a division. But what do you or Bengalee leading papers suggest that we, Beharis, should get in exchange of these tracts. We are not unmindful of the fact that in a partition or as we may call it separation on linguistic ground, an eye should be kept on compactness and convenience of the parties concerned. We do not in any way intend to injure the new Bengalee nation or be in the way of their getting all the Bengalee-speaking people placed under a Governor in Council and for this reason we, the Beharis, wholeheartedly support the proposal of the Bengalee to include the districts of Sylhet, Goalpara and Cachar in Bengal proper and place them under the administration of the Governor of Bengal because the people of these three districts are almost all Bengalee-speaking. You also want the northern portion of Balasore to be included within Bengal proper on the same linguistic ground. It will be a very good thing indeed for the Bengalees if these tracts and districts were to be taken away from Behar, Orissa and Assam and added to Bengal so as to constitute a compact Province consisting of people speaking one language and being of the same manners and customs. But the simple question which the Beharis ask you and the leading papers of Bengal is as to what you suggest the Government of India should give us in exchange for (1) Manbhoom,

(2) Pergunnah Dhalbhoom in Singbhoom and portions of Purnea, Bhagulpore and Sonthal Pergunnahs and the entire Maldah district and also the northern portion of Balasore. If the Government of India be pleased to compensate us by giving us some bordering districts of the United Provinces homogeneous with the sister districts of Behar, the Beharis will very gladly support the scheme of the Bengalees that the aforesaid tracts be taken away from Behar proper and added to Bengal proper. But the Beharis can on no account agree to the proposal that the towns of Bhagulpore and Purnea and other Hindee-speaking tracts be taken away from Behar proper and added to Bengal. The Province of the United Provinces of Oudh and Agra is as big as Bengal and Behar taken together and consists of nearly 48 districts whereas in Bengal there will be only 25 or 26 districts and in the New Province of Behar some 19 or 20 districts. The charge of the Lieutenant-Governor of the United Provinces is so big as to be incapable of efficient administration by one Lieutenant-Governor. The bordering districts of Gorakhpur, Azamgarh, Ballia, Ghazipore and Benares are permanently settled districts like the districts of Bengal and Behar and the people of these five districts speak the Hindee language like the Beharis and their people are kith and kin with the Beharis of Patna and Tirhoot Divisions. The same castes of people live in these five districts and the districts of Patna and Tirhoot Divisions and their mode of living and manners is the same So if Gorakhpur, Azamgarh, Ballia, Ghazipore and Benares be taken away from the United Provinces and added to the New Province of Behar, the Beharis will very gladly consent to part with the tracts intended by the Bengalees to be added to Bengal proper under the Governor of Bengal. In such a case the Beharis can even afford to part with the whole of the Maldah and Purnea districts and not with portions alone. This is the unanimous opinion of the people of Behar.

Yours truly,
ARIKSHAN SINHA,
Pleader, Judges' Court, Muzaffarpur.

MUZAFFARPUR,
The 17th January, 1912.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CIVIL APPELLATE JURISDICTION. Before CARNDUFF, J. APPEAL FROM APPELLATE DECREE No. 1583 OF 1910. JOTINDRA MOHAN AND OTHERS, Plaintiffs, Appellants *v.* KEDAR NATH, Defendant, Respondent. Heard, 5th December 1911. Judgment, 13th December 1911.

Homestead land—Ejectment—Bengal Tenancy Act, applicability.

The appeal arose out of a suit brought by the Plaintiffs-Appellants for the ejectment of the Defendant-Respondent from two parcels of land in Mouzah Sonapakari in the District of Hughly. The Respondent was himself a raiyat of the village, in which he had both a homestead and an agricultural holding. The two parcels in suit were situated near his old homestead, and he acquired them separately by his purchase from the respective raiyats to whose homesteads they originally belonged. He had been cultivating them and paying rent to the Appellants, who were the landlords. The Appellants contended that as the disputed lands were homestead lands, their cultivation by the Respondent could not change their character.

Held—That the law applicable was the Bengal Tenancy Act and not the Transfer of Property Act.

Abdul v. *Kuthan* (1 C. W. N. clxxi) explained.

Munshi Golam Mowla v. *Abdul Lowar Mondol* (S. A. 1078 of 1892, decided on 16th May 1893, unreported) followed.

Babu Narendra Kumar Bose for the Appellants.

Mr. N. C. Bordolai for *Babu Jadunath Kanjilal* for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before CARNDUFF, J. APPEAL FROM APPELLATE DECREE No. 102 OF 1910. MUSST NAZIRUNNISSA BIBI, Appellant *v.* MAHAMMAD ZAFFER NASKAR, Respondent. 13th December 1911.

Usufructuary mortgagee—Possession not given—Remedy.

The appeal arose out of a suit brought by a usufructuary mortgagee for recovery of his mortgage debt by sale of the property mortgaged. The suit was decreed by the Court of first instance, but on appeal it was dismissed on two grounds, the first being that a usufructuary mortgagee could not sue for sale, and the second that the holding mortgaged was not transferable.

Held—That the remedy of the mortgagee to whom possession had not been given, was to sue for possession under his contract or to bring, under sec. 68 of the Transfer of Property Act, a suit for money. He could not turn his usufructuary mortgage into a simple mortgage.

Kangaya Gurukal v. *Kalimuthu* (I. L. R. 27 Mad. 526) not followed.

Moulvi Nuruddin Ahmed for the Appellant.

Babu Harendra Narayan Mitter for the Respondent.

A. T. M. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 33 OF 1910.

JENKINS, C. J.
WOODROFFE, J.
1911,
18, July.

In the goods of GOPESSUR DUTT, deceased,
SM. JARAT KUMARI DASSI, Plaintiff, Appellant,
v.
BISSESSUR DUTT, Defendant, Respondent.

Will, challenged as forgery—Proof—Suspicion alone when ground for refusing probate—Presumption against misconduct, operation of—Evidence Act (I of 1872), secs. 3, 45, 101, 135—Order in which witnesses to be tendered, discretion of counsel and Court's power—Expert, medical, examination of, to test value of evidence of attending physician—Expert in Bengali language and legal terms, examination of—Document put to witness, right of opposing counsel to inspect.

If a party writes or prepares a will under which he takes a benefit, that circumstance in itself ought generally to excite suspicion of the Court and calls upon it to be vigilant in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased.

BARRY *v.* BUTLIN (2) *referred to and the rule in* TYRRELL *v.* PAINTON (1) *explained.*

Per JENKINS, C. J.—*The suspicion which by itself would be ground for the Court not pronouncing in favour of an alleged will must be one inherent in the nature of the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction.*

(1) L. R. [1894] P. D. 151 (1893).
(2) 2 Moore P. C. 480 (1838).

Per WOODROFFE, J.—*The rule in* TYRRELL *v.* PAINTON (1) *applies to cases where the circumstances of suspicion arise from the nature of the case as put forward by the propounder, in which case the propounder must remove the suspicion. Where, however, the alleged suspicion against a will arises from facts which form part of the impugnant's case, then the Court must see whether the facts which are said to give rise to suspicion are proved or whether the propounder's case is proved. The rule therefore does not apply where the question is simply which set of witnesses should be believed.*

In this case the trial judge having decided against the genuineness of the will on the ground that the evidence of the witnesses whom the propounder had called to support her case was not so unimpeachable, so absolutely trustworthy in itself as by its own merit to dispose of all objections and to allay all doubt and suspicion,

Held (*per* JENKINS, C. J.)—*That the standard of proof required by the Judge was higher than the law (as contained in sec. 3 of the Indian Evidence Act) prescribes.*

Per WOODROFFE, J.—*A probate case is not singular as regards the application of the general principles of proof as contained in secs. 3 and 101 of the Indian Evidence Act.*

Per JENKINS, C. J.—*The Evidence Act, by which in matters of proof the Courts in this country must be guided, has in conformity with the general tendency of the day, adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof.*

The Evidence Act is at the same time expressed in terms which allow full effect to be given to circumstances or conditions of probability or improbability, so that

(1) L. R. [1894] P. D. 151 (1893).

IN THE GOODS OF GOPESSUR DUTT.

where, as in this case, forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight as a circumstance of improbability, though the standard of proof to the exclusion of all reasonable doubt required in a criminal case may not be applicable.

COOPER *v.* SLADE (3) *and* DOE D DEVINE *v.* WILSON (4) *referred to.*

This probability gains in strength where the character and position of the individual impugned is, apart from the particular case, above reproach.

Per CURIAM.—*While counsel has discretion, the Court has also power under sec. 135 of the Evidence Act to direct the order in which witnesses cited by a party shall be examined.*

Per WOODROFFE, J.—*A Court cannot assume that a document was proved from the refusal of opposing counsel to cross-examine to it. The latter is entitled to wait until the Court ruled whether the document was proved or not.*

If a cross-examining counsel after putting a paper in the hands of witness merely asks him some questions as to its general nature or identity his adversary will have no right to see the document but if the paper is used for refreshing the memory of the witness or questions are put respecting its contents or regarding the handwriting, his opponent may claim to see the paper.

TAYLOR ON EVIDENCE, 1452, *referred to and approved.*

The limits within which the opinion of experts is admissible considered and the difference between mere advice on evidence and opinion indicated by WOODROFFE, J.

(3) 6 H. L. Cas. 746 (1858).
(4) 10 Moore P. C. 502, 531 (1855).

This was an appeal from a judgment of Chitty, J., passed on the 21st of March 1910, dismissing the Appellant's application for probate of an alleged will of Gopessur Dutt, deceased.

The facts of the case material to this report will appear from the judgment.

Messrs. Jackson, Zorab and *B. L. Mitter* for the Appellant.

Messrs. S. P. Sinha, S. R. Dass, B. C. Mitter and *R. C. Bonnerjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This appeal arises out of an application for probate of an instrument bearing date the 13th Ashar 1316, or the 27th of June 1909, and purporting to be the will of Gopessur Dutt and to bear his signature.

Two questions arise : *First*, whether the signature to the instrument is that of Gopessur Dutt, and, *secondly*, in case it is his signature, whether, when he placed it there, he was of sound mind.

Chitty, J., has decided against the will on grounds which I will later discuss, and from his judgment the present appeal has been preferred.

Gopessur Dutt died in the early hours of the 28th of June 1909 at the age of 36 or thereabouts. He left a widow, the Appellant Sreematy Jarat Kumari Dassi, who seeks to propound the instrument in dispute. There was one daughter who died in infancy, but apart from this, there was no child of the marriage. Gopessur was one of three brothers, the other two both younger than he, being Bissessur, the caveator and Respondent, and Parmessur.

It is admitted by counsel for the Respondent, and is clear from the evidence,

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that Gopessur and Bissessur were not on terms of friendship. The relations between Gopessur and Parmessur, however, were good; for some time after they parted from Bissessur they lived together in the garden house that had been allotted to them on partition; and though, shortly before his death, Parmessur had parted in mess and was building himself a separate house, this did not indicate any serious estrangement between these two brothers. Parmessur died in the autumn of 1908, and a month after his death his widow gave birth to a little boy, to whom Gopessur seems not unnaturally to have been attached. Gopessur fell ill in March 1909, and, while there may have been temporary periods of improvement, he was never restored to health, though he passed through the hands of many and variously qualified medical attendants. At first his trouble seems to have been appendicitis, later dysentery supervened, and he ultimately died of bowel trouble. His earliest attendant was Dr. Chatterjee, the family physician, who also brought in for consultation three doctors of repute, but they do not seem to have satisfied the patient, for in May he placed himself under the homœopathic treatment of Dr. P. C. Mazumdar, a practitioner of good repute and standing. Shortly after this, Dr. P. C. Mazumdar, on leaving Calcutta, placed Gopessur under the treatment of his son, Dr. J. N. Mazumdar, and so things went on for some time.

Then Gopessur consulted a Kabiraj, but as dysentery appeared on or about the 18th of June, Dr. J. N. Mazumdar was again summoned, and he attended him up to his death.

On the 20th and 21st of June, Dr. D. N. Roy was called in for consultation, and here seems to have been a slight improvement in the patient's condition till the 25th when he was not so well. On the 26th he was seen both by Dr. P. C. Mazumdar, who had returned to Calcutta, and by Dr. J. N. Mazumdar. On the Sunday morning they both saw him. On the evening of Sunday the 27th Dr. P. C. Mazumdar visited him about 5 or 5-30. Shortly after this, about 8 or 8-30 o'clock, Gopessur is alleged to have executed the will now propounded. Then he is said to have slept, but the pain becoming intense, Dr. J. N. Mazumdar was sent for. He was, however, unable to come, and in his place Dr. Gosswami visited the patient, and remained with him until his death, about 1 or 2 o'clock on the morning of the 28th. The same day the cremation took place, and on return from it, the widow, according to her evidence, handed over to her brother, Shambhu Nath Sen, the will and certain drafts, which had been entrusted to her by her husband, and on the 29th in the morning they were delivered by him to Mr. Rutter, the family attorney, whose assistant he was.

On the 11th August 1909, the widow filed her petition for probate through Mr. Rutter. Bissessur, however, entered a caveat and on the 20th of August he affirmed an affidavit in its support.

In the 5th paragraph of the affidavit he said :—"That I have no personal knowledge as to whether the said alleged will is the last will of the said deceased or as to whether it was duly and properly or at all executed by the said deceased or duly and properly attested as required by law, and if it was executed by the said deceased under what circumstances it was done, and whether the said deceased was in a disposable frame of mind and body, but, as far as I have been able to ascertain from enquiries made, so far I verily believe that

the said alleged will of the said deceased, dated 27th June 1909, is not and cannot be the will of the said deceased."

The proceedings then took the form of a regular suit; witnesses were examined on commission and in Court, and after a prolonged hearing of 24 days the case terminated adversely to the applicant.

I must here digress for a moment to express my disapproval of the way in which this litigation was needlessly prolonged, notwithstanding the endeavours of the learned Judge to keep those who appeared before him within proper limits.

The caveator's grounds of objection I have read, but, notwithstanding the restrained and even languid terms in which they were formulated, the contest has been conducted with unusual bitterness.

Thus the cross-examination of the Petitioner on commission covers upwards of 80 printed pages, the cross-examination of other witnesses occupies in one case upwards of 40 printed pages, in another 17, in another upwards of 20, in another upwards of 50, and in another 19.

I have read through the whole of this cross-examination and I can find no justification for its length. Then there is another matter to which I would allude, as it is not without its bearing on the case.

The hearing began, but was not completed, before the 'Xmas vacation of 1909. Before the vacation the Petitioner had called all her witnesses and she was described by the Judge as having closed her case. The cross-examination of the last of her witnesses was almost at a close, and indeed so nearly at an end did it seem to the Judge that when the cross-examination had to be postponed on account of the witness's illness, the learned Judge proposed to counsel for the caveator that he should in the interest of expedition open his case. The suggestion was scouted, and was even met with a threat on the part of counsel which might as well have been left unuttered. And so the cross-examination of this witness was taken up on the reopening of the Courts. But in the interval much had happened; fresh counsel had been retained for the caveator, and two of the Petitioner's servants had been won over to the caveator's side under circumstances to which I will later allude. And when the cross-examination was taken up, in place of the few questions that the learned Judge had anticipated, the cross-examination was pursued through 3 more days. Not only that, but an application was made on behalf of the caveator with a hardihood little short of astounding to have the Petitioner's witnesses recalled, including even the Petitioner herself whose previous cross-examination had been dragged out to the length I have described. The learned Judge rightly refused this application, but the judgment states, as the record shows, that, on the day when fresh counsel appeared for the caveator, his case assumed an entirely fresh complexion. Now the case made was left in no doubt; the will was denounced as a forgery, Babu Shambhu Nath Sen, an attorney of this Court of some years' standing, was said to have forged Gopessur's signature, and the Petitioner herself to have been a party to and have had a hand in the forgery. And yet when the case first came before Chitty, J., he could get no definite reply when he made the very reasonable enquiry what the caveator's case really was, and when the learned Judge specifically enquired whether a charge of forgery was made, the boldest reply he could elicit was: "It amounts to that." When counsel for the caveator rose to present his client's case

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before this Court I thought it right to ascertain what his case really was, but the diffidence of December had to some extent reasserted itself. Ultimately the following statements were made by counsel and were duly recorded: "I give up the allegation that the signature was forged by Shambhu Nath." "I say the date placed below Gopessur is in Jarat's handwriting; but I don't know when, or whether she knew Gopessur had not written his name." "I say Shambhu Nath was a party to forging this will. I make a charge of forgery against Shambhu Nath and the Petitioner.'

I propose here to examine the judgment under appeal. The key to the decision is, I think, this: there are a number of circumstances which in the opinion of the learned Judge create suspicion: the occasion for suspicion has not been removed: therefore the will has not been proved.

In so handling the case the learned Judge professed to be guided by *Tyrrell* v. *Painton* (1). As I understand that decision it laid down no new principle, but it merely applied a well-established principle to an exceptional set of circumstances. That principle was enunciated in *Barry* v. *Butlin* (2), where it was said, "the rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The first, that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

(1) L. R. [1894] P. D. 151 (1893).
(2) 2 Moore P. C. 480 (1838).

The effect of this decision is tersely stated by Lord Davey, as he afterwards became, in *Tyrrell* v. *Painton* (1), where he said, "The principle is that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed."

The suspicion to which allusion is made must, I think, be one inherent in the transaction itself, and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction.

Now, while I willingly concede the value to us of these decisions, it must not be forgotten that the law is laid down for us in clear and imperative terms by Acts of the Indian Legislature, and it is by the provisions of those Acts that we must be guided. Gopessur was a Hindu, and the law applicable to any will alleged to have been executed by him is to be found in the Hindu Wills Act which incorporates the sections of the Succession Act to which I will refer.

By sec. 46 of the Succession Act it is provided that every person of sound mind and not a minor may dispose of his property by will. In explanation 4 to this

(1) L. R. 1894] P. D. 151 at p. 159 (1893).

section it is said that no person can make a will while he is in such a state of mind, whether arising from drunkenness, or from illness, or from any other cause that he does not know what he is doing. A light is thrown on the meaning of the section by the illustrations appended to it.

By sec. 48 it is provided that a will or any part of a will the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the testator is void.

Sec. 50 prescribes the rules for the execution of unprivileged wills and enjoins (among other things) that the testator shall sign the will; that his signature shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will; and that it shall be attested by 2 or more witnesses.

So much then for the conditions necessary for a valid will. Next we have to see how the existence of those conditions is to be established. For this I turn to the Evidence Act which declares by sec. 3 that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists. The disproof of a fact is similarly treated. It appears to me that the learned Judge has required a higher standard of proof than the law prescribes. Thus at one place, he says, "but even so it cannot be said that there is no doubt regarding Gopessur's possession of the requisite mental activity at the point of time in question:" again, in discussing the signature on the will he says "it is therefore impossible to express a decided opinion on this point:" and he ultimately formulates his attitude towards the problem before him in these words: "The question is,—Is the evidence of the witnesses whom she has called to support her case so unimpeachable, so absolutely trustworthy in itself, as by its own merit to dispose of all objections and allay all doubt and suspicion?" But the materials on which Courts have to pronounce are necessarily imperfect: for apart from the inherent uncertainty of human affairs the presentment of them to a tribunal is ordinarily the outcome of faulty observation, defective memory, inaccurate description and natural bias, and even that is blurred here by the intervention of interpretation.

Demonstration, or a conclusion at all points logical cannot be expected nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable. Accepting the external test which experience commends, the Evidence Act in conformity with the general tendency of the day adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof.

The Evidence Act is at the same time expressed in terms which allow full effect to be given to circumstances or conditions of probability or improbability, so that where, as in this case, forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight as a circumstance of improbability, though the standard of proof to the exclusion of all reasonable doubt required in a criminal case, may not be applicable [Cf. *per* Willes, J., in *Cooper* v. *Slade* (3) and *Doe d Devine* v. *Wilson* (4)].

I have dealt with this topic in some detail as, at the first blush, it would almost

(3) 6 H. L. Cas. 746 (1858).
(4) 10 Moore P. C. 502, 531 (1856).

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appear as though we were asked to dissent from the learned Judge's appreciation of the evidence, and that I should hesitate to do in the absence of very strong circumstances justifying such a course. What we have to see in this case is whether, after considering the matters before us the Court ought to believe the two main facts alleged by the Petitioner, or to consider them so probable that a prudent man ought, in the circumstances of this particular case, to act upon the supposition that they are true. These two facts alleged are, *first*, that Gopessur was of sound mind at the time of the alleged execution of his will, and, *secondly*, that he in fact duly executed his will.

First, I will deal with the problem whether he was mentally capable of making the will propounded, bearing in mind that for this purpose it is on the Petitioner to establish affirmatively that he was at or about 8 or 8-30 on the evening of the 27th of June 1909 of sound mind and not in such a state of mind from illness or any other cause that he did not know what he was doing (sec. 46 of the Indian Succession Act). If the story of the preparation of the will be accepted a lower standard of capacity would be requisite, *Perera* v. *Perera* (5); still I propose to discuss the evidence in the first place without reference to the view that Gopessur had a prior knowledge of the contents of the alleged will.

Now the evidence on the part of the Petitioner consists of the testimony of the three doctors who were in actual attendance on Gopessur, the two attesting witnesses, Gopessur's Sircar and the Petitioner. To this is opposed the evidence of the caveator, his nephew Gora Chand Mullick, two servants who were in Gopessur's service, but left in the course of this suit in circumstances which invite comment, and a doctor who never saw the deceased.

Now I take first the three medical men who attended the deceased, Dr. P. C. Mazumdar, Dr. J. N. Mazumdar and Dr. S. N. Goswami. Not a word has been said against the probity of these three gentlemen, nor has it been suggested that they have any bias in favour of the Petitioner.

Indeed it ultimately came out in the course of the evidence that prior to their giving evidence, all three had been approached from the caveator's side, and it was contended that it must have become known to him or his legal advisers what they were prepared to say, and this has been made a matter of comment by counsel for the Petitioner, in view of the serious charge of forgery involved.

Dr. P. C. Mazumdar is a well-known doctor in Calcutta, and he attended Gopessur in the early part of his illness; he then went to Darjeeling, and he renewed his attendance on Saturday the 26th of June 1909. On that day he saw him once at 3 P.M. and on the following day, Sunday, he saw him twice, at 9 A.M. and 6 P.M. These times are no doubt approximate, but they are sufficiently accurate for the purpose in hand.

On both days he found Gopessur very weak, but he declares that "Gopessur's brain was in no way affected by the disease." On the Sunday evening, he says, the patient was a little better as regards his stools.

Then he says (pp. 197 and 198 of the paper-book)—"I was with him 5 or 6 minutes on Sunday evening. I spoke to him, questioned him about his condition. He gave answers. The answers were in-

(5) L. R. [1901] A. C. 354,

telligent answers." "After seeing him I left the room and went downstairs. Some one accompanied me, Shambhu and one of the servants. That is Shambhu there; Prannath was the servant. I had a conversation with these two. They asked me about the state of the patient. Then I said the condition of the patient was very serious and they asked me also whether they can make a will. They wanted to make a will, Shambhu was asking me whether they could make a will. Whether the patient is to make a will. I said yes he can. You can make a will. English is not my tongue."

"They enquired if the patient could then make a will. I said he could. Nothing further was said."

"In my opinion his mental condition was such that he could make a will then. I say so from what I had observed immediately before."

"I think I told them that the patient might survive 2 or 3 days. That is my opinion."

In cross-examination not a question was put to this witness as to Gopessur's mental condition. This, however, was elicited, *first*, that he did not tell the patient or his friends there was any immediate danger of his dying that night, and, *secondly*, that the patient was sitting up some time and lying down also.

Dr. J. N. Mazumdar saw even more of Gopessur, for he was in daily attendance from June the 19th to the 27th. He describes him as very much more prostrate than on the previous occasions when he had attended him. He says (p. 201 of the paper-book):

"For a few days from the 19th he seemed to improve. Then he began to get worse and worse."

"On the 25th he was not so well. Up to 25th he appeared to be getting better. On the 26th he was worse and on the 27th he was very bad. On the 27th I think I saw him in the morning. I went with my father and had a talk with Gopessur. His mind was quite clear. During this week I did not notice his mind getting cloudy, not that I know of. I was sent for about midnight of the 27th. I could not go. I told him to take Doctor Goswami."

In the cross-examination of this witness too there is a similar reticence on the question of his mental capacity.

The third of the medical men, Dr. S. N. Goswami, only saw Gopessur once; that was about midnight of the 27th, and he remained with him to his death.

His description is as follows (p. 199 of the paper-book):—"He was lying in his bed suffering very much. I found it is from old dysentery he is suffering. I spoke to him. He answered. He was conscious. He gave me intelligent answers. He told me what he was suffering from. I asked him what was troubling him. He said he was suffering from an intense pain in the abdominal region. He said all he wanted me to do was to relieve that pain. I told him I would try my best to do so. I gave him medicine. It did not relieve him. He wanted to smoke once. He said he wanted *hooka*. I said, no, you can't have *hooka* now. I gave him medicine 2 or 3 times. I was there some time. He was complaining of his troubles generally. I can't remember particularly what he said."

"I was there when he died."

"I remained with him till he died. It was about an hour after I went there or more."

"At first his mind was clear, but was falling off very fast. He became unconscious before he died. I can't exactly say how long, about half an hour or so."

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Here too there was no cross-examination as to Gopessur's mental estate.

This abstention on the part of cross-examining counsel, which certainly cannot be ascribed to any reluctance to use this method of eliciting information, valuable or valueless, becomes the more remarkable, if, as the Petitioner maintains, it must have been ascertained what the views of the three doctors were.

I pause here to say that though these three witnesses may be experts their evidence in this case has not been that of experts but of men who had observed relevant facts, and whose evidence derives an enhanced value from the circumstance that they had favourable opportunities, peculiar facility and obvious incentive for accurate observation, and that their training would fit them to appreciate and describe what they observed.

At this point, it will be convenient to consider the evidence of the medical man who was called by the caveator by way of counterblast.

He is Col. Pilgrim, also a medical man of repute in Calcutta, but without the advantage of having seen Gopessur. He comes before the Court as an expert pure and simple, and without discussing the argument as to the characteristics of this type of remunerated witness, or determining how far he is merely to be regarded as a man who is paid a retainer to make a sworn argument, it is impossible to get away from the fact that he labours under a disadvantage to which his medical brethren, if the difference of schools permits this description, were not subject. They saw the patient, he did not. The learned Judge seems to have read the expert's evidence as supporting his own view that the evidence of the three doctors was meagre and unsatisfactory in the extreme.

But it is important to see what was the question that elicited from the expert the reply to which the learned Judge apparently alludes.

This is the question that had such momentous consequences :

"How would you describe the clinical picture such as it is that is presented by the evidence of the three doctors ?

A. Meagre and incomprehensible."

But as I read the evidence of the three doctors they did not profess to paint a "clinical picture," whatever that may mean, but as plain honest men to give a true and plain account of Gopessur's mental condition on or about the 27th of June 1909, as it appeared to them. Had they been required to paint clinical picture for the expert's purposes, I see no reason to suppose they would have been incapable of responding to the demand.

To clinch the matter, counsel put this question to his expert :

Q. "Upon the meagre and incomprehensible clinical picture presented by the evidence of the doctors, are you able to form a clear, satisfactory and convinced opinion as to the mental condition of the patient during, say, the last 8 hours of his life ?

A. No I am not.

Q. Or during the last 8 or 10 days of his life ?

A. No. I am not."

So much the worse for the expert ; but I fail to see how this discredits the evidence of facts given by the three doctors.

Before leaving the medical evidence, it is necessary that I should deal with a comment of the learned Judge who says, "It may also be noticed in this connection that Dr. D. N. Roy who saw Gopessur after the relapse in consultation with Dr. J. N. Mazumdar, and who is said to have

given advice as to the capacity of Gopessur to make a will on 20th June has not been called. His evidence would, in my opinion, have been most valuable, and I cannot understand why it was omitted." Now, nothing can be clearer than that, if there is sufficient evidence of a fact, it is no objection to proof of it that more evidence might have been adduced.

But, apart from this, I do not fully appreciate the learned Judge's comment. To begin with, Dr. D. N. Roy only saw Gopessur on the 20th and 21st, and so he was not in a position to give direct evidence as to his mental condition on the 27th ; in other words, like Col. Pilgrim he could only have expressed an opinion. The "clinical picture" of which the caveator's counsel and expert were in quest could not have been filled in by him, and he, as they, would have found that which there was "meagre and incomprehensible" when he essayed to speak as an expert.

I therefore fail to see how his evidence could have been "most valuable." But more than this, for what it may be worth, the cross-examination of Dr. J. N. Mazumdar by the caveator's counsel elicited information that it was Dr. D. N. Roy's view on the 21st that as Gopessur seemed to be better that day, there was no particular hurry about making a will, but as the case was bad he should make one.

The evidence of the three doctors is supported by that of the Petitioner and the other witnesses called on her behalf, but in the view I take, it is not necessary that I should examine their evidence in any detail at this stage. I, however, find it difficult to follow the learned Judge's comment on Biswanath Sen's absence from the witness-box, or the expectation that he would have given valuable evidence as to Gopessur's condition on the 26th. Biswanath is a brother of the Petitioner and Shambhunath and claims to be a creditor of the estate to the extent of Rs. 5,500 and, a few pages earlier in the judgment, a comment is made on him which makes me doubt whether, if he had been called, the learned Judge would in fact have regarded his evidence as valuable in the view he has taken of the case.

I now turn to the evidence of the caveator's witnesses as to Gopessur's mental condition. The first witness was Gora Chand Mullick, the caveator's nephew.

There can be no doubt that he has warmly espoused and keenly supported his uncle's cause, and that he has a strong bias in his uncle's favour. Consciously or unconsciously he has heightened the colour ; if his evidence be credited, then Gopessur was practically in a state of coma that the doctors failed to observe, and on a careful consideration of his evidence, I cannot avoid the conclusion that he has gravely exaggerated Gopessur's debility. Bissessur the caveator presents an equally gloomly picture. His interest is obvious, but, beyond that, he unfavourably impressed the Judge, who further commented on the way he had been kept back and had not entered the witness-box until a late stage of the case. Why he should have been kept back does not appear, but the adverse comment it invites is so obvious, that it is difficult to understand how counsel came to overlook it. I may point out that though counsel has a discretion in such matters the Court is not powerless (Evidence Act, 135).

The two other witnesses Nityananda Thakur and Jogessur Kahar were justly treated by Chitty, J., as undeserving of credit. Not only is their evidence in-

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herently improbable, but the circumstances under which they were procured is calculated to create neither confidence nor approval.

The conclusion then to which I come, on the best consideration I have been able to give to the case, is that on the 27th of June, at the time when Gopessur was alleged to have executed the will, he was of sound mind, and that, though very feeble and debilitated, he was capable of knowing what he was doing and of exercising a judgment as to the proper mode of disposing of his property.

Then was the instrument now propounded in fact executed by Gopessur ?

The evidence is this : in support of the affirmative there is, first, the direct evidence of Shambhunath and Hem Chander Neogi, the attesting witnesses, and of the Petitioner and Prannath Sur, who all claim to have been actual eye-witnesses of the execution. Next, there is the testimony of Mr. Rutter, who deposes to his belief that the signature to the will is in the handwriting of Gopessur.

In opposition to its execution, there is the evidence of Gora Chand Mullick and the caveator Bissessur Dutt that in their belief the signature is not that of Gopessur, and the evidence given by them and Nityananda Thakur and Jogessur Kahar that it was impossible for him to have executed the document.

Then, over and above this evidence which has a direct bearing on the question at issue, there are the rival contentions as to the probabilities and improbabilities of the case, and in particular as to the truth or falsehood of the story as to the preparation of the drafts on the 20th of June.

This summary of the evidence invites one broad comment. On the Petitioner's side there is the evidence of eye-witnesses, which if contrary to the fact admits of no explanation but that it is a tissue of deliberate and concocted falsehoods. Indeed it was the case presented to us on behalf of the caveator that the story of the drafts was so obviously and palpably false that it was incumbent on us to go beyond the learned Judge and to hold affirmatively that "Sambhunath and Prannath conspired to give false evidence," and the learned counsel went on to say "as I present my case, I have to ask the Court to accept this view."

The line of reasoning really came to this, that the story of the drafts so clearly pointed to concerted perjury that it would be wrong to believe the evidence of the Petitioner's witnesses as to the execution of the will.

Though the case made before Chitty, J., that Shambhunath actually forged Gopessur's signature has been abandoned here still, as I have already pointed out, it is contended that he and the Petitioner had a hand in the forgery. The gravity of this charge cannot well be exaggerated, and this becomes the more apparent when the position of the persons thus charged is realized.

Babu Shambhu Nath Sen is an attorney of this Court, enrolled as such in 1904, and his general good character and the respectability of his family is not questioned.

Shambhunath is, and ever since his enrolment has been in the employment of Messrs. Rutter & Co., a firm of repute. Mr. Rutter, the head of that firm, is a gentleman held in high esteem, and indeed, in the course of this case, it has been distinctly said by counsel for the caveator that "no question is raised as to Mr. Rutter's veracity." Mr. Rutter des-

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cribes Shambhu as a trusted servant of his.

The Petitioner is a lady of position, the deceased's widow. The other witnesses are of humble social position ; still they have characters which no doubt they value. Though perhaps it may be going too far to say that the presumption of innocence is so strong even in a civil case as to cast on him who alleges forgery the whole burden of proof, still the presumption against misconduct is among the probabilities to be taken into account in estimating the value of evidence, and this probability gains in strength where the character and position of the individual impugned is, apart from the particular case, above reproach.

Now the evidence of Shambhunath, Hem Neogi, the Petitioner and Prannath is distinct, that Gopessur signed the propounded instrument on the evening of the 27th of June. Their testimony is supported by Mr. Rutter, who states it as his belief that the signature on the instrument is Gopessur's. His acquaintance with the deceased's signature is not questioned. Had matters rested there it is difficult to see how the grant of probate could have been withheld. In saying this I do not overlook, and for this purpose I do not seek to controvert, though I refrain from affirming, the unfavourable comment passed by Chitty, J., on Prannath. Even if he be left out of consideration, there still remains ample evidence of execution.

I do not understand the learned Judge to have been unfavourably impressed by Shambhunath's demeanour, or by that of Jogendra Nath Sur or Hem Chander Neogi. Certainly he has not recorded any remark respecting the demeanour of any of these witnesses while under examination in manner provided by Or. XVIII, r. 12 of the Code.

As to the Petitioner's demeanour or the manner in which she sustained the ordeal to which she was subjected, the learned Judge is in no better position to form an opinion than this Court. The learned Judge's criticism on these witnesses is as follows: Hem Chander Neogi, he says, is "merely a servant on Rs. 15 a month" but for all that he may be a truthful witness and it is to be noted that he is a servant not of the Petitioner, but of Paramessur's family, so that the will is to the detriment of those he serves.

Jogendra Nath Sur, the learned Judge says, is interested to a large extent and is a man of no position or means. His interest, however, is not under the will, but as a creditor, while the estimate of his position and means is unduly depreciatory. This at any rate seems clear, that he was a friend of the deceased, and the friendship was of long-standing.

The evidence given by Shambhu Nath and the Petitioner is depreciated by the learned Judge not from its inherent demerits, or the unworthiness of these witnesses, but it is said that, as Prannath and Jogendra Nath Sur are not witnesses of truth, "this must reflect back on the Petitioner and Shambhu Nath." This is a doctrine to which I am unable to subscribe in the circumstances of this case.

What then is the evidence led in opposition ?

First, we have Gora Chand Mullick's declaration that he does not believe the words "Gopessur Dutt" in the alleged will to be in Gopessur's handwriting.

Prior to this he had said he was acquainted with Gopessur's handwriting, but when he was shewn Ex. D, he said, "I

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have got to compare it with other handwriting.'' But notwithstanding this statement, and in spite of the other signatures not being shewn to him, he asserted his belief in the terms I have indicated. In cross-examination he was able to go further for he then asserts "I also say this will is not his will. I am prepared to swear it is not his signature." Later he says, "It was not his intention to make a will like this will. The signature is not like the signature of his hand. From all these circumstances I say it is not his signature."

Perhaps too literal an interpretation should not be placed on his declaration that before he came into the box, neither Mr. Kar nor any one else asked him about the signature of the will. This is a common form among witnesses of a certain type, and possibly Gora Chand should be given the benefit of this somewhat equivocal concession. But Gora Chand is not a man for half measures: not only does he gain sufficient confidence to make his unqualified statement regarding the will and the signature, but he is able to ascribe the Bengali date under the signature to the Petitioner. He betrays too much zeal.

Then comes Bissessur who in the witness-box is prepared to pledge his oath that the signature at the foot of Ex. D, the propounded instrument, is not his brother's signature. This confident assertion has to be contrasted with his behaviour when he was shewn the instrument by Mr. Rutter on the 19th of July, and with the attitude taken up in the affidavit supporting his caveat.

Surely if the signature is the manifest forgery that Bissessur now declares, he would have denounced it as such on the 19th of July, and he would have formulated his opposition in more emphatic terms. He was a witness who did not impress the learned Judge, and his statement that the signature is not his brother's is not in my opinion of any value.

Then there is the evidence which aims at showing Gopessur was incapable of executing a will on the 27th. This proceeds form Gora Chand Mullick, Bissessur Dutt, Nityananda Thakur and Jogessur Kahar. I have already dealt with the evidence of these witnessess so far as they purport to describe his mental condition; their version of his physical incapacity is equally unconvincing. Nityananda and Jogessur seek to negative any opportunity or possibility of executing a will on the evening of the 27th, but I do not regard these witnesses as deserving of any credit. This view accords with the learned Judge's appreciation of their evidence; it is supported by the general character of their testimony, and is justified by the mode in which they came to be ranged on the caveator's side.

In my opinion of the evidence directly bearing on the question whether Gopessur executed his will on the 27th June as alleged by the Petitioner, there is a distinct preponderance in favour of its execution. Is there then anything in the probabilities of the case that disturbs this preponderance? To answer this it must be seen what are the facts and considerations that have to be taken into consideration in estimating these probabilities. We start with the fact that there was an estrangement between Gopessur and Bissessur, who alone opposes the will, and that Gopessur was at least anxious that Bissessur should have no interest in his property.

On the other hand he was on terms of affection with his wife, who had moreover, as far as one can judge, nursed and attended him with devotion in his distressing

illness. There was, therefore, nothing in the state of the family or his feeling that would suggest it was improbable he should make an absolute disposition of his property in his wife's favour, and, in so saying, I do not forget the little boy, Paramessur's posthumous son, to whom he doubtless was attached, though not as extravagantly devoted as the caveator would have us believe. Then we have the undoubted fact that on Tuesday, the 29th of June, the alleged will passed into the custody of Mr. Rutter bearing the signature that is now denounced as a forgery. Our attention has been called to that signature, though not to the photographic enlargements and it has been suggested the D, the "u," and the crossing of the "t t" should arouse suspicion. It is a matter of common knowledge that forgeries commonly, I do not say always, present certain appearances which are indicative of their origin. Counsel, when questioned as to this, was unable to suggest that this signature exhibited any of these marks. I do not say that this is in any sense conclusive, but, at any rate, it justifies the view that when the document came into Mr. Rutter's possession, and that was comparatively speaking within a short time after Gopessur's death, it did not present those appearances which are commonly associated with a forged signature.

Then there is Bissessur's behaviour on the 19th of July, and the ordinary presumption against misconduct which I think the Petitioner is entitled to ask should be ranged among the probabilities in favour of her story.

And now I come to the probabilities which the caveator asserts weigh with overwhelming force against the validity of the will. *First*, I will take up the story of the preparation of the drafts and the propounded instrument, Exs. B, C and D. What is said by the caveator is this:—this story is so bound up with the actual issue in the case that if it be disbelieved, it creates an insurmountable improbability in the caveator's way and more than that, it would be impossible to act on the evidence of those involved in it, that is to say, of the Petitioner, Shambhunath, and Prannath when they speak to the execution of the will.

The story presented by the Petitioner is this. On the night of the 18th of June Gopessur suffered a relapse and on the 19th Shambhunath was sent for. In the evening Gopessur told him he wanted to consult him about his will. Nothing further, however, was said that night. On the next day, a Sunday, the topic was renewed and Shambhunath's version is as follows:—

"(To the Court—He said stop here to-night, we will have a talk to-morrow). The next day was Sunday the 20th June. After our meals myself and Prannath remained with Gopessur, Gopessur told me to make a will for him. To that I questioned why you are eager to make a will. To that the answer was 'As there was a relapse he had better make a will,' and the second reason he said that he had on several occasions heard from me that, in case of his dying intestate, his properties would go to his brother, and he said that you know our respective feelings towards each other, meaning himself and Bissessur. So by the will he wanted to exclude his brother. Then I enquired what kind of will do you want to make. He said first thing he wants to give everything to his wife, and also give her power to adopt and give certain legacies. Having heard that I told him to send a carriage to Mr. Rutter

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and he will do everything. To that he said 'Let me prepare the will and afterwards I shall go to Mr. Rutter to his office any other day, and get it attested by him and Mr. Rutter junior, and leave my will with them.' Then again he pressed me for the will.

(To the Court—To make the will for him).

To that I said one thing you ought to consider now. You are going to give your properties to your wife and give her power to adopt. In case she does not adopt and dies intestate, whom do you want your estate should go to, as in that case the properties which you are giving to your wife would go to her parent's line. To that he answered I have no children. She is my wife. I want to give her everything. I am not coming after my death to see how my wife deals with the properties. Hearing that I said you can write down your intentions on paper and that will be your will, only you are to see that an executor or executrix is appointed and that you sign it in the presence of two persons who must also witness it. Then he ordered his Sircar Prannath to bring paper and writing materials and he dictated his intentions and Prannath wrote. That was in my presence. This was about 12 noon. As there were certain interlineations, Gopessur asked Prannath to fair copy it and said in fair copying you make the last para. the third one and the third one the last para.

(Shown document).

This, was the first copy that Prannath wrote. The third para. contains the legacies, he wanted that at the end so as to fill in the names and amounts of legacies at the time of execution. This contains what I heard Gopessur dictated correctly.

After it was written out, the testator read it. He said it was all right. Just then Gopessur's friend Jogendra Nath Sur came in. Jogendra was a neighbour of Gopessur. They had known each other from boyhood I think. I saw Jogendra with Gopessur since Gopessur's marriage. Jogen went into the room (myself and Prannath both were there), and Gopessur told him the same reasons as to relapse and said that he was going to make a will and handed over the paper to him, the first draft written out by Prannath, to read, saying that this contains the same provisions as he used to tell Jogen. Jogen Babu read it out.

(To the Court—He read it aloud. We all heard.) And then Gopessur told him to fair copy it, asking him to alter the paras as I have already said. As there was no paper in the room Prannath was going to bring paper from the Daftarkhana in the adjoining house which was the Thakurbaree, but Gopessur said you both better, meaning Jogen and Prannath, go there, and write out. They went away. About half an hour after they came back. I was all along with Gopessur and Jogen handed over both the papers to Gopessur. The original draft and the fair copy written out by Jogen He read both, Gopessur read both.

(Shewn document).

This is the fair copy I refer to. It was handed to Gopessur in my presence. It's in Jogen's handwriting.

During the time Prannath and Jogen were away, I don't recollect anything.

After reading both the papers Gopessur gave me the fair copy (Ex. C) to look at. On seeing I said this would not do as there was much space between the several paragraphs, and he enquired how it was to be written. I said there ought not to

be any space so let it be written out again without any space. To that Goppessur directed Prannath to re-write it at night and give him the next morning, and gave both the papers to Prannath. He said there was no use of hurrying now, you can write at night, and give me the next morning, so that Gopessur would cxecute it in the presence of the doctors when they came. I stayed with Gopessur in this garden house that night. He asked me to stop that night also. I had also my father's permission when he turned up that night. Dr. J. N. Mazumdar came that night. He said the patient is much better now, and hoped to give him rice next morning—Monday morning. On Sunday my father was there in the morning, but came away when the doctors left in the morning, then again my father and mother both went up there a little before dusk I think, and I came away after the doctor left. I remained there that night.

Next morning (Monday, 21st June), at about 8 o'clock, Prannath brought all the three papers, the original draft, the fair copy and the copy he had written out the previous night, and gave them to Gopessur in my presence. Gopessur saw them. He read them and said that he was feeling much better so let the execution of the will be postponed now, and said, as soon as he was well and allowed out for drives, he would come to Mr. Rutter at his office and execute the will there, and told Prannath to keep the three papers in the almirah, and Prannath kept them there. The almirah was closed, Gopessur handed over the key which was attached to his *Har* (golden chain) he wore. He handed both key and chain, and Prannath opened the almirah and kept the papers there and handed the key and chain back. It was about 8 A.M."

For the caveator it was asserted before us that this is a false case, and that those of the Petitioner's witnesses who have deposed to it have conspired to tell a false story, and this assertion is based not on any definite sworn testimony to the contrary, but on the inherent incredibility of the story, and the inference invited by an examination of the documents.

It is said, it is incredible that Shambhunath should have preserved the attitude of aloofness he professes, seeing that the purpose for which he was invited was to assist in the preparation of the will, that the will itself points to the handiwork of a lawyer and not of a layman, and that the story as to the preparation of the three documents (Exs. B, C and D.), more particularly when regard is had to their appearance, is not worthy of acceptance.

I am disposed to think the assistance rendered by Shambhunath in the preparation of the will has been minimized and it is this that has furnished the caveator with his most potent and controversial weapon of attack, and if, at first sight, this would seem to imply a lack of candour on his part, a closer examination shows that he has dissociated himself from that which is formal, not that which is of real and essential importance in the will. Thus he, in effect, admits, without any attempt at concealment, that the mention of an executrix in the will may be fairly attributable to him, and that he had a hand in placing the absolute interest of Jarat beyond question. And after all, these are the two matters in which he might be said to have an interest, these are the matters of substance. The power to adopt was, if anything, to his detriment while the pecuniary legacies are of no serious moment. Much has been made of the phraseology and form of the will,

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and it is in this connection that Mr. Mohini Mohan Chatterjee, an attorney of this Court, has come forward to lend his support to the caveator's case. He is described, and has been treated by Mr. Justice Chitty, as an expert, and his evidence had a manifest influence on the learned Judge. In the view I take of this gentleman's evidence I do not consider it necessary to discuss in detail the relevancy or irrelevancy of its different parts, or his title to give the evidence he did as an expert: it suffices for me to say that I do not attribute to his testimony the importance that the caveator claims for it. Our attention has been drawn to words and phrases which it is said, in the light of Mr. Chatterjee's evidence, could only have owed their appearance to Shambhunath but it is not unreasonably answered that, if this was the caveator's case, then it is to be regretted that these points were not put to Shambhunath, and it is appropriately pointed out that he was cross-examined by a learned and experienced counsel in every way equipped, possibly as well equipped as Mr. Chatterjee, for the purpose of estimating whether the words and phrases were as pregnant of suspicion as Mr. Chatterjee would have the Court believe. Thus the caveator's counsel would see something sinister in the fact that the widow is merely authorized and not directed to adopt, and yet he is constrained to admit that, in law, the result is the same. Next he would see something even more sinister in the fact that the widow takes an absolute interest whilst no effective legal provision is made for the adopted son. It is difficult to appreciate with exactness what the train of reasoning here is; whether the omission points to the presence, the absence, or the abuse of legal assistance, and the learned counsel did not succeed in elucidating this point. But be that as it may, it was conceded that the mere fact that an absolute interest was given to the widow was not in itself suspicious, and it could not well be otherwise contended in the light of common knowledge, and indeed, for what it may be worth, it may be remarked that the Privy Council in *Dowlat Koer* v. *Ramphul Dass* (6) upheld a will propounded by a widow in whose favour a similar disposition had been made. So it must be on the absence of an adequate provision for the adopted son that comment is made. Now it is outside my present purpose to construe the will so far as it relates to the adopted son's rights, but I am by no means sure that the author of the document may not have thought that the adoption, apart from special provisions, might detract from the widow's right in favour of the adopted son, for he expressly declares that the adopted son shall not be competent to put forward any manner of claim in respect of the testator's properties during the life-time of the wife. I do not propose to discuss the legal effect of the provision, but the words appear to me to suggest an impression in the person responsible for them, that the adoption in itself might create a right in the adopted son. This may have been a misimpression, and, if so, it is one into which a layman rather than a lawyer would have been misled and in any case I fail to trace Shambhunath's hand in it. So much for the caveator's contentions based on the internal evidence furnished by the words, phrases and provisions of the alleged will.

This brings me to a topic on which, before us, the caveator's counsel has principally directed and concentrated his attack, that is to say, the actual preparation of

(6) I. L. R. 25 Cal. 459 (1897).

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the documents B, C, D as disclosed by the evidence. The whole story it is urged is incredible. Thus it is said that it is ridiculous to suppose C was rejected because of the wide spaces between the paragraphs, and that this is merely a device for bringing Jogendra Nath Sur into the plot. I cannot agree with this. I think the explanation of the rejection is eminently reasonable, when it is borne in mind that the proposal was that C should be executed as a will. Then it is said that in view of the fact that both C and D are alleged to have been drafted in the *daftarkhana* no satisfactory explanation of the difference in the ink is given, for that vouchsafed by Shambhunath is improbable. But if an explanation was desired, it should have been sought of the only man who could give it. Prannath alone knows the conditions under which he wrote out Ex. D, but he was not questioned on this point. Then it is asked why was Mr. Rutter not instructed to approve the drafts, why was he not invited to attest the will, why was the will not executed in the presence of the doctors? No doubt had any of the precautions indicated in these questions been observed, much trouble would have been saved, but I cannot regard the failure to observe them as creating any serious improbability. The truth is superstition and caprice are not foreign to the execution of a will, and the reluctance that results from seeing in a will a "remembrancer of death" is not without its influence on the behaviour of intending testators. Then it is said Gopessur was *in extremis*. If by this is meant that he was *in articulo mortis*, and that he was testamentarily incapable, the answer is that this contention is against the weight of evidence: if it is meant that the will is alleged to have been executed in circumstances which call for a vigilant scrutiny of the evidence, my reply is that to the best of my ability I have endeavoured to perform that duty. Then how do matters stand if the preparation of Exs. B, C and D be looked at from the Petitioner's point of view? We start with this that I am convinced these documents were in existence on Tuesday, the 29th of June, and were handed to Mr. Rutter on the morning of that day. This is the conclusion at which Mr. Justice Chitty also arrived. The Petitioner's version, if true, affords a reasonable explanation of how the three documents came into existence, and yet, at the same time, the circumstances which explain their peculiarities, depending as they do on the curious and trivial chances of actual events, are not such as a forger would be likely to forecast or invent. More especially is this so if, as the caveator would have us suppose, the documents were prepared while Gopessur was in a moribund state or afterwards. I do not propose to examine the possibilities of this theory in detail, but it is not without its difficulties. The time at the disposal of the schemers was not long, while their undertaking was complex. Gopessur died in the early hours of Monday, the documents were in Mr. Rutter's possession on the following Tuesday morning. From this period must at least be deducted the time occupied in the funeral ceremony, that is to say from 6 or 7 in the morning, when the party started for the ghat till their return at 12 or 1. In the available time much had to be done; the story requiring the preparation of the three drafts had to be composed or sketched at any rate in outline by some one, the three documents had to be prepared with the interlineations, erasures and variations that they exhibit, the two writers and Hem

Chander Neogi had to be procured and convinced, there was the attestation clause to be added by Shambhunath, and the attestation by him and Hem Chander, there was the admirable imitation of Gopessur's signature to be effected, and the widow's addition of the Bengali date. Leaving out all such hindrance to despatch as the feelings evoked by Gopessur's death might be expected to create, this would be no mean performance on the part of this confederation of forgers.

Though the caveator is not bound by the theory advanced in his interests, I have not thought it necessary to discuss other possible but unpropounded theories. On the other hand, as favouring the view that the drafts were prepared on the 20th, we have the fact that the advisability of a will was discussed when the doctors came on the 20th, while Mr. Rutter declares that he heard of the two general provisions of the will two or three times before the documents were brought to him. To escape from this important statement, the learned Judge says "Mr. Rutter's memory may be deceiving him on this point," while before us it has been suggested, not that Mr. Rutter was not told about the two general provisions, but that he must have been so told after the documents had been handed over to him.

But if this is the caveator's case, it is a pity it was not put to Mr. Rutter while he was in the witness-box, he could have dealt with it. For my part I can see no sufficient reason for not accepting Mr. Rutter's statements in the sense in which he made it, and if so, it unquestionably lends considerable support to the Petitioner's case that the documents were prepared before Gopessur's death.

I have discussed these three documents Exs. B, C and D in considerable detail as the caveator so largely rested his case on what he contended was the obvious falsehood of the story.

The conclusion to which I come is that the story of the three documents is in the main true, and though Shambhunath may not have been so detached as the evidence would make out, I hold that Exs. B, C and D were written out as the witnesses describe, and that Gopessur was responsible for them, and knew and understood their contents. His mental capacity at that time has not been questioned, so that had it been necessary it would have been open to the Petitioner to rely on the doctrine recognised in *Perera* v. *Perera* (5).

It now only remains for me to express the view I take of the whole case. The weight of evidence in my opinion is strongly in the Petitioner's favour, both as to Gopessur's mental condition and the fact of execution. Though there are matters on which there is room for doubt, I am unable to regard the probabilities as opposed to the case made by the Petitioner; rather otherwise. Moreover the mere improbability of this or that in so complex a transaction as that under consideration cannot go for much against the clear and distinct evidence of witnesses of good general character, and, after all, probability and improbability of the type with which we are here concerned is apt to become a matter of speculation and predilection, for different persons act differently in similar circumstances and much of that which has been classed as improbable in this case comes to little more than a failure to observe a higher standard of precaution and to do the wisest and safest thing under the circumstances.

The conclusion then to which I come is that Gopessur did sign Ex. D on the

(5) L. R. [1901] A. C. 354.

evening of June the 27th, as alleged by the Petitioner, that he intended by so signing to give effect to the writing as his last will, and that at the time he was of sound mind and capable of exercising a judgment as to the proper mode of disposing of his property, and that he knew what he was doing. No dispute was raised before us as to the legality of the attestation.

The judgment of Chitty, J., should, therefore, be reversed, and a grant of probate made to the Petitioner, Sreematy Jarat Kumari Dassi. The costs of the suit and appeal throughout must be borne by the Respondent, Bissessur Dutt.

WOODROFFE, J.—A considerable number of decisions have been cited upon the question of the nature of the proof required in the case of wills. In my opinion a reference to them is unnecessary for I am not aware that a probate case is in any respect singular as regards the application of the general principles of proof. Those general principles have been stated in the Evidence Act to be as follows :—

"Whoever desires any Court to give any judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." (Evidence Act, sec. 101). In this case we are asked to give judgment as to the existence of the will propounded and as to the legal rights which follow such a conclusion. Sec. 3 shows the meaning of proof to be that the fact (in this case the will) is proved when the Court, after considering the matters before it, either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists. Each case must therefore be determined on its own facts.

Upon however the decisions cited I would observe that the rule in *Tyrrell* v. *Painton* (1) applies in my opinion to cases where the circumstances of suspicion arise from the nature of the case as put forward by the propounder. In such cases the propounder must remove the suspicion which his own case creates. Where however the alleged suspicion against a will arises from facts which form parts of the impugnant's case then the Court must see whether the facts which are said to give rise to the suspicion are proved or whether the Plaintiff's case is proved. The rule therefore does not apply where the question is simply which set of witnesses should be believed [*Shama Charan Kundu* v. *Khettromoni Dasi* (7)]. In the present case the Defendants put forward (though in an uncertain way and at a late period of the case) a charge of forgery. This the learned Judge has found to be not established.

Of the Defendants' eight witnesses the first and last are formal. The learned Judge does not accept the caveator's evidence, nor that of the two former servants. He does not, at one passage at least, consider Colonel Pilgrim's evidence necessary for his decision though on other points he does refer to it. The bulk of Colonel Pilgrim's evidence was irrelevant. He stated that he was unable to pronounce an opinion either as to the cause of death or as to the physical and mental condition of the alleged executant. This admission substantially disposes of his evidence. Other portions of his testimony are inadmissible as being mere advice to the Court on the evidence and outside the opinion rule, or if admissible in form, are not in the present cir-

(1) L. R. [1894] P. D. 151 (1893).

(7) L. R. 27 I. A. 10; s. c. 4 C. W. N. 501 (1899).

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cumstance of value or relevant. This testimony appears to have been given not after hearing the evidence but on a copy of the deposition. It has been objected that this in itself makes the evidence inadmissible. I do not agree though I think the better course to follow where expert testimony is given is that the expert should hear the evidence as to which he is asked his opinion. There remain the two witnesses Mohini Mohan Chatterjee and Gora Chand Mullick. As regards the first it was contended that he was not expert. It is however quite clear in my opinion that he is expert on questions relating to the Bengali language which is his own (including Bengali legal terms) and Sanskrit which he has studied. It is essential however to distinguish the rule of qualification founded on the experience of the witness and that which permits him to advice the Court with an opinion. Every witness must be fitted or expert in the matter upon which he gives his supposed knowledge. In some cases, *viz.*, where the witness is "expert" in the narrower sense his competency must be specially shown. The question however whether besides deposing to facts he is to be permitted to express his opinion is another matter. In each case therefore it must be asked, is the matter one upon which the witness is sufficiently qualified by experience; and if he is, is it a matter upon which the witness is permitted to assist the Court with his opinion. This must be (sec. 45, Evidence Act) a matter of foreign law, science and art, handwriting or finger impressions. It would be relevant in this case to prove by the evidence of persons who knew him that the testator was of limited education and without literary and legal attainment and then that the alleged will was written in literary Bengali and contained terms of a peculiar literary or technical legal character, and on these facts to invite the Court to say that the will was not written by the deceased. His evidence however in parts goes beyond this and where it does is inadmissible as where he was asked to express an opinion as to the literary skill and culture and legal knowledge of the deceased. The learned Judge states that this evidence raises a grave doubt whether the will was the exclusive composition of the alleged testator as the Petitioner's witnesses assert. As regards Gora Chand Mullick, the learned Judge, after stating that he is a partisan of Bissessur and that portions of his evidence are hard to believe, says that he is inclined to think that his story as to the deceased's physical conditions is substantially correct. These two are practically the only conclusions (though it may be doubted whether they amounted even to that) which are held to be established by the Defendant's evidence.

The question then became simply this: Had the Plaintiff under these circumstances made out his case? The learned Judge has held that he has not, because he thinks that there are elements of doubt and suspicion which have not been removed.

Before dealing with this there are two points of evidence which arise upon the Defendant's case as to which I desire to express my opinion. As regards Bissessur the learned Judge points out that he abstained from going into the witness-box until all his witnesses other than the experts and formal witnesses had given evidence. The Court might and I, venture to say under the circumstances of this case, should have directed that the caveator be examined earlier, if not (as would

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have been proper) in the first place. The Court has always power to do this under sec. 135 of the Evidence Act.

Next in re-examination of the witness, Gora Chand, an unproved copy of a statement briefed to counsel of his evidence was put into his hands and he was asked whether it correctly represented the substance of what he had told the caveator's attorney. The question though objected to was allowed and answered affirmatively. It is not necessary to consider whether it was admissible as the document itself was subsequently rejected. I would observe however that the Court could not assume that the document was proved from the refusal of opposing counsel to cross-examine to it. The latter was entitled to wait until the Court ruled whether the document had been proved or not. A question has arisen in connection with this as to the right of counsel to inspect a document which opposing counsel has put in the hands of a witness. The rule on this point appears to be correctly stated in Taylor on Evidence, 1452, as follows:—"On the whole the practice seems to be that if the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some questions as to its general nature or identity his adversary will have no right to see the document but that if the paper he used for the purpose of refreshing the memory of the witness or if any questions be put respecting its contents or as to the handwriting in which it is written (as in the case, *Peck* v. *Peck* (8), cited to us in argument) a sight of it may then be demanded by the opposing counsel."

Proceeding then to the propounder's case we have the following facts: The will is not an unofficious one. The deceased had no children living. The evidence clearly establishes that he was on very bad terms with his brother Bissessur and desired to exclude his taking any portion of his estate. He was on good and probably affectionate terms with his brother Parmeswar who is dead and was possibly fond of his child. The latter however is provided for, having succeeded to his father's estate. If the alleged conversation between Shambhu Nath Sen and J. N. Mazumdar is admissible, a matter which is open to doubt, it is of too vague a character to establish any intention to benefit Parmeswar's son. There is no suggestion that the deceased was not on good terms with his wife to whom he left his property. It has been found that there is nothing improbable in such a disposition. Mr. Rutter says that about a week before deceased's death he had heard that the testator was going to make a will and that he had heard from Shambhu Nath Sen of the two general provisions of the will. The medical evidence (the veracity of which is not impeached) also proves preparations for a testamentary disposition. Mr. Rutter who was the solicitor of the family and whose credit it is admitted is beyond attack swears that the signature on the will is that of the deceased and that the will and the two drafts were in his possession on the Tuesday following the death of the testator. There is other evidence as to the signature which is strongly supported by the attitude which the caveator assumed on this point. Though he now alleges the will is a forgery he did not set that up in his affidavit of 20th August 1909 though in the previous month he had seen the will at Mr. Rutter's office when he says he at once detected that it was not his

(8) 21 L. T. R. 670 (1870).

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brother's signature. He says that Mr. Rutter asked him if he had any doubts with regard to the signature upon which the witness said "I told him how could I tell him." The affidavit is silent on the point.

The propounder's medical evidence establishes the mental capacity of the deceased. In my opinion the cross-examination of these witnesses which was very brief does not challenge their evidence as to the physical or mental condition of the deceased. It was not open then for the caveator to contend that their evidence was meagre or unsatisfactory on points which their cross-examination in no way challenged. It was argued that it was not good policy to cross-examine the doctors even though they had prior to suit been approached by or on behalf of the caveator who admits them to be persons of respectability anxious to speak the truth. One might have understood this argument where the credit of the witness was doubtful but this is not impeached. An omission to cross-examine is not intelligible on the assumption that there was a desire to elicit the truth. We have it then that there is a will containing provisions of a probable character, the intention to make and the general provisions of which were disclosed to a witness whose credit is not impeached; which bears a signature which by the same witness as by others is shown to be that of the deceased who by the testimony of medical witnesses (whose respectability is not impugned) was of sound and disposing mind. All this is most powerful evidence to support the evidence of preparation and actual execution of the will. The main attack here has been against the evidence as to the preparation of the draft on the 20th. It is contended that the evidence that the deceased dictated it without assistance except such as Shambhu Nath Sen admits is untrue and that in fact the draft was the composition of the latter witness who denies this from fear that it might be suggested that he had exercised undue influence over the deceased for the benefit of his sister. It is possible that the witness, Shambhu Nath Sen, may have understated the assistance which he gave to the deceased but that fact alone, even if it were established and he had been (as he was not) directly cross-examined on the point, would not in my opinion under the circumstances of the case be sufficient to displace the strong inferences in favour of the will which arise from the rest of evidence in the cause. If, as I find, the signature is that of the deceased and the latter was when he affixed it of sound mind and knew what he was doing the details as to the mode in which the will was actually prepared are in this case of secondary importance.

It is noteworthy that objection was taken to Mr. Rutter stating what Shambhu Nath had said to him prior to the death of the deceased relative to the preparation of the will, and that on the 7th January 1910 a suggestion was made to him in cross-examination that there was then in his office a deed of gift by the deceased's widow in favour of Parmeswar which was to be executed if probate was granted; a suggestion which is only consistent with there having been a will which gave the property absolutely to her. There is no caveat entered from Parmeswar's branch of the family though it is charged that the alleged forged will defeats the alleged intention of the deceased to benefit it. Hem Chander Neogi one of the attesting witnesses is employed by that branch of the family.

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It is further suggested that the attorney, Shambhu Nath Sen, who it is charged took the principal part in the alleged forgery of the will, told Dr. J. N. Majumdar that the deceased's nephew was to be benefited under the will which he was about to forge and which when produced in fact excluded the nephew. These and other suggestions, the nature and (on points) absence of cross-examination, and the time and mode in which the defence has been presented indicate very clearly to me that the caveator has no definite case, and the charges he now makes fail. On the other hand for the reasons I have stated I am of opinion that the propounder has established the will.

I agree therefore in decreeing this appeal and in the order passed thereon.

Messrs. Rutter & Co., Attorneys for the Plaintiff, Appellant.

Messrs. G. C. Chander & Co., Attorneys for the Defendant, Respondent.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 1161 OF 1911.

CHITTY, J.	ELAHI BUKSH MANDAL and others,
N. R. CHATTERJEA, J.	Defendants,
1911,	Petitioners,
Heard, 23, March.	*v.*
Judgment,	RAM NARAYAN
27, March.	GHOSH, Plaintiff, Opposite Party.

Provincial Small Cause Court, if may decide title—Procedure—Mesne profits if recoverable when Plaintiff out of possession—What must be proved—Petty case, pecuniary value not an unfailing test.

In a Small Cause Court suit the Judge is no doubt competent to decide the question of title upon which the claim depends, but if he does so it is incumbent on him to decide the question correctly and according to law.

Although a Plaintiff may perhaps recover mesne profits though out of possession still in order to recover damages in a case where he was out of possession, the Plaintiff must show that he has a right to immediate possession.

The maxim de minimis non curat lex *should not be applied to Small Cause Court suits for damages in respect of immoveable property for the importance of the case to the parties is not to be measured by the pecuniary limit of their claim.*

POONA CITY *v.* RAMJI (3) *referred to.*

This was a Rule granted on the 2nd of March 1911, against the judgment of Babu S. N. Guha, Small Cause Court Judge of Baburghat, dated the 23rd of December 1910.

The facts of the case will appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Ramesh Chandra Sen* for the Petitioners.

Dr. Rash Behary Ghosh and *Babu Joy Gopal Ghosha* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This is a Rule obtained by the Defendants in a Small Cause Court suit calling upon the Plaintiff to show cause why the judgment and decree should not be set aside. The Plaintiff sued for Rs. 5 as damages for fish said to have been caught by the Defendants from a certain tank in the month of Chaitra 1316, (March—April 1910). The main point in the suit was in whom the title to the tank lay. The Small Cause Court Judge was (we are told) asked to return the plaint for pre-

(3) I. L. R. 21 Bom. 250 (1895).

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Calcutta Weekly Notes.

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Contents.

NOTES.

The constitution of Benches and the distribution of business amongst them from to-day will be as follows :—

APPEALS FROM THE ORIGINAL SIDE AND THE PRIVY COUNCIL DEPARTMENT.—The Hon'ble the Chief Justice and the Hon'ble Mr. Justice Woodroffe.

PRESIDENCY GROUP.—The Hon'ble Mr. Justice Brett and the Hon'ble Mr. Justice Carnduff.

RAJSHAHI GROUP.—The Hon'ble Mr. Justice Stephen and the Hon'ble Mr. Justice D. Chatterjee.

PATNA AND BURDWAN GROUPS.—The Hon'ble Mr. Justice Coxe and the Hon'ble Mr. Justice Imam.

CRIMINAL BUSINESS.—The Hon'ble Mr. Justice Holmwood and the Hon'ble Mr. Justice Sharfuddin.

REGULAR APPEALS OF ALL THE GROUPS.—The Hon'ble Mr. Justice Chitty and the Hon'ble Mr. Justice Teunon.

SPECIAL APPEALS OF THE VALUE OF Rs. 1,000 AND UNDER.—The Hon'ble Mr. Justice N. R. Chatterjea.

ORIGINAL SIDE.—The Hon'ble Mr. Justice Fletcher and the Hon'ble Mr. Justice Chaudhuri sitting singly.

WE NOTE WITH PLEASURE THAT THREE additional Judges have been appointed to the Calcutta High Court Bench. Of these Mr. Teunon, I. C. S., Superintendent and Remembrancer of Legal Affairs in Eastern Bengal and Assam, has already officiated as a Judge of the Calcutta High Court and is well-known to the profession. The other two appointments have been given to Indian barristers. In making these two appointments Government may be said to have recognised the principle for which we have contended in these columns that at least a third of the appointments on the High Court Benches should be given to Indian members of the legal profession. Of the two barrister Judges, Mr. Hassan Imam, who only lately joined the Calcutta High Court, had a good practice at the Patna Bar. Although he is little known on this side of Bengal, yet we who have known him for many years feel confident that he will turn out a successful Judge. He is intelligent, cultured, free from any racial bias and we fully expect that he will prove worthy of the position to which he has been raised.

OF MR. A. CHAUDHURI, IT WILL SUFFICE TO say that he has been in the first rank of the legal profession for some years past. We are told that it has caused some surprise in professional circles that his services should have been requisitioned on the Bench and that he should have thrown up such a lucrative practice and so readily responded to this call to duty. We on the other hand would have been most painfully surprised and no less disappointed if any man of his position at the Bar had refused to go on the Bench when required, for no better reason than that he was getting much more at the Bar. According to the best traditions of the English Bar, a member of the Bar ought never to refuse a judgeship when it is offered to him. The Bar is and should always be the recruiting ground for judges and the prestige of the Bench and of the profession would be a thing of the past if it ever ceased to be so. The most eminent Judges on the English Bench have almost all been eminent men at the Bar and their income at the Bar has not unoften been far in excess of the professional income of the leaders of the Bar in India. Yet they have never hesitated to abandon their practice when they were required to serve on the Bench.

SUCCESSFUL MEN IN INDIA OWE EVEN A HIGHER duty to the Indian community in respect of high judicial and other responsible appointments. We

have always been hammering at the gate of Government for equal treatment with other British subjects in the Empire and we assert that all positions of responsibility and trust should as a matter of principle be given to the men best fitted for the position. What would become of all this talk if we do not cultivate sufficient public spirit to be able to make sacrifices when called upon to serve the State. It would, therefore, have been a calamity from the Indian point of view if Mr. Chaudhuri had not accepted the judgeship that was offered to him by Government. The result of it might have been that the appointment would have gone out of the country and the claims of Indians to such appointments would have suffered a set back which would have greatly prejudiced our claims to any such responsible position for some time to come. We are glad to find that the view we have expressed above is the general sense of the community and that the offer of the appointment to him and the acceptance of it by Mr. Chaudhuri has given universal satisfaction.

RE-PARTITION OF BENGAL.

We have shown by unimpeachable authority what has been the boundary of Bengal historically, what it is linguistically and what it should be geographically. Now that Bengal is being reunited after six years of schism and strife and is being raised to the status of a Presidency Government, it is natural that every class and community of people who have the Bengalee language as their mother tongue should feel most strongly about being brought together under the same Province and under the same form of Government. We have shown that the existing districts and divisions have been formed and not unfrequently transformed only for the sake of administrative convenience and without any regard for their historical, geographical or linguistic boundaries. So long as Bengal, Behar, Orissa and Chota Nagpur formed one province it was a matter of comparative indifference whether a Bengalee-speaking district or sub-division was included in one or other of the above Divisions. But now that they are being divided into several Provinces, it would cause the Bengalees all the pangs of partition if the outlying Bengalee-speaking districts were to be severed from Bengal and included in Behar, Chota Nagpur, Orissa or Assam. No doubt the partition of Sylhet and Goalpara is not of recent origin but still the people of these parts desire as strongly to come back to their kins as any other section of the Bengalee community.

It is but right and proper that the whole and every component part of the Bengalee community should participate equally in the great Royal boon and should not be made to feel any grievance in respect of it. It would therefore be singularly unkind and impolitic to sever the Bengalees of the outlying districts from their brethren and to transform the boon into a dire grievance so far as they are concerned. Their grief will be all the greater because under this partition they would be left as small detached communities and as such would form a hopeless minority in the new province. Leaving the boundaries as they were before would also be of considerable administrative inconvenience to the new Province. The two languages of Behar and Orissa have little in common and on the top of that to add Bengalee as a third language for the new Province would surely add to its administrative complications.

A Province with three Court languages would make the life of judicial and executive officers a burden to them. They are expected to acquire a working familiarity with the vernaculars of the Province. If every member of the executive or judicial service has to learn Uria, Bengalee and Behari, they would hardly acquire any familiarity with any of them. The result of tacking a number of Bengalee-speaking districts with Orissa, Chota Nagpur and Behar will require even the police and other officers to acquire a fair knowledge of more than one language as otherwise difficulties would arise on the occasion of their transfer from one district to another. Records will also have to be kept in different districts and divisions in different languages. That such inconveniences existed in the past is no justification for their continuance under the present momentous changes. It needs hardly any argument to convince any practical man of the inconveniences and the desirability of obviating them when the Provinces ate being reformed. If the Bengalee language was altogether eliminated from Behar it would be ever so much more convenient for all classes of officers—judicial, executive, police and ministerial. So from every point of view the Bengalee-speaking districts and sub-divisions should be excluded from Behar and included in the Presidency of Bengal. In any event Manbhum, Dhalbhum and the Sonthal Pergunnahs from Rajmehal to Deoghur should not be repartitioned from Bengal.

THE LEGAL SOURCES OF HINDU LAW.

The sources of law recognised by Hindu Law are enumerated as follows :—

"Sruti, Smriti, good custom, what is agreeable to one's soul and deliberate will are laid down as the sources of law (1).

"Four persons versed in the Vedas and Dharma

(1) श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।
सम्यक् सङ्कल्पजः कामः धर्म्ममूलमिदं स्मृतं ॥

or a body of persons versed in the three Vedas is a *Parshat*, whatever it says is law, and so what even one supremely learned in spiritual lore says" (2).

So too Manu.

"The Veda, Smriti, good custom, what is agreeable to one's soul, these are laid down as the four direct proofs of Dharma" (3).

In a previous article [16 C. W. N., p. lvi], I have dealt with the nature of Sruti as well as the legal foundation of the authority of professional opinion.

In considering these sources of law it is necessary to bear in mind that by Dharma the Hindu law-writers understand not law in the narrow sense of the word but a far more comprehensive idea. Dharma strictly understood is the eternal order of things, it is that which holds the world together, regulates every movement in the universe and is in short the principle of order, regularity and justice which is the supreme principle of universe. With reference to human conduct, it embraces all human conduct from the minutest movements of the limbs to the most momentous acts. In the whole literature of Hindu religious law, this comprehensive conception was never completely displaced by a more specialised notion indicating Law as we now understand it in its narrowest sense, though *Vyavahara* as a distinct and important branch of *Dharmashastra* was no doubt developed in the later Smritis.

This conception of *Dharma* or some analogous idea of a universal principle of right and order more or less vaguely apprehended was the earliest notion analogous to law known to humanity. While in Europe each branch of law started off from this common stock and formed a new department of human knowledge clearly and distinctly marked off from other branches, in India to very late stages in the growth of knowledge these special conceptions yet formed departments of one comprehensive conception of a law of order in general,—*i.e.*, of Dharma.

I have pointed out in a previous article that Sruti furnishes very scanty material for civil law and the references to Sruti in later law must be taken as referring to a hypothetical Revealed Law than to the extant Vedas. But viewed as a source of Dharma in the wider sense even the extant texts of the Sruti are living and potent as regulatives.

In the age of the Smritis the Sruti is very largely replaced in most matters of ritual and surely in matters of law by the Smritis. The Smritis, with the single exception of Narada, are themselves very comprehensive treatises which undertake to regulate from the minutest to the most important items of human conduct. Narada's Smriti was obviously an abridgement of a then extant text of Manu with alterations and additions, so far as necessary, clearly directed towards furnishing a manual for the purposes of administration of justice. How the Smritis were developed by schools of law by incorporating traditional learning and existing customs I have attempted to show in my previous article.

But with all their attempt at comprehensiveness the Smritis clearly recognised the necessarily incomplete character of their work. Hence the recognition of other legal sources of law.

Of these custom (सदाचारः) is the most important. It is likely that custom first found recognition as one of the indicia by which divine law had to be ascertained, which is the view distinctly laid down in the Mimansa. According to a well-known principle of exegesis (called the *Holakadhikarana Nyaya*) where there is a well-established custom it must be regarded as founded on a text of Sruti known to the founders of the custom but which has been lost. Assuming that the old school of Hindu Pontiffs referred to existing custom for solving questions of law referred to them, and assuming further that in ancient times no rule could have a binding force without a belief in its divine origin the conclusion seems irresistible that the recognition of custom owed its origin to a belief in its supernatural ordinance which was the source of authority of all primitive law. But later on this principle was clearly departed from. For when Manu [II, 12] and Yajnavalkya refers to (सदाचारः) [Yajn. I, 7] good custom as a source of law, it is to custom as such without reference to any hypothesis of divine origin. So too Manu [VIII, 3] requires the king to do justice "देशदृष्टैश्च शास्त्रदृष्टैश्च हेतुभिः" "according to principles found in (the custom of) the country as well as those found in the *Shastras* (religious works). Here the Shastric and customary rules are set up as independent principles of decisions and Medhatithi whose comments follow the spirit of the text more closely than that of any other commentator of Manu, regards the reference to be to customs opposed to the written law (विरुद्ध) as well as to such as are not inconsistent with it (अविरुद्ध).

It is possible that the recognition of custom as binding by its own force apart from its being the embodiment of a lost Sruti may have been due to the necessity of maintaining unimpaired the laws and customs of a country newly conquered. An indication of this is furnished by the emphatic

(2) चत्वारः वेदधर्मज्ञाः पर्षत्त्रैविद्यमेव वा ।
सा ब्रूते यं स धर्मः स्यादेकोवाऽध्यात्मवित्तमः ॥

(3) वेदः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।
एतच्चतुर्विधं प्राहुः साक्षाद्धर्मस्य लक्षणम् ॥

terms in which the King is required to regard the customs of the country conquered by him. [Cf. Yajnavalkya, I, 343]. This recognition of foreign custom must have reacted upon the theory of the validity of local customs.

As to the two other sources referred to by Yajnavalkya they may be shortly dismissed. Where a rule of law is optional or where the law lays down no rule of conduct a person may act according to his own considered judgment. This is what Yajnavalkya means by laying down "स्वस्य च प्रियमात्मन:" and "सम्यक संकल्पज: काम:" as sources of law, understanding by that term all regulation of conduct.

Two other sources of new law which were in operation even before the Smritis were promulgated, and which must have had important influence on the development of law were the decrees of the King and the regulations of village or caste communities. These are recognised as legal sources of law though not enumerated in the tex's cited above.

In the dense darkness that surrounds the history of Hindu law it is yet possible to mark a few important stages in the development of the power of Kings to make laws. The Vedic kings were nothing more than military captains and in India as elsewhere the King came in not as a maker of laws but as an arbitrator of disputes. The law was eternal and divine of which the Brahmans were repositories and the King but an administrator. But with the growth of Kingly power the King's power to make laws came gradually to be recognised. Consistently with the theory of a divine law, the royal legislative power was based on the divine character of the King. It is doubtful when the divinity of the King came first to be recognised, but it seems clear that at the time when the extant Code of Manu was prepared the King's legislative power was yet in the making and was deemed an innovation. For the Manu Sanhita in establishing the obligatoriness of the King-made laws preludes the proposition with an elaborate argument based on the divine character of the King and concludes that hence his commands to his officers as well as others should be implicitly followed (*a*).

The authority of the King to make laws at any rate within the limits of divine law was fully established during the age of the Smritis; for Yajnavalkya in laying down the principles for the guidance of corporations mentions राजकृत धर्म or 'King-made law' along with the law framed by the community itself and the common law of the Shastras as the regulatives of the conduct of members of the community (*b*).

But the legislative authority of Kings was checked even in the age of the Smritis. As I have shown in my previous article the authority of the King passed gradually into the hands of professional regulators of Dharma and from that date down to the British rule the further development of Hindu law was left entirely in the hands of learned Brahmins.

If this be a true account of the sources of Hindu law a study of these tends to modify to some extent our ideas as to the sources and the course of development of law in general. In Europe too the course of development can be traced to have run on somewhat parallel lines to some extent. The history of Roman law up to the age of the Pontiffs and that of Indian law to the age of interpretation seem to have been very nearly parallel. But while Rome law passed out of the hands of spiritual legislators and became secularised, in India it continued in the hands of the spiritual leaders of society. The short spell of secular law into which we gain an insight in the Artha Shastras of Chanakya must soon have been broken.

The period when Buddhism reigned supreme in the greater part of India does not seem to have had much influence in secularising the law, for with Buddhists as well as with Hindus law was more a matter of religion than of secular relations. The Mahomedan rule over the greater part of India still further strengthened the power of the expounders of religious law and the law as it came down to British rulers was if possibly more rigidly spiritual than it was ever before.

While the religious character of law led to a decline of what little power the sovereign had over it in the East, the secularisation of law in the West led to the exactly opposite consequence. Legislation as an innovation of the existing law was scarcely known in ancient Rome. It was the product of a later age when law had completely shaken off its religious associations. The authority of the sovereign over legislation by way of innovation being thus once established, the road was clear to a centralisation of all legislative power in the sovereign. Although in the later Empire and the feudal times there are indications of a practical realisation of this idea, the theoretical exposition of law as essentially the command of the sovereign was not possible till the days of Hobbes. The lingering remnant of the old religious conception in a law of Nature still greatly hampered the growth of this new conception and it must be said that despite the strong advocacy of Austin and his numerous followers the idea of law as nothing but an embodiment of Sovereign Power has not yet obtained complete ascendancy in Europe.

N. S.-G.

(*a*) Manu, VII, 3—13.
(*b*) Yajn. II, 183.

ELAHI BUKSH MANDAL *v.* RAM NARAYAN GHOSH.

sentation to a Court having jurisdiction to determine the title, but he declined to do so and proceeded to investigate the question of title himself. This he was no doubt competent to do for the purpose of determining the question of the Defendants' liability for damages, but if he did so, it was incumbent on him to decide the question correctly and according to law. He has rejected the survey map produced by the Defendant on the ground that the tank in dispute has not been clearly located upon it while he accepts the thak map produced by the Plaintiff which was open to a precisely similar objection. Moreover he finds that the Defendant was in possession at the time in respect of which the suit was brought. Now a Plaintiff may perhaps recover mesne profits even though he be out of possession, see *Dyamoyee* v. *Modhoo Soodun* (1) and *Dwarkaram* v. *Jogessur Lall* (2); but to recover damages in a case like the present he must at least show that he has an immediate right to possession, if he were claiming it. This the Plaintiff has failed to do in this case. It was argued that *de minimis non curat lex*, and that the amount at stake being so small this Court would not interfere in revision. The importance of the case to the parties, however, is not to be measured by the pecuniary limit of the claim. It is notorious that before embarking on litigation as to title, litigants in this country frequently endeavour to obtain an advantage, or what they think will be an advantage, by securing in their favour a decree of a Small Cause Court or a decree under sec. 9 of the Specific Relief Act, or an order of a Criminal Court. That has no doubt been the object of the present Plaintiff, and it is not one which should be encouraged. That this Court has ample jurisdiction to interfere is not denied. The true principle to be followed is, we think, that enunciated by the Bombay High Court in *Poona City* v. *Ramji* (3). The powers conferred by sec. 25 of the Provincial Small Cause Courts Act are no doubt discretionary, but at the same time that section is somewhat wider in its scope than sec. 115 of the Civil Procedure Code.

We think that the judgment of the Small Cause Court is clearly not in accordance with law, and that it is a case in which we should interfere. We accordingly make the Rule absolute and set aside the judgment and decree of the Small Cause Court and in lieu thereof order that the Plaintiff's suit be dismissed with costs. The Plaintiff must also pay the costs of this Rule. We fix the hearing-fee at two gold mohurs.

Rule made absolute.

(1) 8 W. R. 147 (1865).
(2) 21 W. R. 276 (1874).

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 1129 OF 1911.

CHITTY, J. 1911, Heard, 4 & 5, December. Judgment, 6, December.	N. C. SIRCAR & SONS, *v.* THE BARABONI COAL CONCERN LD.

Joint Stock Co. if may be restrained from dismissing its Managing Agent—Shareholders of Co., if may be restrained from considering proposal of removal of Managing Agents—Injunction—Contract of service—Specific Relief Act (I of 1877), secs. 21 and 57.

Under secs. 21 and 57 of the Specific Relief Act a Limited Liability Company cannot be restrained by injunction from dispensing with the services of Managing

(3) I. L. R. 21 Bom. 250 (1895).

N. C. SIRCAR & SONS *v.* THE BARABONI COAL CONCERN LD.

Agents even when the contract of service provides that the Managing Agents are only to be removed in a specified manner and after a specified period.

Nor can the shareholders be restrained by injunction from considering the question of such removal at an Extraordinary General Meeting.

The remedy of the Managing Agents for dismissal, if wrongful, lies in a suit for damages.

ISLE OF WIGHT RAILWAY CO. *v.* TAHOURDIN (1) *relied upon.*

This suit was instituted by the Plaintiff firm against the Defendant Co. for (*a*) a declaration that the services of the Plaintiff firm as Managing Agents of the Defendant Co., cannot be dispensed with otherwise than by a special resolution passed at an extraordinary general meeting of the company specially convened for the purpose, of which meeting not less than twelve calendar months' notice should be given, and at which persons holding five-sixths of the issued capital for the time being shall be present personally or by proxy or by attorney ; (*b*) for a declaration that it is not competent for the Defendant Co. to dispense with the services of the Plaintiff firm as Managing Agents by any resolution held under and referred to in a letter purporting to be a notice to that effect ; (*c*) that the Defendant Co. be restrained by an injunction of this Hon'ble Court from passing any resolution at any meeting to be held under or in pursuance of the said notice. The notice was in these terms :

" *The Baraboni Coal Concern Ld.*

Notice is hereby given that an extraordinary general meeting of the Baraboni Coal Concern Ld. will be held at No. 7, Swallow Lane, Calcutta, the registered office of the Company on Tuesday, the 28th day of November 1911, at 10 o'clock in the afternoon for the purpose of considering the past and present management of the company's business so far as it concerns its Managing Agents, Messrs. N. C. Sircar & sons, and for deciding what steps, if any, should be taken with regard thereto and for the passing of such resolution or resolutions in relation to the premises as may be thought fit particularly including a resolution or resolutions dispensing with the services of the said firm of Messrs. N. C. Sircar & Sons as such Managing Agents as aforesaid and appointing other Managing Agents. Dated Calcutta, the 17th day of November 1911.

By order of the Board.

7, SWALLOW LANE, *Calcutta.* — J. R. BERTRAM. A. D. WILSON. *Directors.*"

On the 22nd of November 1911, the Plaintiff firm obtained a Rule for a temporary injunction in terms by the last prayer quoted above.

Mr. L. P. E. Pugh, for the Defendant Co., showed cause.—If it should turn out that the Plaintiffs are wrongly dismissed the Defendant Co. are liable to an action for damages. The employment of Managing Agents is purely a matter of personal service and an injunction which would run counter to the wishes of the general body of shareholders ought not to be granted. If the company has not had any dividend for a very long time surely the shareholders have a right to consider the position and get rid of their Managing Agents, if it is found that it is owing to them that the present unfortunate situation has been brought about. The passing of a resolution in breach of the agreement cannot be restrained, for it is not distinctly

(1) 25 Ch. D. 320 (1883).

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specified as to what the meeting proposes to do. As regards an agreement of personal service of this kind your Lordship cannot interfere by way of an injunction. The only point from which your Lordship can consider this point is from a service point of view. There was admittedly a breach of duty on the part of the Agents. A director or a person in the position of a director could not get an injunction to force a company to employ him or to restrain a company from dismissing him. A Managing Agent could not be in a higher position than a director. The rule in the light of the position with regard to the Articles is easily disposed of. (Palmer's Company Law, p. 194). Their only course is to bring an action for damages for wrongful dismissal if it is wrongful. He relied on *Bainbridge* v. *Smith* (2), (Palmer's Company Precedents, p. 1243), *Mair* v. *Himalaya Tea Company* (3), and submitted that the Court could not by injunction enforce a contract for personal service. Secs. 21 and 56, cl. (*f*) of the Specific Relief Act (Act I of 1877) are quite clear on the point. Counsel submitted that persons bringing suits against companies for enforcement of personal contract have never been successful. *Eley* v. *Positive Government Security Life Assurance Co., Ld.* (4), *Browne* v. *La Trinidad* (5). The company have a perfect right to hold the proposed meeting, *Harben* v. *Phillips* (6), *Isle of Wight Railway Co.* v. *Tahourdin* (1), *Burland* v. *Earle* (7). On the authorities cited your Lordship cannot restrain the holding of the proposed meeting.

Mr. J. E. Bagram (with him *Mr. H. Knight*) in support of the Rule.—This case would never have been arisen but for some friction between Messrs. Wilson and Bertram on the one hand and Mr. N. C. Sircar on the other—all being directors. Most coal companies had come to grief for there was a boom and then a slump. The management had always acted with the authority and sanction of Messrs. Wilson and Bertram and now that things have gone a litle wrong they raise all these questions. His Lordship should not be prejudiced by *ex parte* statements. Could the company dismiss the Agents—that was the real point. It has been treated as though it was an individual case but there was distinction between an individual and a corporation and a company. If the company passed a resolution adverse to the Managing Agents the first point for consideration would be whether that should be treated as a dismissal. Under Art. 99 the company could not act as they purported to do. *Harben* v. *Phillips* (6). The object of the injunction was to prevent the company wielding a power which they had not the power to wield. A person may not have power to do a thing but may claim it and cause damage. The shareholders had the power in a general meeting to appoint but not to dismiss. On the authority of *Browne* v. *La Trinidad* (5), if the company dismissed the Managing Agents in accordance with the terms of the contract then the agents could not complain. In the case of a corporation, it must be shown that the act was one which was binding on the corporation and the authority cited showed what

(1) 25 Ch. D. 320 (1883).
(2) 41 Ch. D. 462 (1889).
(3) L. R. 1 Eq. 411 (1865).
(4) 1 Ex. Dn. 20 (1875).
(5) 37 Ch. D. 1 (1887).
(6) 23 Ch. D. 14 (1882).
(7) [1902] L. R. App. Cas. 83 (1901).

(5) 37 Ch. D. 1 (1887).
(6) 23 Ch. D. 14 (1882).

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acts were binding on the corporation. Acts binding on the corporation were the acts contained in the Articles of Association. The proposed action of the company must be sanctioned by the Articles of Association. Unless the provisions of the Articles authorised the dismissal of the agents by the company they could not be dismissed. *Automatic Filter Syndicate Co., Ld.* v. *Cunningham* (8). Articles were for the protection of the minority. The proposed resolution would be invalid but might cause damage. Unless the Articles contained a prior assent of the shareholders on the part of the company binding them there is no authority to say that that act is applicable to the Co., so as to bind them. *The Directors &c. of the Ashbury Railway Carriage & Iron Co., Ld.* v. *Hector Riche* (9). The proposed meeting could be approved by all the shareholders and therefore ineffectual, and might cause damage, *In re North of England Steamship Company* (10). The company was endeavouring to do that which it had no power to do. *Quin* v. *Salmon* (11), *Baily* v. *British Equitable Assurance Company* (12).

C. A. V.

The JUDGMENT OF THE COURT was as follows:—

CHITTY, J.—This suit was filed on the 22nd November by the firm of N. C. Sircar & Sons against the Baraboni Coal Concern Ld. for (1) a declaration that the service of the Plaintiff firm as Managing Agents of the Defendant Company cannot be dispensed with otherwise than by a special resolution passed at an extraordinary general meeting of the Company specially convened for that purpose of which meeting not less than 12 calendar months' notice shall be given and at which persons holding not less than five-sixths of the issued capital for the time being of the Company shall be present personally or by proxy or attorney; (2) for a declaration that it is not competent to the Defendant Company to dispense with the services of the Plaintiff firm as Managing Agents by any Resolution passed at any meeting held under or in pursuance of the notice above referred to and dated the 17th day of November 1911; and (3) for an injunction, that the Defendant Company be restrained by injunction from passing at any meeting to be held under or in pursuance of the said notice of the 17th day of November 1911, any resolution purporting to dispense with the services of the Plaintiff firm as Managing Agents of the Defendant Company, and from interfering with the conduct of the business of the Company by the Plaintiff firm as its Managing Agents, otherwise than in accordance with the provisions contained in the Articles of Association of the Company and the said agreement of the 29th day of May 1911. On the same day Counsel for the Plaintiffs applied for and obtained a rule for a temporary injunction in much the same terms. I suggested, when the matter came on for argument, that the rule might by arrangement stand over till the hearing, and the proposed meeting of the Company be adjourned, the hearing being expedited. This suggestion, however, was not accepted, and I must give my decision on the rule. The matter has been argued at great length on either side, but I propose to deal with it as briefly as possible. I do

(8) [1906] 2 Ch. 34.
(9) L. R. 9 Ex. 224; 7 H. L. 653 (1875).
(10) [1905] 1 Ch. 609.
(11) (1909) App. Cas. 442.
(12) [1904] 1 Ch. 374

not wish to enter into the merits of the case itself, but it is impossible to altogether avoid doing so from the close connection of the rule with the suit and the similarity of the reliefs claimed. The only question now before me is whether the Company should be restrained pending the disposal of the suit from passing a resolution purporting to dispense with the services of the Plaintiffs' firm or from interfering with the conduct of the business of the Company by the Plaintiffs' firm otherwise than in accordance with the Articles of Association and the agreement of the 29th May 1907. A large number of authorities were referred to, which deal with the removal of a Director by a Company, where the Articles of Association do not contain any provision for such removal. It was pointed out by the Petitioner's Counsel that although in the case of the Defendant Company Art. 99 provides for the appointment of Managing Agents, neither it nor any other article provides for their removal. This is no doubt the case, but I must not be taken to accept as correct the proposition put forward at the Bar that the Company could not therefore dismiss any Managing Agents whom they had appointed. I am of opinion that the cases cited have little or no bearing on the present case. The position of a Director is very different from that of Managing Agents, who are merely servants of the Company. Further in this case the Plaintiffs' claim is based on the agreement of 29th May 1907, and by that they must stand and fall. It is true that the Company entered into that agreement purporting to act under the authority of Art. 99, but so far as the Plaintiffs are concerned their contract is contained in the agreement alone. If the learned Counsel's argument as to the Articles of Association was sound, it would follow that the Company had no power to make the stipulation as to the removal contained in the agreement, or to act upon it. The Plaintiffs, however, cannot of course plead that. It was conceded that if it were a simple case of wrongful dismissal, the Plaintiffs would have no case on their present plaint as framed. Their only remedy would be by an action for damages for wrongful dismissal. It was argued, however, that the threatened resolution would not amount to a dismissal. I am unable to fully appreciate the learned Counsel's argument on this point. At one time he said it would not be a dismissal because it would not be the act of the Company. If that were so, the Company would not be the appropriate Defendants in this suit. The Plaintiffs ought to sue the individual or individuals by whose act they would suffer or had suffered damage. The Company clearly can only be sued in respect of an act done or purporting to be done by itself. If the act threatened, the passing of the resolution did not operate as a dismissal, the Plaintiffs would have no cause of action against the Company for wrongful dismissal. If it caused damage to the Plaintiffs in some other way, the correct course would be for them to sue the Company on that cause of action, if any were so created. It was perhaps necessary for Counsel to frame his argument in some such way as this, because if the case be one of a contract for service, the Plaintiffs are met by the combined effect of secs. 21 and 56 of the Specific Relief Act. They could not enforce the contract of service against the Company, nor could they by injunction directly obtain the relief prescribed by sec. 21. I cannot accede to the argument of their Counsel that sec. 57

would help them. If they could not enforce the positive contract of service, they clearly could not obtain an injunction to restrain the Company from dispensing with their services, except in a given manner, or until after a stated period ; for the result of this would be to continue their services, and so in effect to specifically enforce the contract. It would be a very strong measure to restrain the body of shareholders from expressing their opinion at a meeting duly convened. It is the only way they have of interfering in the matters of the Company. On this point the remarks of the Lords Justices in *Isle of Wight Railway Co.* v. *Tahourdin* (1) are very pertinent, though the question in that case was as the removal of directors, not the dismissal of servants. It is by no means certain that the resolution, of which the Plaintiffs are so apprehensive, will be passed. It is not certain what will be its effect. I do not desire to go into the merits of the case. It is conceded on both sides that there is considerable friction with regard to the management of the Company, and in the minds of some of the shareholders considerable dissatisfaction with the conduct of the Plaintiffs as Managing Agents. It is expedient that the matter should be ventilated, and it cannot be better ventilated than at a meeting of the shareholders. If the proposed resolution be not passed, the Plaintiffs will have no cause of complaint against the Company. If it be passed, it remains to be seen what will be its effect. If the Plaintiffs are thereby dismissed, they will have their remedy. If they are not, but they thereby suffer some other damage, they will also have their remedy. It was said by their Counsel that in this last case the damages would be too remote to support a claim in a suit for damages. If that be so, it is clear that I ought not to restrain by injunction an act which would have such a shadowy result.

For these reasons I am of opinion that the present application must fail. The Rule is accordingly discharged with costs.

Messrs. Orr, Dignam & Co., Solicitors for the Defendant Co.

Messrs. Pugh & Co., Solicitors for the Plaintiff firm.

A. K. G. *Rule discharged.*

(1) 25 Ch. D. 320 (1883).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 2485 OF 1911
WITH RULE No. 5356 OF 1911.

STEPHEN, J.
COXE, J.
1911,
29, November.

RAJA RAGHUBUR SAHI,
Defendant, Appellant,
v.
MAHARAJA SRI PRATAP UDOY NATH SAHI DEO,
Plaintiff, Respondent.

Second appeal—Chota Nagpur Tenancy Act (VI of 1908, B. C.), secs. 87, 264, sub-sec. (1), cl. (8)—Suit before settlement officer—Appeal to Judicial Commissioner—Second appeal to High Court, if excluded—Civil Procedure Code (V of 1908), sec. 100.

No second appeal lies from a decision of the Judicial Commissioner of Ranchi passed on appeal from a decision of a settlement officer in a suit under sec. 87 of the Chota Nagpur Tenancy Act, the operation of sec. 100 of the Civil Procedure Code being excluded in such cases by sec. 87 read with sec. 264, sub-sec. (1), cl. (8) of the Chota Nagpur Tenancy Act.

Whether a* jaigirdari *tenure is of a hereditary nature or one for life is a matter which a settlement officer is competent to decide under sec. 87 of the Chota Nagpur Tenancy Act.

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This was an appeal preferred on the 5th of September 1911, against the decree of Mr. D. H. Kingsford, Judicial Commissioner of Chota Nagpur at Ranchi, dated the 13th of July 1911, reversing that of Babu Bhuban Mohun Chatterjee, Assistant Settlement Officer of Ranchi, dated the 31st of August 1909.

The facts of the case are as follows :—

Under orders of Government, Settlement Survey operations were commenced in Pergunnah Burway. Before the settlement authorities, the Defendant, Raja Raghubar Sahi Deo, claimed the said Pergunnah as his Jaigir descendible to children, generation after generation. The Paintiff, Maharaja Protap Udai Nath Sahi Deo, objected to this on the ground that it was merely a life-grant, resumable upon the death of the grantee. The Settlement Officer made an entry in the Khewat that the Jaigir was "Putraputradik." In view of that decision the Maharaja instituted a suit in the Court of the Assistant Settlement Officer at Ranchi for correction of the entry made in the Khewat. The suit was, however, dismissed by the Settlement Officer, and an appeal was filed against it before the Judicial Commissioner of Chota Nagpur at Ranchi. The Maharaja succeeded in the appeal, whereupon the Defendant filed an appeal from the appellate decree before the High Court, and also made an application under sec. 115 of the Civil Procedure Code and sec. 15 of the Charter Act on the ground that, should it be held that there was no second appeal, the Court should interfere under its revisional powers. The gross annual collection of the estate was stated by the Defendant to be, according to the Road-cess papers, about Rs. 88,000.

Mr. S. P. Sinha (with *Mr. B. C. Mitter* and *Babus Provash Chandra Mitter*, *Surendra Madhub Mullik* and *Harihar Prosad Singh*) for the Appellant.

Mr. A. Chaudhuri (with *Babu Jogesh Chandra Dey*), for the Respondent, took a preliminary objection that there was no appeal to the High Court, and there was no case made for the exercise of the revisional powers of the Court. Chapter XII of the Chota Nagpur Tenancy Act was analogous to Chapter X of the Bengal Tenancy Act, and was complete in itself. Sec. 87, Chota Nagpur Tenancy Act, corresponds to sec. 106, Bengal Tenancy Act, as amended in 1907. It provided in sub-cl. (2) that appeal lay in the prescribed manner and to the prescribed officer from decisions passed under sub-sec. (1). Sec. 264, cl. (viii), empowered the Local Government to prescribe the officer to whom, and the manner in which appeals should lie from orders or decisions passed under sec. 87. By Government Notfication 786 T. R., dated the 21st May 1909 (See Part I, *Calcutta Gazette*, page 729), the Local Government prescribed that such appeals were to be heard by the Judicial Commissioner of Chota Nagpur. The expression "Judicial Commissioner" is defined in sec. 3 (vi) and means the Judicial Commisioner of Chota Nagpur, a special officer. Second appeals are provided for only in cases which fall under Chapter XVI of the Chota Nagpur Tenancy Act (see sec. 224). Sec. 109A (3), Bengal Tenancy Act, distinctly provides for second appeals to the High Court. In the Chota Nagpur Tenancy Act the provision has been deliberately omitted.

Mr. B. C. Mitter contended that it was never intended that a Revenue Officer should determine difficult questions of title, and the scheme of the Act showed that he had no jurisdiction in such matters. The provisions of sec. 87 were similar to those of sec. 106, Bengal Tenancy

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Act, under which the High Court had ruled that a Revenue Officer had no jurisdiction to decide disputes as to title to land [see *Norendro Nath Chowdhury* v. *Srinath Sandel* (2), *Pandit Sirdar* v. *Mea Jan Mirdha* (3), *Padmanand Singh* v. *Bajo* (4)]. In support of the proposition that unless the right of appeal had been exepressly or by necessary implication, taken away the right remained, reliance was also placed upon *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (1), *Nilmoni Singh* v. *Bakranath* (5), *Ram Lochan* v. *Beni Prosad* (6), *Kamaraju* v. *Secretary of State for India* (7).

Mr. Sinha contended that even if it should be held that there was no appeal, there was a sufficient case for interference under the revisional powers of the Court.

The JUDGMENT OF THE COURT was as follows:—

STEPHEN, J.—This matter comes before us on appeal and also on a Rule. The appeal was from a decree of the Judicial Commissioner of Chota Nagpur sitting on appeal from an order under sec. 87 of the Chota Nagpur Tenancy Act.

A preliminary objection is taken by the Respondent that no second appeal lies in this case, and this contention, we think, must succeed Sub-sec. (2) of sec. 87 of the Act enacts that an appeal shall lie in the prescribed manner and to the prescribed officer from decisions passed under sub-sec. (1). By an order of the Local Government which has power to act in this matter, the prescribed officer is the Judicial Commissioner, and it is argued that an appeal lying to him from a decision of a Revenue Officer, there can be no second appeal. It is admitted that the provisions of sec. 100, C. P. C., must be excluded either expressly or by implication. There is no express exclusion in this Act; but we think on looking at the frame-work of this Act, that it is intended that no second appeal should lie to this Court. An appeal is provided for, as we have said, in sub-sec. (2) of sec. 87, and if there is to be a further appeal we must then look to the provisions of sec. 224 of the Act, which says, that "A second appeal shall lie to the High Court, under Chap. XLII of the Code of Civil Procedure, from any appellate decree passed by the Judicial Commissioner under this chapter, or from any order passed by him on appeal under sec. 215, sub-sec. (3)." We are of opinion that sec. 87 has been deliberately excluded from its scope. We are led further to this conclusion by a consideration of the provisions of the Bengal Tenancy Act from which this Act has been very closely adapted. Reading sec. 87 with sec. 106 of the Bengal Tenancy Act, it seems to us that it is by implication provided that there shall be no second appeal in cases arising under that section.

We therefore hold that there is no second appeal in this case.

The appeal is dismissed with costs.

COXE, J.—I agree. It appears to me that cl. (2), sec. 87 read with sec. 264, sub-sec. (1), cl. (8) is tantamount to an express provision of law within the meaning of sec. 100 of the Code of Civil Procedure that these appeals should be heard by the prescribed officers and should not be heard by officers other than those. I only desire to state that in the case of

(1) 12 C. W. N. 8 (1907).
(2) I. L. R 19 Cal. 641 (1891).
(3) I. L. R. 21 Cal. 379 (1893).
(4) I. L. R. 20 Cal. 577 (1892).
(5) I. L. R. 9 Cal. 187 (1882).
(6) I. L. R. 36 Cal. 252 (1903).
(7) I. L. R. 11 Mad. 309 (1888).

Mohunt Padmalav Ramanuja Das v. *Lukmi Rani* (1), to which we have been referred, there is nothing that in any way limits the scope of sec. 106 of the Bengal Tenancy Act, in so far as it relates to suits between landlord and tenant.

The appeal is dismissed with costs.

Rule No. 5356.—We have then to consider this Rule. The Rule was on the Opposite Party to show cause why the decision complained of should not be set aside. The decision arrived at was that the Petitioner was a tenant for life and not possessed of a tenancy of a hereditary nature. It is argued on his behalf that the Judicial Commissioner acted without jurisdiction in deciding this question. Under sec. 87, however, it is the duty of the Settlement Officer to decide the matters contained in sec. 81, para. (*b*). It, therefore, was clearly his duty to decide the question which he has decided and we cannot see that there is any room for the contention that he has acted without jurisdiction.

The Rule is discharged without costs.

Appeal dismissed:
Rule discharged.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES
NOS. 150 & 268 OF 1908.

COXE, J.
TEUNON, J.
1911,
Heard, 18, 19, 20, 25 & 26, July.
Judgment, 9, August.

LAL GOPAL DUTT CHOUDHURI, Defendant No. 3, Appellant,
v.
THE KHORORIAH MAJOZILLA ZEMINDARY SYNDICATE LTD., Plaintiff and ors., Respondents.

Company, proprietors of zemindari forming into a, if opposed to public policy.

(1) 12 C. W. N. 8 (1907).

Where the proprietors of a zemindari having grown too numerous formed themselves into a limited liability company and the company was duly registered under the provisions of the Indian Companies Act,

Held—That such a course was likely to be beneficial not merely to the proprietors themselves but to all who may be compelled to have dealings with them, and there was nothing in the constitution of the company which was opposed to public policy.

This was an appeal preferred on the 10th of April 1908, against the decree of Babu Purna Chandra Dey, Subordinate Judge of Khulna, dated the 17th of February 1908.

The Plaintiff in the suits out of which the appeals arose was a company registered under the provisions of the Companies Act VI of 1882. The suits were instituted by the Plaintiff for the specific performance of an agreement to grant a lease alleged to have been entered into with the Plaintiff by the proprietors of a certain share in a zemindari called the Khororiah Borozilla of which the Appellant, Lal Gopal Dutt, was also a part-owner. It was alleged in the plaint that in breach of the aforesaid agreement the proprietors aforesaid had granted a lease in favour of the Appellant, Lal Gopal Dutt, and that the Appellant had full knowledge and notice of the agreement. The Appellant as well as his lessors were joined as Defendants in the suit. The Defendants set up various pleas in defence of which the only one material to this report was that the company was not constituted for a *bonâ fide* purpose and the suit could not lie at its instance. The Subordinate Judge found upon this point that the members of Company were the proprietors of a zemindari called the Khororiah Majozilla, that when the proprietors became too many in

number and were unable to manage the property, some of them formed themselves into a limited company under Act VI of 1882, with a view to saving the estate from being wasted way, and its members, as stated by one of its directors, Bhupendra Kumar Dutt, intended to protect themselves from incurring liabilities in regard to the estate and to save themselves from criminal prosecution which might arise by reason of dissensions amongst themselves. The taking of putnis and other leases of zemindari properties was specified in the memorandum of association of the company as one of the objects for which it was constituted and the company started by taking a 99 years' lease of the Khororiah Majozilla zemindari itself. No outsiders appear to have been taken in as a shareholder and the shares taken by the members were in proportion to their interest in the zemindari. It was objected on behalf of the Defendants that the company was constituted for an unlawful object and that the lease having been virtually taken by the proprietors from themselves was an illusory transaction and conferred no title on the company, supposing it was lawfully constituted. The Subordinate Judge held that the company was in the eye of law a different person from the proprietors of the zemindari, [*Farrar* v. *Farrars* (1)], and that its object was not unlawful and its constitution was not opposed to public policy and that the suits were maintainable at its instance. On the merits the Subordinate Judge found in favour of the Plaintiff and decreed the suits.

Lal Gopal Dutt who alone appealed contested in several findings of fact and law of the Subordinate Judge in the High Court.

(1) 40 Ch. D. 395 (1888).

Mr. A. Chaudhuri and *Babus Provash Chandra Mitra* and *Jadu Nath Kanjilal* for the Appellant.

Dr. Rash Behary Ghose, with him *Mr. C. R. Das* and *Babus Joy Gopal Ghose* and *Nogendra Nath Ghose*, for the Respondent Company.

Babu Jogesh Chandra Dey for the other Respondents.

The JUDGMENT OF THE COURT in so far as it dealt with the Appellant's objection regarding the constitution of the company was in the following terms :—

"Next it is argued that the suit is not maintainable because the company is a bogus company. This contention however is too intangible to be dealt with. It has not been shown to us that the constitution of the company offends against the provisions of the Companies Act, but it has been argued that the shareholders of the company being identical with the proprietors of the land its recognition would be contrary to public policy. The learned counsel for the Appellant however has been unable to show us how the existence of this company injures or endangers the rights of anybody. Indeed if the proprietors are numerous and their separate interests are minute the adoption of this means for the management of their property would seem to be beneficial not only to themselves but to all who may be compelled to have dealings with them."

Appeals dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1645 OF 1910.

MOOKERJEE, J.
TEUNON, J.
1911,
Heard, 24 &
25, April.
Judgment,
21, August.

GOKUL KRISHNA DAS and others, Defendants, Appellants,
v.
SASHIMUKHI DASI, Plaintiff, Respondent.

Indian Contract Act (IX of 1872), sec. 253 (10) —Partnership business carried on after death of partner on the assumption of representative continuing as partner—Widow of deceased, a purdanashin *lady, not taking any part in business and not examining accounts—Accountability of working partners—Accounts to commence from beginning of partnership, if accounts not settled—Partnership money, diversion of—Accounting with interest or profits—Remuneration to working partner—Balancing of accounts, effect of.*

Where on the death of a partner the business was carried on on the assumption that his widow was a partner.

Held—*That the conduct of the parties showed that there must have been a contract between the original parties that the partnership would not be dissolved by the death of a partner within the meaning of cl. (10) of sec. 253 of the Indian Contract Act, but should be continued with the representative of the deceased as a partner.*

The mere balancing of account in a book of account does not of itself constitute an account stated much less does it constitute an account settled which the parties cannot reopen.

In a general account of partnership dealings the time from which the account is to begin is the commencement of the partnership unless some account has since that time been settled by the partners in which case the last settled account will be the point of departure.

Where one of the partners having the right to examine the partnership accounts did not for a long time exercise the right:

Held—*That unless fraud was established purchases and sales in respect of the business by the working partners should not be challenged, but they were bound to account for sums withdrawn from the partnership business and applied for purposes unconnected therewith with the profits realised therefrom or with interest at the option of the partner demanding the account.*

Where one of the partners wilfully leaves the others to carry on the partnership business unaided the Court may upon dissolution decree an allowance in favour of the partner who had carried on the business alone.

This was an appeal preferred on the 19th of May 1910, against the decree of E. P. Chapman, Esq., Additional District Judge of Zillah 24-Pergunnahs, dated the 18th of March 1910, modifying the decree of Babu Aghore Chandra Hazra, Subordinate Judge, first Court, of that district, dated the 19th of July 1909.

The facts of the case will appear from the judgment.

Babus Bepin Behari Ghose and *Mohini Mohun Chatterjee* for the Appellant.

Babus Tara Kishore Chaudhuri, Braja Lall Chuckerbartty and *Satish Chandra Mukherjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal is directed against the preliminary decree in a suit for dissolution of a partnership business, for adjustment of accounts, and for incidental reliefs. The claim of the Plaintiff related to four firms in respect of which she alleged that her husband, and after his death, she herself, was partner with the Defendants. In the original Court, the suit was dismissed on the ground that all the partners

had not been joined as Defendants. The District Judge, on appeal, reversed that decision, and gave the Plaintiff an opportunity for the proper constitution of the the suit. Upon remand the Subordinate Judge held that the Plaintiff was entitled to a decree for dissolution and gave directions as to the mode in which the business was to be dissolved and accounts taken. Upon appeal the learned District Judge has affirmed this decision with two important variations, namely, *first*, that the Plaintiff was entitled to a decree for dissolution in respect of one of the firms only, from the income of which the other firms appear to have been established by the Defendants, and, *secondly*, that the Plaintiff was not entitled to interest on sums overdrawn by the Defendants. The Defendants have appealed to this Court, and, on their behalf, the decree of the District Judge has been assailed substantially on two grounds, namely, *first*, that the direction as to the mode in which the accounts are to be taken are unjust and erroneous, and, *secondly*, that the Defendants are entitled to remuneration on account of their services in the management of the firm. The Plaintiff has contested the validity of these arguments, and has further urged that she is entitled to claim interest on amounts overdrawn by the Defendants. We may add that when the appeal was first called on for hearing, it was argued on behalf of the Defendants-Appellants that the suit was not properly constituted as parties interested in the partnership had not been served with notice, either in the primary Court or in the Court of appeal below. We thereupon directed notices to be issued upon such persons. But they have not entered appearance in response to the notice; in other words, in spite of the best efforts of the Plaintiff, no one has come forward to claim an interest in the partnership transactions. We are satisfied that there is no substance whatever in the contention that the suit as framed is open to objection on the ground of defect of parties. We shall therefore proceed to consider the objections urged against the decree of the District Judge.

The first point taken on behalf of the Defendants is that the District Judge has not given proper directions as to the manner in which the accounts are to be taken. It has been suggested that the Plaintiff is not entitled to claim any account at all by reason of her laches. The partnership was commenced on the 19th November 1883 between the husband of the Plaintiff and the Defendants. The husband of the Plaintiff died in 1887. It has been found that since his death the business has been conducted on the assumption that the Plaintiff was a partner. Consequently, no question arises whether the partnership was or was not dissolved in 1887, under cl. (10) of sec. 253 of the Indian Contract Act. That section provides that in the absence of a contract to the contrary the relations of partners are determined by the death of any partner. There is no direct evidence to shew what was the contract between the parties in this respect at the inception of the partnership: but the Subordinate Judge has held—and his view does not appear to have been contested before the District Judge—that the conduct of the parties since 1887 shews that these must have been a contract between the original parties that the partnership would not be dissolved by the death of any partner. There is no room for the theory that after the death of the husband of the Plaintiff a new partnership was consti-

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tuted between herself and the surviving partners. The true view is that the original partnership was continued by common consent with this difference that the Plaintiff replaced her husband and this condition of things can be explained only on the hypothesis that the contract between the founders of the partnership was that it was not to be dissolved by the death of any of the partners. The position since 1887 has consequently been that the Defendants have managed the business and kept the accounts. The Plaintiff as a *purdanashin* Hindu lady could hardly have been expected to take an active interest in the actual management of the trading concern. She might, no doubt, have employed an agent to examine the accounts from time to time. Indeed, the case for the Defendants is that the accounts were settled from year to year. This, however, has been negatived by the Courts below, and in our opinion very properly. It is well settled that the mere balancing of an account in a book of accounts does not of itself constitute an account stated, much less does it constitute an account settled such as the parties would not be entitled to re-open except on special grounds, *Clancarty* v. *Latouche* (1). The contention of the Defendants that there has been a settled account cannot therefore be sustained nor can the position be maintained that there has been such acquiescence on the part of the Plaintiff as to disentitle her to claim an account. No doubt, where an account has been rendered and has long been acquiesced in, unless fraud be proved, a Court will not re-open it, although the account may be shewn to be erroneous, and although no final settlement was ever made, *Scott* v. *Milne* (2). The same principle is acted on in taking accounts, for charges long improperly made and acquiesced in, or long omitted to be made and known so to be, are regarded, in the absence of fraud, as having been made or omitted by agreement, *Thornton* v. *Proctor* (3). This principle has obviously no application to the present case. The Defendants were fully aware that as they were in charge of the business and kept the accounts they were liable to render accounts to the Plaintiff who as a *purdanashin* Hindu lady could not herself take part in the management or control the accounts. As already explained, their case is that such accounts have been rendered. This defence has failed. They cannot now very well turn round and contend that they were under the impression that the accounts as entered by them in the books of the firm were accepted by the Plaintiff. But although the Plaintiff is not disentitled to claim an account, the question may very well arise as to the extent to which the accounts are to be taken. No question of limitation obviously arises. As the partnership had not been dissolved before suit, Art. 106 of the Limitation Act, 1877, would have no application, *Harrison* v. *Delhi and London Bank* (4); in other words, as put in *Foster* v. *Hodgson* (5), so long as a partnership continues, the statute of limitation does not apply at all as between the partners. Art. 120 would consequently govern the present suit. If therefore no question of limitation arises, the point requires consideration, what is the period for which the accounts have to be taken. There can be no question that the time from which the account is to begin in a general account of partner-

(1) 1 Ball and Beatty 420 (1810).

(2) 5 Beav. 215 (1841); on appeal 7 Jur. 709 (1843).

(3) 1 Anstr. 94; 3 R. R. 558 (1792).

(4) I. L. R. 4 All. 437 (1882).

(5) 19 Ves. 180 (1813)

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ship dealings and transactions is the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure, *Cook* v. *Collingridge* (6). In the present case, there has been no such settled account; consequently, the accounts must be taken from the inception of the partnership. It is clear also that the accounts must be taken of all dealings and transactions up to the date of the dissolution, *Beak* v. *Beak* (7), *Jones* v. *Noy* (8). It has been contended, however, with considerable force by the learned Vakil for the Defendants-Appellants that, as the Plaintiff was entitled to exercise her right of examining the books and accounts of the firm by an agent appointed by her for that purpose, *Beavan* v. *Webb* (9), and as she has never chosen to exercise such right, it would be a great hardship upon the Defendants if they were called upon now to justify the purchases and sales on account of the firm at this distance of time, many years after the transactions have taken place. The learned Vakil for the Plaintiff-Respondent has appreciated the force of this contention and has stated that the Plaintiff is not anxious to require the Defendants to justify the ordinary items. Her grievance is that sums have been paid out in an obviously unauthorised manner, and that the Defendants ought to be called upon to account for such sums. The payments so made have been classified under four heads, namely, *first*, sums paid by way of remuneration to the Defendants, *secondly*, sums paid to Mohesh Chandra De, the nephew of the husband of the Plaintiff, or to creditors of Mohesh, *thirdly*, sums paid to Bindubashini, the widow of Mohesh Chandra, and, *fourthly*, sums paid to the Defendants which they have invested in very profitable business. In so far as payments of the first of these four classes are concerned, we shall deal with the matter when we consider the second ground urged by the Appellants. In so far as the second and third classes of payments are concerned, the Defendants are obviously liable to render an account. Their case throughout has been that Mohesh Chandra De was one of the partners of the firm, and that after his death, his widow also continued to be a partner. This defence has completely failed. The payments made to Mohesh or his creditors or to his widow cannot therefore be justified on the ground that they were payments made to a partner. But it has been suggested on behalf of the Defendants that Mohesh had rendered services to the firm, for which he was entitled to remuneration. That is a question which remains to be investigated; if it is established that Mohesh was entitled to remuneration for services rendered, a reasonable amount of remuneration may be set off against the sums paid out to him, his creditors or his widow. The remainder, however, must be deemed as unauthorised payments for which the Defendants are bound to render an account. In so far as payments of the fourth class are concerned, it is clear that the Defendants are liable to render an account. If it is established that they have withdrawn sums from the partnership business and applied them for purposes unconnected therewith they are bound to render an account for the sums so withdrawn. It follows, consequently, that the Defendants are liable to render an account from the commencement of the

(6) Jac. 607; 28 R. R. 155, 767 (1823, 1825).
(7) Finch. 190; L. R. 13 Eq. 489.
(8) 2 M. & K. 125; 39 R. R. 160 (1833).
(9) [1901] 2 Ch. 59.

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partnership business, that unless fraud is established, the ordinary items relating to purchases and sales in respect of the business are not to be challenged, but that the Defendants must render an account with regard to the four classes of payments just mentioned.

The second point taken on behalf of the Defendants is that they were entitled to remuneration on account of their services in the management of the firm. We are of opinion that this contention is well-founded. It may be conceded as put by Lord Wynford in *Thompson* v. *Williamson* (10), under ordinary circumstances, the contract of partnership excludes any implied contract for payment of services rendered for the firm by any of its members; consequently in the absence of any agreement to that effect, one partner cannot charge his co-partners with any sum for compensation, whether in the shape of salary, commission or otherwise, on account of his own trouble in conducting the partnership business, and in this respect a managing partner is in no different position from any other partner, *Hutcheson* v. *Smith* (11). This doctrine has been applied even where the amount of the services rendered by the partners is exceedingly unequal. In such a case, a remuneration to be paid to either partner for personal labour exceeding that contributed by the other is considered as left to the honour of the other, and it has been said that where that principle is wanting a Court of Justice cannot supply it. [*Webster* v. *Bray* (12), where an allowance for trouble was made to the Defendant, because it was offered by the Plaintiff; *Robinson* v. *Anderson* (13), where no allowance was offered and none was given by the Court]. Where, however, it is the duty of each partner to attend to the partnership business and one partner in breach of his duty wilfully leaves the other to carry on the partnership business unaided, the Court may, upon dissolution of partnership, decree an allowance in favour of the partner who had carried on the business alone, *Airey* v. *Borham* (14). In the case before us, the circumstances are peculiar; the Plaintiff is a *purdanashin* lady and is unable, by reason of her station in life, to take an active interest in the management of the partnership business, the responsibility for the conduct of which has naturally been thrown upon the Defendants. In view of these facts, we expressed our opinion that it was just and equitable that some allowance should be made in favour of the Defendants. The Plaintiff thereupon offered remuneration at the rate of Rs. 150 a year. In our opinion, this is reasonable and we direct accordingly that when the accounts are taken, the Defendants be credited with remuneration at the rate of Rs. 150 a year from the time of the death of the husband of the Plaintiff. If the Defendants have credited themselves with any sum in excess of Rs. 150 a year, by way of remuneration, they must account for the difference.

The point urged on behalf of the Plaintiff against the decree of the District Judge, raises the question, whether the Defendants are liable to pay interest on sums withdrawn by them from the partnership business. The learned District Judge has disallowed the claim for interest, and the learned Vakil for the Defendants has sought to justify this view by reference to

(10) 7 Bligh N. S. 432 (1831).
(11) 5 Ir. Eq. 117.
(12) 7 Hare 159 (1849).
(13) 20 Beav. 98 (1855).
(14) 29 Beav. 620 (1861).

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the case of *Meymott* v. *Meymott* (15). He has argued that except where there has been fraudulent retention, as in *Hutcheson* v. *Smith* (10), or an improper application, as in *Evans* v. *Coventry* (16), a partner ought not to be charged with interest on money of the firm in his hands, *Webster* v. *Bray* (12), *Stevens* v. *Cook* (17). It may be conceded that this is a sound rule, but in our opinion it is of no assistance to the Defendants. The case for the Plaintiff is —and her allegation has been accepted by the Courts below—that the Defendants have, from time to time, withdrawn large sums of money from the partnership business, and applied them to establish other firms from which they have earned large profits. Under these circumstances, it is difficult to appreciate how the Defendants can resist the claim for interest. If the money had been retained and laid out judiciously or applied for the legitimate expansion of the business of the firm, the Plaintiff would have been entitled to the additional profit. This is clearly a case where some of the partners have, without the assent of the other partner wrongfully used in trade funds which were not their exclusive property. They are clearly liable to restore the property and to make the owner proper compensation. In our opinion, the Plaintiff under these circumstances would be entitled, at her option, either to take interest or the profits made by the use of the funds. Although she claimed the latter alternative in the original Court, she has not put forward any such claim before us ; she has contented herself in this Court with a claim for interest. This is clearly unanswerable, *Yates* v. *Finn* (18), *Booth* v. *Parkes* (19), *Docker* v. *Somes* (20). When the accounts therefore come to be taken, not only must the Defendants account for all sums overdrawn by them and applied for purposes unconnected with the firm, but also pay interest thereon at 12 per cent. per annum from the date when the sums were overdrawn to the date of the final decree of the lower Court.

The result is that the appeal and the cross-objections must both be allowed in part ; the decree of the District Judge will be varied and the accounts will be taken in the manner explained in this judgment. Subject to the variation indicated, his decree will be affirmed. There will be no order as to the costs in this Court.

Appeal and cross objection allowed.

(10) 7 Bligh N. S. 432 (1831).
(12) 7 Hare 159 (1849)
(15) 31 Beav. 445 (1862).
(16) 8 DeG. M. & G. 835 (1857)
(17) 5 Jur. N. S. 1415 (1859).
(18) 13 Ch. D. 839 (1880).
(19) Beaty 444 ; 1 Moll. 465.
(20) 2 My. & Ke. 655 (1854).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 1270 OF 1910.

CASPERSZ, J. CHATTERJEE, J. 1911, Heard, 30, November. 1912, Judgment, 4, January.	RAJAH BIRENDRA KISHORE MANIKYA BAHADUR, Plaintiff, Appellant, *v.* AKRAM ALI, Defendant, Respondent.

Construction of sanad—*Grant by Hindu Raja for excavation of tanks with no rent reserved—Presumption as to rent-free character—Estoppel by conduct—Long acquiescence, effect of—Limitation Act (IX of 1908), Sch. I, Art. 130—Adverse possession by tenant, what is—Time begins to run only when right to assess rent accrues.*

The Raja of Tipperah granted sanad chitis *to certain tenants permitting the tenant to construct embankments to a silted*

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up tank and to re-excavate the tank, but no rent was reserved for the tank. The tenants acting upon that sanad *spent money in re-excavating the tank,*

Held—*That in the circumstances and having regard to a long course of conduct implying the rent-free character of the tank the Raja was estopped from revoking the license granted and from asserting that the subject-matter of the grant should come under a new liability.*

RAMSDEN *v.* DYSON (2), AHMAD YAR KHAN *v.* THE SECRETARY OF STATE (3), PLIMMER *v.* THE MAYOR, ETC., OF WELLINGTON (4) *referred to.*

Per CASPERSZ, J.—*The Plaintiff had every opportunity to have the tanks assessed with fair rent but having deliberately abstained from so doing, he must be taken to have confirmed the* niskar *grant and could not afterwards avoid it.*

As the right of assessing rent on the land had not yet accrued, and as the tenants in this case had not asserted a title adverse to the proprietary right of the Raja, the suit was not barred by limitation under Art. 130, Sch. I of the Limitation Act.

BENI PERSHAD *v.* DUDHNATH (7), ISHAN CHANDRA *v.* RAM RANJAN (8), BIR CHANDRA *v.* RAJ MOHAN (9) *considered.*

Per CHATTERJEE, J.—*In construing the* sanad *regard must be had to the fact that it was given by a Hindu Raja and it must be construed in accordance with the views of Hindus with regard to the sacred duty of digging tanks for water supply. In such view the* sanad *could not be understood as implying that the Raja intended anything other than the grant of land for the re-excavation of ancient tanks or that he intended that rent should be assessed thereon*

It was not a license in the sense in which the word is used by English lawyers.

(2) 1 E. & I. App. 129 (170) (1866).
(3) I. L. R. 28 Cal 693 (19.1).
(4) L. R. 9 A. C. 699 (18.4).
(7) I. L. R. 27 Cal. 156 (166) (1899).
(8) 2 C. L. J. 125 1905).
(9) I. L. R. 16 Cal. 449 (1889).

This was an appeal preferred on the 1st of April 1910, against the decree of Mr. A. H. Cuming, District Judge of Zillah Tipperah, dated the 3rd of January 1910, affirming that of Babu Krishna Kumar Sen, Munsif at Comilla, dated the 1st of December 1908.

The facts of the case will appear from the judgment.

Babus Dwarka Nath Chuckerbutty, Gobinda Chandra Dey Roy and *Surendra Chandra Dass* for the Appellant.

Babu Sasadhar Roy for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

CASPERSZ, J.—The Plaintiff is the Maharaja of Hill Tipperah. He also owns what the plaint describes as "a vast zemindari," that is, Chakla Roshanabad in the British district of Tipperah. The suit giving rise to this second appeal was brought by the Maharaja to have his zemindari title declared in respect of a tank and its banks and for *khas* possession and mesne profits. In the alternative, Plaintiff claimed to have the lands assessed with fair rent. The defence was that the tank had been *niskar* (rent-free) since the time of the Defendant's ancestor in virtue of a *sanad chiti*, dated the 14th Magh 1259 (26th January 1850), granted by the predecessor of the Plaintiff.

The first Court dismissed the suit on the ground of limitation ; and, on appeal, the District Judge has arrived at the same conclusion.

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The Plaintiff appeals. This is one of many appeals involving the same question—the right to assess the *niskar* tanks in the Chakla. We have heard the arguments in this appeal and in Appeals from Appellate Decrees Nos. 1963, 2515 and 2523 of 1910 which may be regarded as test cases the result of which, it is said, will govern both the other connected appeals pending in this Court as, also, the thousands of suits and appeals that are awaiting disposal in the lower Courts in the districts of Tipperah and Noakhali.

It is argued for the Plaintiff-Appellant that the *sanad chiti* amounted to a mere license to re-excavate the silted up tank and it was revocable by the grantor, or, at all events, by his successor in interest: that the tenant never set up any hostile title to, or adversely possessed, the land of the tank, and that the suit was instituted within 12 years from the 25th May 1896 the date of the final publication of the record-of-rights prepared under Chap. X of the Bengal Tenancy Act.

The duty of zemindars to maintain the tanks on their zemindaries was plainly pronounced by their Lordships of the Privy Council in the *Madras Ry. Co.* v. *The Zemindar of Carvatenagarum* (1):—"The tanks are ancient, and formed part of what may be termed a national system of irrigation recognised by Hindu and Mahomedan Law, by regulations of the East India Company, and by experience older than history, as essential to the welfare, and indeed, to the existence of a large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved on zemindars, of whom the Defendant is one. The zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian Law, by reason of their tenure, with the duty of preserving and repairing them."

(1) L. R. 1 I. A. 364 (385) (1874).

The facts of the case from which these remarks are quoted are different from those now under consideration, but the relative rights and obligations of the present parties are similar. The Plaintiff, a Hindu Raja, should be slow to depart from the ancient laws and customs regulating the supply of water for the necessary purposes of his tenants. The Maharaja did not maintain the tanks in the Chakla: Consequently, they silted up, and were re-excavated by the tenants concerned under *sanad chitis* one of which has been produced by the Defendant-Respondent. This *sanad* provides that tenant having applied for re-excavating the ancient and unclaimed tank called Na ir Mahomed, an Amin was appointed to ascertain the area and boundaries thereof; that the area was ascertained (2 kanis, ? gundas, 2 karas, 2 krants) of the four banks; that this *chiti* was granted in order that the tenant should construct embankments on the former sites of embankments of the tank lying within the boundaries so ascertained and specified: and that the tenant should re-excavate the tanks by means of *matials* (earth-cutters). Nothing was said in the *sanad* about rent being payable either for the watery portions or the area of the four banks of the tank.

The case is clearly not one within the ancient prohibition which, we are told, was in force in the early days of last century, that a rent-free grant was not

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valid against the heir or purchaser of the grantor. The *sanad* did not confer any rent-free title; admittedly, it was valid to allow a tenant to spend money and re-excavate an old tank: no contrary view is possible. It is likewise clear that a license to do a thing, to effect improvements, cannot be revoked after the improvements have been carried out, for, in such a case the parties cannot be relegated to their former positions. The *sanad* is merely a piece of evidence showing the intentions of the parties and the nature of the subject-matter. If it had been intended to assess the tank at some future date, some apt and necessary provision would have been made among the terms of the document. If any rent had been previously paid for the tank, or any part of it, that fact also would have been mentioned. The grantor is, in the circumstances, estopped from asserting that the subject-matter of his grant should come under a new liability of which there is no indication whatever in the previous history of the tank. I take it as beyond controversy that the word tank includes the banks which are necessary for the enjoyment of the water.

The rule of estoppel stated in *Ramsden* v. *Dyson* (2) was applied by the Judicial Committee in *Ahmad Yar Khan* v. *The Secretary of State for India in Council* (3), where the persons undertaking to construct a canal were deemed to have "acquired a proprietary interest in so much of the Government lands taken for the purpose of the canal as was required for its construction and maintenance and also a right to have the waters of the Sutlej admitted into the canal so long as the canal was used for the purpose for which it was originally designed." The case of *Ramsden* v. *Dyson* (2) was also approved in *Plimmer* v. *The Mayor, etc., of Wellington* (4), where a wharfinger who had spent money on land on which he had entered under a license was deemed to have acquired a perpetual right to the same. The Privy Council held that such a license could not, in view of subsequent events, be revoked.

It is also well-settled that if a person having a right to avoid a transaction on any legal ground and being aware of and reasonably capable of enforcing such right manifests an intention to confirm the transaction, he cannot afterwards avoid it [*Wright* v. *Vanderplank* (5), *Jarratt* v. *Aldam* (6)]. The Plaintiff had every opportunity, both before and particularly in the settlement proceedings, to have the *niskar* tanks assessed with fair rent: he deliberately abstained from so doing. He now comes but not within a reasonable time.

Again, it is a matter of common knowledge that private owners in this country have, in times past, granted lands for various public purposes—such lands are liable to resumption when the particular purpose has been exhausted. There is, in such cases, a reversion in the grantor. On the finding, that these *niskar* properties are still used as tanks, and not for the purpose of cultivation, or otherwise, in opposition to the intentions of the grantor, the time has not arrived for the Plaintiff to re-enter or to insist upon the payment of rent.

The Plaintiff's suit is, therefore, not maintainable. But it remains to consider

(2) 1 E. & I. App. 129 (170) (1866)
(3) I. L. R. 28 Cal. 693 (1901).

(2) 1 E. & I. App. 129 (170) (1866).
(4) L. R. 9 A. C. 699 (1884).
(5) 2 K. & J. 1 (1855).
(6) L. R. 9 Eq. 463 (1870).

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and decide the plea of limitation upon which we have heard the arguments of the learned Vakils engaged. In my opinion, the District Judge has fallen into error in dismissing the suit on this ground. Art. 130 of the First Schedule of the Limitation Act, 1908, provides a period of 12 years within which a suit must be brought for the resumption or assessment of rent-free land, and the period begins to run when the right to resume or assess the land first accrues. In the views already expressed, the Plaintiff's right has not yet accrued. He will have his remedy when, if ever, the tank again becomes silted up and is no longer used for the purposes contemplated in the year 1850. Apart from this, when the settlement proceedings were being conducted on the 21st November 1894, the tenant never asserted any right to hold rent-free forever either the tank or its banks. He merely set up his *sanad chiti* and the Revenue Officer caused a formal entry to be made that, as a fact, the tank with its banks was held rent-free "as not paying rent." There was in my opinion no clear and unequivocal assertion of adverse possession by the tenant in this case. And as the obligation to pay rent is a recurring obligation the landlord cannot be barred by Art. 130.

In *Beni Pershad* v. *Dudhnath* (7), it was observed by Lord Davey, that a mere notice by a person holding for his life, that he claimed to be holding on a perpetual or hereditary tenure, would not make his possession adverse within the meaning of the Limitation Act, so as to bar a suit for possession on the expiration of his life tenancy. No such claim was ever advanced by the *niskar* holders in the present litigation. Their contention merely extended to the enjoyment of the tanks, rent-free, for so long as they were required for the legitimate purposes which the parties had in view when the tanks were re-excavated. It is also impossible to conceive of a claim to hold adversely being made in respect of a right to receive rent. That right is not a limited interest; it is in fact the entire interest of the landlord. Therefore, the rule adopted in *Ishan Chandra* v. *Ram Ranjan* (8), with regard to the dispossession of a landlord, in a limited sense, is not applicable to the present facts; the Plaintiff's tenants have not encroached on any lands not covered by the *niskar* tanks.

The case of *Bir Chandra* v. *Raj Mohan* (9) to which our attention has been called originated in the same part of the district (Chakla Roshanabad) but the facts were widely different from those of the present litigation. It is, however, some authority for the Plaintiff's contention that Art. 130 really covers cases of resumption under the old Regulations and does not apply to suits such as those under appeal. It is manifest that the tanks with which we are now concerned were never dissociated from being a part of the revenue-paying properties of the zemindar: and no question of limitation can arise in such a case as this.

The result of this appeal coincides with the decision of Chitty and N. R. Chatterjea, JJ., in an unreported case, S. A. No. 2551 of 1908, dated the 3rd February 1911. The decision on the question of a *belagân* entry in the record-of rights in S. A. No. 1327 of 1909 (dated the 6th December 1910) is also consistent with that now arrived at. As I decided that case, I may observe that the facts are

(7) I. L. R. 27 Cal. 156 (166) (1899).

(8) 2 C. L. J. 125 (1905).

(9) I. L. R. 16 Cal. 449 (1889).

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distinguishable, but that the word *belagân* (not assessed with rent) which has a special significance in Behar has its counterpart here in the expression *kar dharjya nai* and means that rent was not imposed in the settlement proceedings.

The decree of the lower Appella'e Court is affirmed but not for the reasons given in the judgment of the District Judge. The appeal is dismissed with costs.

CHATTERJEE, J.—The facts shortly are that in the year 1850 the ancestor of the Defendant applied to the then Maharaja of Tipperah for being allowed to re-excavate an unclaimed sil ed up tank in the Maharaja's Zemindari, Chakla Roshanabad. This permission was given by a *chiti* bearing the Maharaja's seal and the grantee was required to re-excavate the tank by employing earth-cutters and the only restriction imposed was that the limits of the ancient tank were not to be exceeded: there was no provision for the payment of any rent presently or in future and nothing was said as to the duration of the grant. The ancestor of the Defendant re-excavated the tank at a considerable expense and it has been in the exclusive possession of the family of the Defendants from father to son and still supplies good drinking water.

There was a survey and settlement of the Chakla in 1894 and the tank with its banks was numbered as 253 and 252 and included within the *nij jama* of the Defendant. The Defendant objected that he held both these numbers under a *niskar* title granted by the *chiti* of 1850 which he produced. The Maharaja's agent asserted that the banks of the tank were included in the *jama* of the Defendant but did not say anything as to the tank. The Settlement Officer recorded both numbers as separate from the *jama* and 'not paying rent.' The order of the Settlement Officer is dated the 21st November 1894. The exclusive possession of the Defendant continued as before and no action was taken by the Maharaja until the 25th of February 1908 when he filed the suit giving rise to the present appeal on the allegation that the tank and its banks were his *khas* property and the Defendant had no right to retain possession of the same without his consent. He prayed for recovery of possession and in the alternative for assessment of fair rent.

The Defendant pleaded *niskar* title under his *sanad*, estoppel and limitation.

The first Court dismissed the suit as barred by limitation and the learned District Judge not only upheld the decision on the question of limitation but held that the *sanad* intended to gran' a rent-free title.

The Maharaja has appealed mainly on two grounds, 1st, that the *sanad* does not confer a rent-free title and is at best a license which can be revoked at any time time and, 2ndly, that the suit is not barred by limitation.

I will deal with the *sanad* first. In construing this document it must be borne in mind that it was granted by a Hindu Raja for the re-excavation of an old tank. According to Hindu Shastras the grant of land for digging tanks, the digging of new tanks and wells and the re-excavation of old ones is supremely meritorious.

"तड़ागकृन्नित्य तृप्तो वारुणलोकमश्नुते।

He who makes a tank becomes devoid of thirst for all time and enjoys the abode of Varuna."

Vishnu 61. 2.

"यो वापीमथवा कूपं देशे तोयविवर्जिते
खनयेत् स दिवं याति बिन्दौ बिन्दौ शतं समाः।

Whoever causes the digging of a tan'

or a well in a place destitute of water goes to the heaven for a hundred years for each drop of water."

Nandi Puran, quoted by Raghunandan.

" कूपाराम तड़ागेषु—देवतायतनेषु च
पुनःसंस्कार कर्त्ता च लभते मौलिकं फलं।

In respect of wells, gardens, tanks and temples the repairer gets the same merit as the original maker."

Vishnu 61. 19.

The great Rishi Narada when on a visit to the great King Judhistir asked him :—

* * कच्चित् तुष्टाः कृषीबलाः
कच्चिद्राष्ट्रे तड़ागानि पूर्णानि च बृहन्ति च
भागशो विनिविष्टानि न कृषि देवमातृका॥

Are the cultivators contented? Have you constructed large tanks full of water in proper places in your kingdom? Is agriculture independent of the rains?

Mahavarata, Sava-parba, Chap. V, 76-77.

Sankaracharya when speaking of the duties of Kings says :—

तस्य इच्छेत् तड़ागं वा वापिकां कृत्रिमां नदीं
कुर्व्वन्त्यन्यत् तद्विधवा कर्षन्त्यभिनवां भुवं
तद्द्वयद्विगुणं यावन्न तेभ्यो भागमाहरेत्

When any one digs a tank or a canal or does some other similar work tending to the improvement (of his country) or reclaims new land the King shall not realise any rent for these until double the cost of the work has been realised from the usufruct.

Sukraniti IV. 2. 121, 122.

This is when such works are done without permission.

जलाधार करणार्थं भूमिदाने फलमाह
चित्रगुप्तः। जलाश्रयार्थं यो दद्यात् वारुणं
लोकमाप्नुयात्। भूमि मिति शेषः।

Whoever makes a gift of land for the purpose of making a reservoir of water attains the abode of Varuna.

Vishnu Dharmottar, quoted in Raghunandan's Jalasayotsargatatwa.

As a Hindu Raja presumbly possessing all the instincts and traditions of a Hindu Raja it is impossible to conceive that the ancestor of the Plaintiff intended anything other than the grant of the land for the purpose of the re-excavation of the ancient tank. He could never have meant to grant a mere license as understood by English lawyers and a consistent course of conduct makes it quite clear that that was so. It is admitted that it was an ancient tank previously possessed by some one or other of the tenants, for the *sanad* calls it a *bewaris* tank, *i.e.*, one in respect of which there were no claimant as heirs : there is no suggestion that it was ever assessed to rent : there are no zemindari paper showing that it was ever considered as a part of the rent-paying lands of the mehal : it has come down from father to son for at least sixty years without any claim having ever been made for rent or resumption : even in 1894 during the settlement operations the Raja's agent did not even assert that the tank was assessable and in respect of the banks of the tank merely said that they were parts of the separate holding of the Defendant : even after that for over 12 years, *i.e.*, until February 1908 we see no attempt to assess or resume the land. It may be noted that there are hundreds of such tanks in Chakla Roshnabad, possessed by the tenants of the Maharaja in the same manner some with *sanads* and some without and in respect of none of them any claim for assessment or resumption has ever been made and I

have no doubt that neither the Maharaja nor the tenants ever understood that these would be ever resumed or assessed to rent and I am of opinion that the Defendant is entitled to hold the tank with its banks without payment of rent so long as the tank serves the purpose for which the grant was made.

The matter may also be considered in another light. When the former Maharaja granted possession to the ancestors of the Defendant to spend an indefinite amount of money for the reconstruction of the tank, he encouraged and created an expectation in the grantee that he would be allowed to enjoy the improved property without any let or hindrance, and his heir the present Maharaja is equitably bound to give effect to such expectation. If that were not so the Maharaja might evict him at any time after the money had been spent or demand an impossible rate of rent. This principle was followed by their Lordships of the Privy Council in the case of *Ahmad Yar Khan* v. *The Secretary of State* (3) and is eminently applicable to the facts of this case.

In this view of the rights created under the *sanad* as interpreted by the surrounding facts the question of limitation does not arise. For so long as the tank continues to be a tank no assertion of adverse title by the Defendant can give the Maharaja a cause of action for resumption or assessment of rent. See *Beni Pershad* v. *Dudhnath* (7). Besides as the Defendant relied upon his *sanad* as the root of his title and claimed *niskar* title under the *sanad* and not by adverse possession as an alterative source of title, his possession cannot be used for any purpose other than that of explaining the grant on which he relies. See *Labrador Company* v. *The Queen* (10).

In this view of the case I agree in dismissing the appeal with costs.

Appeal dismissed.

(3) I. L. R. 28 Cal. 693 (1901).
(7) I. L. R. 27 Cal. 156 (1899).
(10) L. R. [1893] A. C. 104 at p. 122 (1892) per Lord Hannen.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1600 OF 1911.

MOOKERJEE, J.
CARNDUFF, J.
1911,
23, May.

BARKAL PARIDA,
Petitioner,
v.
JOGENDRA NATH SEN,
Opposite Party.

Bengal Tenancy Act (VIII of 1885), sec. 174—Orissa—Sale under Act VIII of 1865, B. C.—Extension of the Bengal Tenancy Act—Repeal of inconsistent provisions of Act VIII of 1865, B. C.

In Orissa, since the extension of Ch XIV of the Bengal Tenancy Act, a sale under Act VIII of 1865 is liable to be set aside on an application under sec. 174 of the Bengal Tenancy Act, the extension to Orissa of the provisions of the former Act having had the effect of repealing the inconsistent provisions of Act VIII of 1865.

This was a Rule against an order of Mr. Syed Wasit Ali, Deputy Collector of Kendrapara, dated the 18th of February 1911.

The material facts will appear from the judgment.

Babu Suresh Chandra Chuckerbutty for the Petitioner.

Babu Ram Chandra Majumder for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

We are invited in this Rule to cancel an order of refusal to vacate a sale held on the 16th January 1911, under Act VIII of 1865 read with sec. 105 of Act X of 1859.

BARKAL PARIDA *v.* JOGENDMA NATH SEN.

The Court below has held that as the sale took place under the provisions of the Acts mentioned, it was not liable to be set aside under sec. 174 of the Bengal Tenancy Act, notwithstanding that Ch. XIV of the Bengal Tenancy Act which includes sec. 174 was extended to the district where the sale took place, on the 3rd January 1907. The sole question in controversy between the parties therefore is as to the precise effect of the extension of sec. 174 of the Bengal Tenancy Act to that district. It has been contended on the behalf of the Opposite Party that as sec. 174 is inconsistent with the provisions of sec. 11 of Act VIII of 1865 (B. C.) the provisions of the latter section ought to prevail. In support of this argument reliance has been placed upon sec. 2 of the Bengal Tenancy Act which provides in sub-sec. (2) that where a portion only of the Act has been extended to the Division of Orissa or any part thereof, so much of the provisions of the enactments in force there as is inconsistent with the portion extended shall be repealed in that division or part. We have been invited to read this provision with Sch. I to the Bengal Tenancy Act which makes mention of Act X of 1859 but not of Act VIII of 1865 (B. C.). It has been argued that if the intention of the Legislature was that the extension of any portion of the Bengal Tenancy Act would by implication operate as a repeal of the provisions of Act VIII of 1865 (B. C.) mention would have been made of the latter Act in the first schedule. In our opinion there is no force in this contention. The provisions of sec. 2, sub-sec. (2) of the Bengal Tenancy Act were no doubt introduced by way of excessive caution, *West-Derby* v. *Metropolitan Life Assurance* (1). Even if such a provision had not been incorporated in the Bengal Tenancy Act, the effect would have been that as soon as any portion of the Bengal Tenancy Act was extended it would by implication repeal the inconsistent provisions of the pre-existing statutes. [*Dean of Ely* v. *Bliss* (2), *West Ham* v. *Fourth City* (3)]. In such a case the maxim applies *leges posteriores priores contrarias abrogant.* This is also sufficiently indicated by the provisions of cl. (*f*) of sec. 195 of the Bengal Tenancy Act. It would be meaningless to hold that sec. 174 of the Bengal Tenancy Act has been extended to the Division of Orissa but that it has no application to sales held there under Act VIII of 1865 (B. C.). No doubt there is an inconsistency between the two sections to this extent that whereas sec. 11 of Act VIII of 1865 (B. C.) renders it obligatory upon the Court to confirm the sale and thereby to create a valid title in the purchaser upon the happening of specified contingencies, sec. 174 of the Bengal Tenancy Act entitles the judgment debtor to have the sale vacated upon the payment of a prescribed sum. But the provisions of the latter statute must clearly prevail over the inconsistent provisions of the earlier statute.

We may add that sec. 4 of Act VIII of 1865 (B. C.) plainly indicates that in cases of sales had under the provisions of sec. 105 of Act of 1859, the provisions of Act VIII of 1865 (B. C.) ought to be treated as supplementary to those of Act X of 1859. But it has not been admitted by the learned Vakil for the Petitioner that the sale in this case did take place under the provisions of Act X of 1859 and it is unnecessary for us to

(1) [1897] A. C 6.7.

(2) 5 Bear 582.

(3) L. R. [1892] 1 Q. B. 654.

THE

Calcutta Weekly Notes.

Vol. XVI.] MONDAY, FEBRUARY 12, 1912. [No. 12

Contents.

NOTES.

MR. JUSTICE STEPHEN WILL PRESIDE OVER THE Criminal Sessions which commences its sittings from this day.

WE HAVE RECEIVED THE REPORT OF THE INCORporated Law Society of Calcutta and we are glad to find that the Society has done much useful work during the year ending with the 31st December 1911. Amongst the record of work the following deserve special mention. They have conjointly with a committee of the Bar considered and submitted their suggestions with regard to the new Taxing Rules. They have also considered the High Court Rules which are to replace the old Rules and the new Rules relating to Admiralty suits. The thanks of their branch of the profession are due to the Society for securing the attorneys the privilege of being appointed Partition Commissioners both within and outside the Ordinary Original Jurisdiction of the High Court and Commissioners for the recording of evidence outside such limits. In the absence of any reference to professional conduct in this report we may presume that there was no occasion for the Society's vigilance in this direction and, if this be so, it is surely a matter for congratulation. The new Committee constituted as it is of the following gentlemen would command public confidence.

Committee of the Incorporated Law Society of Calcutta.

Hon. Mr. C. H. Kesteven, *President.*
,, Bhupendra Nath Bose.
,, Deva Prosad Sarbadhikary.
Babu Ganesh Chunder Chunder.
,, Mohiney Mohan Chatterjee.
H. W. Skakes, Esq.
F. M. Leslie, Esq. *Honorary Secretary.*

IT IS ANNOUNCED THAT A BILL IS TO BE SHORTLY introduced in Parliament for the creation of a Governorship and a Council for the Presidency of Bengal. It would be interesting to review in this connection the provisions in the Parliamentary Statutes relating to the Governorship of Bengal. The Government of India Act of 1833 (3 & 4 Williams IV, c 85), sec. 56 provides that the executive government of the Presidency of Fort William in Bengal shall be administered by a Governor and three Councillors, the Governor to be styled "the Governor of the Presidency of Fort William in Bengal." The East India Companies Act of 1853 (16 & 17 Vict., c. 95), sec. 16 provides that the Governor-General of India shall not be the Governor of the Presidency of Bengal but a separate Governor shall be appointed for the Presidency in the same manner as for the Presidencies of Madras and Bombay and until such Governorship is constituted for Bengal, the Governor-General in Council is authorised to appoint a Lieutenant-Governor. So the Lieutenant-Governorship of Bengal is to this day a sort of provisional form of Government for Bengal. Had not the partition of Eastern Bengal taken place and had Behar, Chota Nagpur and Orissa remained with Bengal, the Governorship with an Executive Council could have been created for the Presidency of Bengal by giving effect to the provisions of the Statute above referred to and providing that the number of the members of the Executive Council shall not be more than four as has been done by the Indian Councils Act of 1909.

BUT HAVING REGARD TO PAST AND PROSPECTIVE changes in the Provinces comprised in the old Presidency of Fort William in Bengal, it is necessary that the Governorship of the Presidency of Fort William in Bengal, as it is to be newly constituted, should be created by a Parliamentary Statute. It will be remembered that at the time Eastern Bengal was partitioned we raised the objection that although under sec. 46 of the Indian Councils Act of 1861 (24 & 25, Vict. c. 67), the Governor-General in Council is empowered to create new Provinces and appoint Lieutenant-Governors, still the proviso to sec. 22 thereof precluded him from making any laws affecting the Statutes of 1833 and 1853 and thus from creating another Lieutenant-Governorship within the Presidency of Fort William in Bengal. The procedure followed at the partitioning of Eastern Bengal was

to raise Assam into a Lieutenant-Governorship and then to transfer Eastern Bengal to Assam under sec. 4 of the Government of India Act of 1854 (17 & 18 Vict., c. 77). This was evidently done to obviate the above difficulty.

THE SAME OBJECTIONS WOULD ARISE IN CONSTITUTING a Lieutenant-Governorship for Behar, Chota Nagpur and Orissa. But we are sure that the Bill that is to be introduced in Parliament for creating a Governorship and Executive Council for the Presidency of Fort William in Bengal will either specifically provide for the new Lieutenant-Governorship or will amend or repeal sec. 56 of Government of India Act of 1833 and sec. 16 of the Government of India Act of 1853. In that case it will be quite competent for the Governor-General in Council to create a Lieutenant-Governorship for Behar, Chota Nagpur and Orissa by proclamation under sec. 46 of the India Councils Act of 1861. But all the same under sec. 3, sub-sec. (2) of the India Councils Act of 1909 the draft of the proclamation for creating an Executive Council for the new Lieutenant-Govenor will have to be laid before each House of Parliament for at least sixty days during the Session of Parliament.

ALTHOUGH THE EXECUTIVE COUNCIL FOR BEHAR cannot be created until two months after the draft proclamation is laid before both Houses, there is no bar to the Executive Council for the Governor of Bengal being formed immediately after the Statute creating Governorship for the Presidency of Bengal is passed in Parliament. We have already noticed that the Statutes of 1833 and 1853 provide that the Executive Council of the Presidencies of Madras, Bombay and Bengal are to consist of three members. The Statute of 1909 has, however, raised this number to four, two of whom as before should be Government servants. We may observe here in passing that it seems to be an omission not to state in the schedule appended to the Statute of 1909 that the provisions in the Statutes of 1833 and 1853 have in this respect been amended or rather repealed by the Statute of 1909. The Statute creating Governorship for Bengal will have to repeal also sec. 3 (1) of the last-mentioned Statute which empowers the Governor-General in Council to create an Executive Council for the Lieutenant-Governor of Bengal and provide for an Executive Council for the Governor. It will therefore follow that on the passing of the new Statute the present members of the Executive Council for Bengal will be *functus officio* and new members will be appointed for the Governor's Council.

IT IS STATED IN THE PUBLIC PRESS THAT A non-official member for the Governor's Council has already been selected and it has been decided that he is to be a Mahomedan. We have always maintained that in making appointments to such responsible offices the best qualified men by reference to education, character, credit and claim to command public confidence, should always be selected. Such appointments should not be conferred as a matter of favour on any particular community. Racial, communal or religious bias should be considered more as a disqualification than a recommendation for such offices. If, however, the selection is to be made on a communal basis it is but right that each of the two most important communities in Bengal should have a member in the Executive Council of the Governor. As the statutory number of members for Bengal is sure to be four, of whom two may be non-officials, there can be no difficulty in making another appointment which would meet with general approval.

TRANSFER WITHOUT ABANDONMENT OF RAIYATI HOLDING.

The transfer of a *raiyati* holding not transferable by custom does not by itself entail a forfeiture of the tenancy. It is settled law in these Provinces that if the original tenant continues on the land and does not repudiate his obligation to pay rent to his landlord, the latter in the absence of a clause in the lease providing for forfeiture and re-entry in the event of an unauthorised transfer, cannot treat the tenant as a trespasser and sue him in ejectment, *Nadhu Mandal* v. *Kartick Mandal*, 9 C. W. N. 56. It is only when the transfer is followed by an abandonment of his holding by the tenant, that the landlord, as in any other case of abandonment, may enter into possession, and he may then disregard the transferee who *ex hypothesi* has acquired no title by his purchase and who if he resists may also be ejected, *Narendra Narain* v. *Johan Chandra*, 22 W. R. 22. When the tenant after sale of the holding continues in possession as a sub-tenant of the purchaser, wholly repudiating his relationship with his former landlord, the act of the tenant has been construed, not unreasonably, as an abandonment, and the consequences above noted have been held to follow: *Rajani Kanta* v. *Akkari*, 11 C. W. N. 811: s. c. I. L. R. 34 689. There would obviously be no ground for concluding that the tenant has abandoned his holding when he has sold only a part of it and continued in joint possession of it with the transferee, the rent continuing to be paid in its entirety in the name of the transferor. *Kabil Sardar* v. *Chunder Nath*, I. L. R. 20 Cal. 590. (See also *Sheikh Gozaffur* v. *E. Dalgleish*, 1 C. W. N. 162): nor also where as in *Srishteedhur* v. *Mudan Sirdar*, I. L. R. 9 Cal.

648, the tenants, notwithstanding that they had sold the holding and taken a sub-lease from the transferee, insisted, when the landlord sued them in ejectment, on being treated as tenants, the transfer being in law, and according to the landlord's own case, inoperative. [See also *Nadhu Mandal* v. *Kartick Mandal*, 9 C. W. N. 56, and *Mathur Mandal* v. *Ganga Charan*, 10 C. W. N. 1033]. On the same principle there would seem to be even less justification for holding that a tenant who has merely executed a mortgage, whether with or without possession, has abandoned the holding, and this, [though a contrary view was put forward in *Krishna Chandra* v. *Khiran Bajania*, 10 C. W. N. 499] hás been rightly reaffirmed in *Chowdhury Mohadeo* v. *Sheikh Pachkari* reported at p. 322 of this issue.

The question still remains what is the position of the transferee without title (be he a purchaser of the whole or a portion of the holding or a mortgagee) when the original tenant continues, even after the transfer, to maintain his former relationship with his landlord? Can the landlord sue him in ejectment over the head of the tenant who in the conditions supposed has not abandoned his holding? The right to possession being in the tenant, a suit in ejectment can lie in such cases only at the instance of the tenant, and he, it may be noted, may be precluded by estoppel or by the terms of the transfer from exercising that right. However that may be, it seems to us to be impossible on principle to hold that the landlord can sue the transferee in ejectment, when abandonment by the transferor has not been made out. The observations of Banerjee, J., in *Kalinath* v. *Kumar Upendra Chandra*, 1 C. W. N. 163 at p. 165, col. 1 and in *Nadhu Mandal* v. *Kartick Mandal*, 9 C. W. N. 56 at p. 60, col. 1, so far as they go, support this view, though the question did not arise in those cases and was not decided in them. In *Mathur Mundal* v. *Ganga Charan Gope Ghose*, 10 C. W. N. 1033, this view was taken for granted. The point actually arose in *Dina Nath* v. *Krishna Bejoy*, 9 C. W. N. 379, but the conclusion that the landlord though bound to recognise the subsisting tenancy of the transferors could yet treat the transferee as a trespasser and recover a decree for possession as against him appears to be self-contradictory. Further, this view of the law would enable the tenant to collude with the landlord to defraud the transferee. This decision was followed in *Madan Mundal* v. *Mahima Chandra*, I. L. R. 33 Cal. 551. The question apparently also arose in the lower Appellate Court in the case reported at p. 322 of this issue, and the Subordinate Judge decided it against the transfer on the principle laid down in *Dino Nath's* case. But the appeal to the High Court was preferred by the landlord and not by the mortgagee who appears to have acquiesced in the Subordinate Judge's decision and the question did not, as it might well have, come up for reconsideration before the High Court. We may however observe in passing that a decree in favour of the landlord for ejectment against the transferee only, when the transferor is maintained in possession, is practically useless and there is nothing to prevent the transferor from putting the transferee back into possession as often as the tranferee is ejected at the instance of the landlord. If the landlord has any cause of action at all against the transferee it must, it appears to us, be at most for a declaration that the transfer was not binding on him. See *Sheikh Gozuffur* v. *E. Dalgleish*, 1 C. W. N. 162, already referred to, for a somewhat similar relief granted in the case of a transfer of a portion of the holding without the consent of the landlord.

Reviews.

MOORE'S HANDBOOK OF PRACTICAL FORMS, relating to Conveyancing and General Matters, with Variations and Notes. *Fifth Edition. Revised and Edited by Humphrey H. King, B. A., LL. B., Barrister-at-Law. 1911. Price 18s. 6d.*

MOORE'S PRACTICAL FORMS OF AGREEMENTS with Variations and Notes. *Seventh Edition. Re-written and Edited by H. F. F. Greenland, B. A., (Oxon), Barrister-at-Law. 1911. Price 18s. 6d.*

Butterworth & Co., Law Publishers. London: 11 & 12 Bell Yard, Temple-Bar. Calcutta, 8/2, Hastings Street.

These admirable collections of Forms and Precedents in general use amongst solicitors have so long formed a part of the ordinary and indispensable equipments of a lawyer's office, that the appearance of a new edition would ordinarily need little more than a bare mention from the reviewer. The present edition however calls for special notice by reason of the thoroughgoing revision and rearrangement of the subject-matter to which the two volumes have been subjected. The first of these volumes shows that a number of forms which have become obsolete and others for which the practitioner would naturally prefer to consult more pretentious works have been omitted. Saving of space has been further effected by striking out redundancies with the result that about 650 forms (*i.e.*, 30 more than could be accommodated in the previous edition of 551 pages) have been compressed within 545 pages. The other volume has been re-written rather than revised. Repetition and verbiage have been rigorously kept down and in this way space has been found in it for nearly 80 more precedents than could be accommodated in the previous edition.

Allthough the subject-matter of both volumes has been sought to be rearranged upon a more

scientific basis, the editors have nevertheless felt the necessity of furnishing exhaustive subject indices which are indispensable keys to the proper handling of books of reference. The tables of cases and statutes would by themselves go to show the character of the notes which the editors have thought fit to append for the elucidation of the forms.

Compact and brought up to date, Moore's Practical Forms may be assumed now to have started on a career of renewed usefulness.

A PRIMER OF ROMAN LAW. *By W. H. Hastings Kelke, M. A. Messrs. Sweet & Maxwell, 3, Chancery Lane, London W. C. Price 6s. 1911.*

This book is an elementary work planned as an introduction to the study of Roman Law, or more particularly of Justinian's Institutes. Justinian's Institutes is a work which every student of Roman law should read at the commencement of his studies on the subject. But that work has its own difficulties for a student unacquainted with the previous history or the exact constitution of Courts of law and of the evolution of the law to the stage at which we find it in Justinian. The author in this work sets out within the briefest compass the most salient facts in the history of the particular legal conceptions of Justinian as well as a brief statement of all circumstances which it is absolutely essential to know in order to understand Justinian. All this comes in the course of an exposition of the most salient facts in Roman law in the order in which the subjects are dealt with in the Institutes. The introductory chapters giving the briefest history of Roman law, law Courts and procedure and the constitution of the family, the *gens* and the *curia* are of the greatest assistance in forming a correct idea of the historical position and the true significance of much of what Justinian says. As an introduction to the study of Justinian and other more ambitious works on Roman law this book is likely to be very useful to students.

THE ELEMENTS OF CRIMINAL LAW AND PROCEDURE. *By A. M. Wilshere, M. A., LL. B., Bar-at-Law. Second Edition by Messrs. Sweet and Maxwell, 3, Chancery Lane, London W. C. 1911.*

This is a handy book which, though intended for students, would give to members of the legal profession in India a clear idea of the English Criminal Law and Procedure. There is also a chapter on evidence which does not aim at giving hard and fast rules as regards the law of evidence but explains within a very small compass the general principles of the law of evidence by reference to practice and case law. For instance it gives very useful guidance to students regarding examination, cross-examination of witnesses, hearsay and other difficult questions relating to evidence from which even practitioners would derive assistance in their every day work.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CIVIL APPELLATE JURISDICTION. Before COXE, J. APPEALS FROM APPELLATE DECREES NOS. 1287 AND 1304 OF 1909. LALA MEHDI LALL, Plaintiff, Appellant *v.* MR. W. M. GRANT AND ANOTHER, Respondents. 15th January 1912.

Bengal Tenancy Act (VIII of 1885), sec. 22—Ijaradar purchasing occupancy holding.

The appeal arose out of a suit under sec. 106 of the Bengal Tenancy Act. The case for the Plaintiff was as follows: The disputed lands originally belonged to four tenants. Suits for rent were brought against them by the *ijaradar* in possession of the village. He obtained decrees and sold the holdings in execution. Three of these holdings he purchased himself. The fourth, that of Jitu Manji was purchased by the Plaintiff. Thereafter the *ijaradar* sold the *jote* right in the three holdings that he had purchased to the Plaintiff. The Plaintiff contended with respect to these four holdings that he was a raiyat and the Defendants were his under-raiyats. In the record-of-rights he was recorded as a tenure-holder and the Defendant as raiyats under him. He disputed the correctness of this entry. Hence this suit.

The Defendants supported the case of the Plaintiff in the Courts below. But notwithstanding this the Assistant Settlement Officer in the first instance and the District Judge in appeal held that the entry in the record-of-rights was correct and dismissed the suit.

The Plaintiff appealed to the High Court.

Held—Sec. 22 of the Bengal Tenancy Act does not lay down that when an *ijaradar* purchased a holding in execution of a decree under the Bengal Tenancy Act as it stood before it was amended the tenancy ceased to exist. The Plaintiff was a raiyat and was entitled to relief under sec. 106 of the Bengal Tenancy Act.

Babu Kshetra Mohun Sen for the Appellant.

Babu Biraj Mohun Mojumder for the Respondents.

A. T. M. *Appeal allowed.*

BARKAR PARIDA *v.* JOGENDRA NATH SEN.

decide whether it was so held, because the judgment-debtor was entitled in any view to have the sale reversed under the provisions of sec. 174 of the Bengal Tenancy Act.

The result, therefore, is that this Rule is made absolute and the order of the Court below discharged. The Petitioner will be at liberty to have the sale set aside upon payment of the prescribed sum. The payment must be made within one week of the arrival of the record in the Court below. Notice of such arrival will be given to the Petitioner.

The Petitioner is entitled to the costs of this Rule. We assess the hearing-fee at one gold mohur.

Rule made absolute.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 42 OF 1910.

JENKINS, C. J.
WOODROFFE, J.
1911,
10, May.

ABDUL HOSSEIN, Plaintiff, Appellant,
v.
RAM CHURN LAW, Defendant, Respondent.

Footing or spreading course of a wall—Presumption that wall built on owner's land—Cornice, lateral extension of, inference from—Trespass—Mandatory injunction—Specific Relief Act (I of 1877), sec. 55.

Where the footing or the spreading course of the wall of a house has been in existence for a great length of time:

Held—***That there was a fair presumption in the circumstances of the case that the footing was not placed there wrongfully and the inference that the land covered by the footing belonged to the owner of the wall received corroboration from the fact that the lateral extension of the cornices of the house corresponded with such spreading course.***

Where a wall has been built by the Defendant encroaching on the Plaintiff's land, the proper remedy in such a case of continuing trespass (in the absence of delay or acquiescence on the part of the Plaintiff) is to grant a mandatory injunction to pull down so much of the wall as is an encroachment.

The Plaintiff-Appellant was the owner of certain premises No. 17, Ezra Street. He acquired these premises on the 24th of March 1904, from one Gubboy.

The Plaintiff brought this suit for the purpose of obtaining a mandatory injunction directing the Defendant who was the owner of premises No. 16, Ezra Street, to pull down a small wall about 12 ft. 8 in. in length, 1 ft. 1 in. in breadth and 11 or 12 ft. in height which the Plaintiff alleged had encroached on Plaintiff's land and had in fact been built thereon.

On the 4th of April 1910, His Lordship, Mr. Justice Fletcher, dismissed the suit. Against this order the Plaintiff preferred this appeal.

Mr. Braunfield (with him *Mr. Morison*) for the Appellant urged that it was ridiculous to say that a man builds on what is not admittedly his land. Every one builds on his own land and there is always irrebuttable presumption in favour of the owner of the main wall of a building that the land in which it is built is his. The wall belongs to him to whom the land on which it is built belongs. The footings of a wall are not apart from the wall but a part of it and therefore the land on which the footings are laid, belongs to the owner and the land above the footings must *a fortiori* belong to the owner. The Plaintiff and his predecessors had long and uninterrupted possession of the land

in dispute and that is sufficient proof of his title in it. The onus of disproof is on the Defendant. He has not discharged it. The question of footings and foundations is discussed in *Mayfair Property Co.* v. *Johnstone* (1).

Mr. B. C. Mitter (with him *Mr. Mehta*) for the Respondent.—The survey map of 1887 is an official publication and as such ought to be accepted as an authority. It does not show any opening between the Plaintiff's wall and the Defendant's wall. This is conclusive against the Plaintiff and even if it is not so, the Defendant has had his wall flush with the Plaintiff's wall for over 30 years, and therefore limitation bars the Plaintiff's suit. It is true there are some cases decided against the Defendant's view, but the survey map ought to be accepted for by it the boundary was settled.

Mr. Braunfield was stopped in the course of his reply.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The litigants in this suit are two neighbouring house owners, the Plaintiff being the owner of No. 17, Ezra Street and the Defendant of No. 16, Ezra Street, in the town of Calcutta, and the point in dispute is whether a wall which in December 1908 or February 1909 was erected by the Defendant in the immediate proximity of the Plaintiff's premises was or was not a wrongful encroachment entitling the Plaintiff to relief in this Court.

The Plaintiff alleges that the wall was built on his land, and that it therefore constituted a trespass. The Defendant on the other hand denies this, and he goes on to plead that even if it was built on the Plaintiff's land, still it occupied the site of an old wall of his on that land which had stood there for more than thirty years; and so, he says, any claim by way of trespass now fails.

The case came in the first instance before Mr. Justice Fletcher who decided in the Defendant's favour, his view being that the Plaintiff had failed to establish that the site of the wall on which it stands was the property of the Plaintiff. On the second point he expressed no definite opinion.

We first then have to see how far the Plaintiff has succeeded in establishing his title to this piece of land apart from any possible subsequent encroachment. The southern wall of No. 17, Ezra Street, faces in part on a public lane and in part on a portion of the premises No. 16, Ezra Street. At the basis of this wall there now exists, and there can be no doubt that there has existed ever since the wall was constructed —and that admittedly dates to a very early period,—a spreading course or footing of the width of 13 inches on the south side of the wall of No. 17. It is on this footing that the Plaintiff's wall stands. Now, is this footing within the limits of the Plaintiff's land? It is not suggested that the title-deeds in this case contain anything that is opposed to that view. The description of the parcels in the deed brought to our notice certainly does not negative the idea that these footings were built within the limits of the Plaintiff's land. On the other hand, we have it that these footings have been there for a great length of time, and I think it is a fair presumption in the circumstances of the case to hold that they were not placed there wrongfully. I see no ground for presuming a trespass on the part of the Plaintiff's predecessor when he constructed that wall. The inference that I would

(1) [1894] 1 Ch. 508.

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rather draw would be that when these footings were placed in the position that they now occupy, they were placed within the limits of the land belonging to the Plaintiff's predecessors and now belonging to the Plaintiff. This view I think receives some corroboration from the fact that the lateral extension of the cornices of this house towards the south corresponds precisely with the southern extension of these footings.

Before us, indeed, no serious attempt has been made to support this finding of the learned Judge, and I do not hesitate to come to the conclusion that the Plaintiff has established that this footing is within the limit of his property. While the Defendant has not sought to sustain his case on the ground which found favour with the learned Judge he has urged before us and has made it his principal point that the new wall of which complaint is now made in fact occupies the site of an old wall that stood there for more than thirty years. If that be so, obviously he would have a very good answer to the Plaintiff's claim.

Now how does the case stand as to that? The *onus* clearly rests on the Defendant. Has he discharged that onus? He has adduced evidence;—in particular, there is the evidence of his *mistry* to the effect that the new wall occupies the site of the old wall. This evidence has invited the comment from Mr. Braunfield that in a certain sense it is not only incorrect but lacking in candour, because the wall in part occupies the site of the old wall but not in whole. In addition to this oral evidence, reliance has been placed—and indeed, has been principally placed—on the survey map of these premises.

Now, this survey map is one drawn on the scale of 50 feet to an inch, and it is obvious that any small matters are incapable of indication in a map drawn on this scale. But what is urged is—and it is the strongest point made on behalf of the Defendant—that while the Plaintiff contends that there was between the wall of No. 17 and the old wall of No. 16 an open drain, no such drain is shown in the map. It is perfectly true that there is no such drain shown on that spot in the map, but that is by no means conclusive in the matter. To that it may be equally retaliated that there is nothing in the map which shows the wall of No. 16 as being in immediate contact with the wall of No. 17, so that giving every weight to the argument advanced—and very clearly advanced—by Mr. Mehta on the basis of this map, I am unable to regard it as in any way conclusive. As against this we have the evidence on the part of the Plaintiff, the cogency of which cannot be gainsaid. To begin with, we have the evidence of the old foundation to which I have already made a passing reference. It is indicated in the plan which has been put in on behalf of the Plaintiff, and there we find distinctly shown the position of the old foundations as they stood, and we have the evidence of the engineer to that effect. Beyond that, we have oral evidence and in particular I am impressed by the evidence of Mr. Gubboy, the former owner of the property. There is no suggestion that Mr. Gubboy has any interest and I can see no reason why he should think fit to come forward now and depose falsely. He deposes to two facts which appear to me to give very distinct support to his general statement that there was an intervening space of 13 inches or thereabouts between the old wall of No. 16 and the wall of No. 17—I refer particularly to his evidence as to the demand made by his

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tenant Khetter Mohan Mukerjee for the closing of the window in the room which looked out on the old wall, and the reason why that application was made to him. He has said, "on the south of that room" —(that is the room which was directly opposite to the old wall) "was the porch. The south portion of that room had an opening window—barred at least—not a window, an opening with iron bars. That window was blocked up by me under my orders. Tenants complained on account of the drain being there that a foul odour was coming. They preferred the drain to be blocked up. That drain I have seen from my childhood. It has always been there." He there speaks to a distinct fact, and is not merely giving a general impression, and it seems to me impossible not to consider that as being of considerable importance. Not only that: In another part of his evidence he speaks of the gap between the south wall of No. 17 and the porch of No. 16, and he says, "To go from the top storey of 17 to the porch you have to jump over it." I do not place any very great reliance on the deposition of Laljee Premjee—it may or may not be correct for he had not the occasion for intimate observation that Mr. Gubboy or Khetter Mohan Mukerjee had. Khetter Mohan Mukerjee is the tenant to whom I have already referred, and he gives distinct evidence pointing to the fact that the old wall of No. 16 was not flush against the wall of No. 17, but was distant from it some 13 inches or so, and it is with Khetter Mohan Mukerjee that Mr. Gubboy had the arrangement that led to the blocking up of the window.

These circumstances appear to me not merely to throw considerable doubt on the evidence of the Defendant but in my opinion it outweighs that evidence and convinces me that the old wall of the porch was, as the Plaintiff maintains, not flush with the wall of No. 17. Therefore the Defendant's plea that his new wall occupies the site of the old wall fails. The just conclusion from this is that there has been an unlawful encroachment. Now, if that be so, there is a wrong; in respect of which the Plaintiff is entitled to a remedy. In the prayer of his claim he seeks a declaration, a mandatory injunction and damages. In the view I take, it is unnecessary to enter into the question of damages, but I think the Plaintiff is entitled to a mandatory injunction, and in the circumstances it appears to me that that is his proper remedy. To begin with, I do not think that there has been any delay or acquiescence on the Plaintiff's part:—There is a conflict of evidence on this point as between Abdul Ali and Ram Churn Law, and of the two versions I prefer that of Abdul Ali. It is true that the wall has been completed, or was completed before the suit was brought, still we are here concerned with trespass on the land of the Plaintiff,—a trespass not carried out as the result of long and continuous work but of work completed quickly and promptly. Not only has a trespass been committed, but the trespass is one which still continues and will hereafter continue to be committed as long as the wall remains in its present site. That being so, I think the proper remedy is by way of mandatory injunction. The case appears to me to come clearly within the law as established in Chap. X of the Specific Relief Act, and I think that in accordance with what is provided in sec. 55 it would be right for us to compel the Defendant to pull down so much of the wall as is an encroachment on the land of the Plaintiff, that is to say, so much of the

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wall as stands over the 13 inches, to which the Plaintiff has established his title in this suit. As I have said, there is no case for damages, but the Plaintiff will get his costs both of the suit and the appeal from the Defendant.

A month's time is allowed to pull down the wall, with liberty to apply if necessary.

WOODROFFE, J.—I agree.

Messrs. Bannerjee & Bannerjee, Attorneys for the Appellant.

Babu R. C. Hazra, Attorney for the Respondent.

A. K. G. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2243 OF 1908.

MOOKERJEE, J.
TEUNON, J.
1911,
Heard, 1 and 16, February.
Judgment, 17, February.

PRYA NATH MAZUMDAR Plaintiff, Appellant,
v.
MAHENDRA KUMAR MITRA and others, Defendants, Respondents.

Thakbust maps, value of, as evidence—Condition of land how far affects value of thak maps—Map prepared by Government on behalf of private proprietor, how proved—What circumstances must be established before using such map against a party—Indian Evidence Act (I of 1872), secs. 74, 83, 90—Applicability to private maps made at the instance of Collector—Secs. 12, 13—Admissibility to prove assertion of title.

Sec. 90 of the Indian Evidence Act only shows that a document was prepared at the time at which it purports to have been made by the officer whose signature it bears, but it does not establish the accuracy of the document.

The question whether a map is a public document within the meaning of sec. 74 of the Evidence Act is primâ facie *a question of fact, and the fact that a map was treated as a public document in a previous suit to which the Plaintiff was not a party would not make it binding as such on the Plaintiff.*

A map prepared at the instance of the Collector when in charge of a private estate is a private document and sec. 83 of the Evidence Act has no application to such map.

So before such a map can be used against a party not only must its accuracy be strictly proved, but other circumstances which may affect its evidentiary value such as the purpose for which the map was prepared, must be duly considered; for a map prepared for one purpose cannot be used for a totally different purpose, and in considering the value of such maps the Courts must consider how far the boundaries now in dispute had been in contemplation when the map was prepared.

Such a map unless proved to have been prepared with the assent or at any rate the knowledge of a party is of very little value as evidence against such party; and in the absence of signature of the parties on the map the mere recital on the map that other persons had notice of the proceedings would not be conclusive.

Although the evidentiary value of a thak map would be affected by the condition of the lands at the time of the survey, the map cannot be ignored merely on a general allegation that the lands were jungle at the time without considering whether it was still capable of being surveyed.

Possession of jungle lands is primâ facie *with the person whose title is established.*

This was an appeal preferred on the 9th of November 1908, against the decree of S. B. Chaudhuri, Esq., District Judge of Zillah Khulna, dated the 18th of July 1908, affirming the decree of Babu Satya Chandra Ganguly, Additional Subordinate Judge at Khulna, dated the 10th of December 1906.

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The facts of the case will appear from the judgment.

Babus Provas Chandra Mitter and *Sachindra Prosad Ghose* for the Appellant.

Babus Surendra Chandra Sen, Dwarka Nath Mitter, Sailendra Nath Palit and *Baranoshibashi Mookerjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The subject-matter of the litigation which has given rise to this appeal consists of a tract of land described in the plaint as covering about 120 bighas but found subsequently on measurement to cover about 200 bighas. The case for the Plaintiff is that the disputed land is comprised in Mouzah Alilaipur whereas the case for the Defendants is that it is part of their property Bul Pabla. The Courts below have concurrently dismissed the suit on the ground that the Plaintiff has failed to establish his title as well as possession within 12 years of the commencement of the suit.

The decision of the District Judge has been assailed before us on behalf of the Plaintiff substantially on two grounds, namely, first, that the question of title has been erroneously decided by reason of the reception of evidence which is inadmissible in law, and, secondly, that the question of limitation has been erroneously decided because the evidence has not been examined from the point of view of the nature of the land.

In so far as the first branch of the contention of the Appellant is concerned, it may be stated at the outset that the Plaintiff relied mainly on the thak map of 1856 whereas the Defendants relied upon the map prepared in 1865 under the supervision of the Deputy Collector, Babu Brahmo Nath Sen. The Plaintiff contended before the District Judge that the map of 1865 was not admissible in evidence against him; but this objection was overruled on the ground that the map on the face of it showed that it was prepared in 1865 and was consequently admissible under sec. 90 of the Indian Evidence Act. In our opinion this position cannot possibly be maintained. Sec. 90 of the Indian Evidence Act only shows that the map was prepared at the time at which it purports to have been made by the officer whose signature it bears, but it does not establish the accuracy of the map. But in the Court below as also in this Court it has been contended that the map is a public map, as was held by their Lordships of the Judicial Committee in the case of *Radhamoni Debi* v. *Collector of Khulna* (1) and by this Court in the case of *Sital Chandra Ghatak* v. *Mohendra Kumar Mitra* (2). In answer to this contention it has been argued on behalf of the Plaintiff that these judgments cannot be used against him for the purpose of establishing that the map is a public map the accuracy of which may be presumed under the provisions of the Indian Evidence Act. In our opinion this position is incontestable. The question whether the map is a public document within the meaning of sec. 74 of the Indian Evidence Act is *primâ facie* a question of fact and the mere circumstance that the map in question was treated as a public map in some earlier litigation to which the Plaintiff was not a party does not bind the Plaintiff. It turns out, however, upon an examination of the proceedings in the case

(1) I. L. R. 27 Cal. 943 (1900).

(2) Reg. Appeals 37 and 57 of 1907 by Woodroffe and Richardson, JJ., dated 12th July 1910. Unreported.

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of *Radhamoni Debi* v. *Collector of Khulna* (1) that the map in question was not treated as a public map. It appears that at the time of that litigation the surveyor, Mahim Chandra Bose, was dead and consequently two persons of the names of Sital Chandra Mitra and Munshi Mazhur-uddin Mahomed who had been present at the time the map was prepared were examined to explain the circumstances of its preparation. It further appears from a passage in the judgment of their Lordships of the Judicial Committee that the map was not treated as a public map and it was expressly s ated that the evidence of conduct of the parties made it clear that it was entitled to no less than the degree of authority which attaches to Government surveys generally. It has been explained to us that in the earlier litigation, the conduct of the parties to which reference is made in the judgment of the Judicial Committee consisted in the circumstance that the map was mentioned in a certain lease which was apparently binding upon the parties. In the case before us, the map is not men ioned in the lease. It is therefore impossible to hold that the decision of the Judicial Committee in the case of *Radhamoni Debi* v. *Collector of Khulna* (1) and of this Court in *Sital Chandra Ghatak* v. *Mohendra Kumar Mitra* (2) proves conclusively against the Plaintiff that the map is a public map. On the other hand, it is fairly clear that the map is a private document. It appears to have been prepared at the instance of the Collector who was in charge of the Syedpur Trust Estate because he was dissatisfied with thak map of 1856. We have not been informed whether any steps were taken for the correction of the thak map, in the manner provided for that purpose, by an appeal to the superior revenue authorities. If such proceedings had been taken the result would undoubtedly have been indicated on the thak map itself. Consequently the true position appears to be that we have on the one hand the thak map and on the other the map of 1865 which was prepared at the instance of the Collector in his capacity as the holder of the Syedpur Trust Estate. Consequently the map must be treated as a private document; and if it is treated as a private document there can be no question that its accuracy has to be established, because, it has been laid down by a series of decisions of this Court that sec. 83 of the Indian Evidence Act has no application to maps prepared by an officer of Government while he is in charge of properties as a private proprietor. In support of this position reference may be made to the decisions of this Court in the cases of *Junmajoy Mallik* v. *Dwarka Nath Mytee* (3), *Ram Chunder Sao* v. *Bunseedhar Naik* (4), *Kanta Prosad* v. *Jagat Chandra Dutt* (5) and the observation in the case of *Dinomoni Chowdhurani* v. *Brojo Mohini Chowdhurani* (6). The contrary view adopted in the case of *Taruck Nath Mookerjee* v. *Mohendra Nath Ghose* (7) which was decided in 1870 before the Indian Evidence Act was passed cannot in view of the later decisions be treated as good law. Consequently before the Defendants can be allowed to use the map against the Plaintiff, they must be called upon to establish its accuracy. But even if its accuracy is established other circum-

(1) I. L. R. 27 Cal. 943 (1900).

(2) Reg. Appeals 37 and 57 of 1907 by Woodroffe and Richardson, JJ., dated 12th July 1910. Unreported.

(3) I. L. R. 5 Cal. 287 (1879).

(4) I. L. R. 9 Cal. 741 (1883).

(5) I. L. R. 23 Cal. 335 (1895).

(6) I. L. R. 29 Cal. 187 (1901).

(7) 13 W. R. 56 (1870).

stances have to be taken into consideration which may affect its evidentiary value. The learned Vakil for the Appellant has contended upon the authority of the case of *Kerr* v. *Nuzzer Mahomed* (8) and *Kanta Prosad* v. *Jagat Chandra Dutt* (5) that a map prepared for one purpose cannot be used for a totally different purpose, a purpose wholly irrelevant to the subject of dispute in the earlier litigation. The Courts below do not appear to have considered the evidentiary value of the map from this point of view. It cannot be disputed as pointed out by this Court in the cases of *Moni Roy* v. *Rajbunsee Koer* (9) and *Ranajit Sinha* v. *Basanta Kumar Ghose* (10) that even though the boundaries between two villages may have been demarcated as between two contesting parties with regard to one portion of estate, if an attempt is made in a subsequent litigation between the same parties to use the map with regard to another portion of the boundaries, the matter requires careful scrutiny. If therefore this map is duly proved and is ultimately used as evidence against the Plaintiff, the Court must consider how far the boundaries in so far as the lands now in dispute are concerned, were in view when the map was prepared. If it is established that the portion of the boundary now in dispute was also directly in dispute at the time when the map was prepared, the map would be of considerable value; otherwise its evidentiary value would be diminished. The learned Vakil for the Appellant has further contended that the map is not signed either by the owners or the tenants of the adjoining lands and that unless it is established that the map was prepared, if not with the assent, at least with the knowledge of the proprietors of the neighbouring lands affected by the demarcation, its evidentiary value would be very little. This contention is supported by the cases of *Omrita Lal Chowdhry* v. *Kalee Pershad Shaha* (11), *The Collector of Rajshahye* v. *Doorga Soondaree Debia* (12) and *Nobo Coomar* v. *Gobind Chunder* (13). The mere recital on the face of the map that other persons had notice of the proceedings would not by any means be conclusive specially in the absence of the signature, such as is usual on the maps, by the holders of the neighbouring land. Consequently if the map is used in evidence this circumstance also must be borne in mind. The learned Vakil for the Appellant has further contended that the map of 1865 appears to be based on the *chitta* of 1234 and as that *chitta* itself was prepared by guess, the evidentiary value of the map cannot exceed that of the *chitta*. The Courts below do not appear to have considered the matter from this point of view, which has obviously to be taken into consideration if the map is to be used in evidence against the Plaintiff. In answer to this contention of the Appellant, it has been argued by the learned Vakils for the Respondents that no objection ought to be allowed to be taken to the admissibility of the map as such objection was not taken in the Courts below. We are unable to hold that objection was not raised to the reception of the map in evidence, although it is quite possible that the objection was not formulated with the precision with which it has been taken in this Court. No doubt, if objection has not been taken to the admissibility of a map which would

(5) I. L. R. 23 Cal 335 (1895).
(8) 2 W. R. 28 P. C. (1864).
(9) 25 W. R. 393 (1876).
(10) 9 C. L. J. 597 (1908).
(11) 25 W. R. 179 (1876).
(12) 2 W. R. 210 (1865).
(13) 9 C. L. R. 305 (1881).

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be admissible if certain requirements were fulfilled, the objection cannot be allowed to be taken at a subsequent stage, as laid down in the cases of *Girindra Chandra Ganguly* v. *Rajendra Nath Chatterjee* (14), *Gunga Narain Choudhry* v. *Radhika Mohun Roy* (15) and *Madhabi Sundari* v. *Gaganendra Nath Tagore* (16). These cases, however, are clearly distinguishable; and the substantial objection which has been raised in this Court was taken undoubtedly before the District Judge, if not also before the Court of first instance. It has further been contended by the learned Vakils for the Respondent that even if the map is not admissible under sec. 83 of the Indian Evidence Act, it is admissible under secs. 13 and 14 of the Act, as laid down by this Court in the case of *Junmajoy Mullik* v. *Dwarka Nath Mytee* (3). This argument, however, even if it is assumed to be correct, is of no assistance to the Respondents. If the map is used in evidence under secs. 13 and 14 of the Indian Evidence Act, it is evidence merely of an assertion of the title which is now put forward by the Defendants so far back as 1865; but the map has been used by the learned District Judge as showing clearly that the thak map is incorrect; and for that purpose it is essential to establish that the map itself is correct.

It has finally been suggested by the learned Vakils for the Respondents that the learned District Judge has given an independent reason for the rejection of the thak map and that consequently apart from the map of 1865 the Plaintiff cannot possibly succeed. Our attention has been invited to a solitary passage in the judgment of the learned District Judge in which he observes that thak maps go upon possession, but here the land was all jungle and there was no visible physical possession. Now it may be conceded that, as was pointed in the case of *Joytara Dassi* v. *Mahomed Mobarruk* (17), the evidentiary value of thak maps would be affected by the condition of the land at the time the survey was made. But obviously the thak map cannot be ignored upon a general allegation that the land at the time was jungle. It is conceivable that the land in dispute was not jungle at the time and was quite capable of survey at the time. Consequently if the learned District Judge based his judgment merely upon the observation upon which reliance is placed, it would be necessary to direct a further enquiry into the matter. It has been suggested as a last resort by the learned Vakils for the Respondent that the map was prepared at the instance of the common superior landlord of both the parties and that consequently it may be used in evidence by either party against the other. This contention does not appear to have been raised in either of the Courts below and we have no evidence on the record to show that the title under which the Plaintiff claims was created subsequent to the survey of 1865. It is obvious that if his title is antecedent to 1865, the map could not be used against him on the ground suggested. We must therefore hold upon the first branch of the case for the Appellant that the decision of the District Judge upon the question of title cannot be supported.

In so far as the second branch of the case for the Appellant is concerned, reliance has been placed upon the decision of this Court in the case of *Mirza Sham-*

(3) I. L. R. 5 Cal. 287 (1879).
(14) 1 C. W. N. 531 (1897).
(15) 21 W. R. 115 (1873).
(16) 9 C. W. N. 1:1 (1904).

(17) I. L. R. 8 Cal. 975 (1882).

shee Bahadur v. *Munshi Kunj Behari Lal* (18). In our opinion the decision of the District Judge upon the question of limitation also cannot be supported. In the first place his decision upon the question of possession is inextricably mixed up with the decision of title which as we have said cannot be supported. In the second place, the learned District Judge does not appear to have considered the nature of the land. It is clear upon the evidence that up to at least 1874, the land was covered with jungle. It has been stated to us that according to the evidence, even on the side of the Defendants themselves, portions of the land were brought under cultivation within 12 years of the commencement of the suit. Consequently the claim of the Plaintiff cannot be treated as barred by limitation in respect of such lands. It is further clear that if the thak map goes on possession, the evidence of possession must be considered from an entirely different point of view and in the case of jungle lands possession *primâ facie* is with the person whose title is established. We are of opinion that the case must go back not merely for the decision of the question of title but also for reconsideration of the question of limitation.

The result therefore is that this appeal is allowed, the decision of the District Judge set aside and the case remanded to him for re-consideration. The Defendants will have opportunity to prove the map of 1865 and the District Judge will for that purpose give necessary direction for the reception of evidence by the Court of first instance. The Plaintiff will have opportunity to rebut any new evidence that may be adduced by the Defendants. New evidence will not be admissible in so far as the question of possession is concerned. The costs of this appeal will abide the result.

Case remanded.

(18) 7 C. L. J. 414: s c 12 C. W. N. 273 (1907).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3163 OF 1909.

MOOKERJEE, J.
CARNDUFF, J.
1911.
Heard, 24 and 25, August.
Judgment, 25, August.

CHOWDHURY MOHADEO PERSHAD, Plaintiff, Appellant,
v.
SHEKH PACHKARI and another, Defendants, Respondents.

Occupancy holding, non-transferable—Usufructuary mortgage by tenant—Tenant remaining on land as sub-lessee of portion of holding and paying rent—Abandonment—Ejectment.

The execution by a tenant of a mortgage of his non-transferable occupancy holding does not by itself amount to an abandonment of the holding because it is only on the assumption that the tenancy continues in operation that the mortgagee can have any subsisting interest in the land.

KRISHNA CHANDRA DUTTA *v.* MIRAN BAJANIA (1) AND RASIK LALL DUTT *v.* BIDHUMUKHI DASI (2) *referred to.*

Where an occupancy raiyat executed a usufructuary mortgage of his holding, but continued to pay rent to the landlord and remained in possession of a portion of the holding as a sub-tenant under the mortgagor:

Held—*That the landlord was not entitled to treat the raiyat as a trespasser and sue him in ejectment.*

This was an appeal preferred on the 17th of December 1909, against the decree of Babu J. N. Chakraverty, Subordinate

(1) 10 C. W. N. 499 (1903).
(2) 10 C. W. N. 719; 4 C. L. J. 306 (1906).

CHOWDHURY MOHADEO PERSHAD *v.* SHIEKH PACHKARI.

Judge, 2nd Court, Zillah Mozufferpur, dated the 3rd of September 1909, modifying the decree of Babu Jaya Prasad Pande, Munsif at Sitamarhi, dated the 31st of March 1909.

The facts of the case will appear from the judgment.

Babus Uma Kali Mukherjee and *Jogesh Chandra Dey* for the Appellant.

No one appeared for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal on behalf of the Plaintiff in an action in ejectment. The subject-matter of the litigation is an occupancy holding in respect of which the second Defendant was the tenant under the Plaintiff. On the 13th May 1905, the second Defendant executed a usufructuary mortgage in favour of the first Defendant under the terms whereof the mortgagor was entitled, if he so chose, to remain in possession of the homestead upon payment of a nominal rent. The case for the Plaintiff is that upon the execution of the usufructuary mortgage, the second Defendant abandoned the holding and the first Defendant came into occupation as mortgagee. The Plaintiff therefore contends that he is entitled to a decree for ejectment against both ; against the first Defendant, because he is a trespasser in possession ; and against the second, because he has severed his connection with the holding. The Court of first instance accepted this contention as well-founded and made a decree for ejectment against both the Defendants. The two Defendants jointly preferred an appeal against this decree. The Subordinate Judge has held that in so far as the first Defendant is concerned, the decree for ejectment must be maintained ; but in so far as the second Defendant is concerned he is not liable to be ejected.

On the present appeal it has been argued on behalf of the Plaintiff that this view is erroneous in law and that the Plaintiff is entitled to a decree for ejectment against the transferer as well as the transferee. In our opinion this contention cannot be supported.

On behalf of the Appellant reliance has been placed upon the decision of this Court in the cases of *Krishna Chandra Dutta* v. *Miran Bajania* (1) and *Rasik Lall Dutt* v. *Bidhumukhi Dasi* (2). Neither of these cases, when analysed, is found to be of any assistance to the Appellant. In the first of these cases, after a usufructuary mortgage had been executed by the tenant in respect of a non-transferable holding he abandoned it. The landlord found the transferee in possession and forcibly ejected him. The original tenant thereupon commenced an action for ejectment against the landlord and contended that if the usufructuary mortgage was invalid in law, his tenancy had not been terminated and he was consequently entitled to be restored to possession. This contention was negatived on the ground that the tenant by abandonment had terminated his interest in the land. This decision possibly goes too far and the view may perhaps be supported that a temporary abandonment does not necessarily imply an extinction of the rights of the tenant. It is not necessary, however, for the purposes of the present case to consider this aspect of the matter. In the second case it was found that the tenant after he had created a usufructuary mortgage and placed

(1) 10 C. W. N. 499 (1903).

(2) 10 C. W. N. 719 ; 4 C. L. J. 306 (1906).

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the mortgagee in possession of the holding not only completely severed his connection therewith but as a matter of fact disappeared from the village. Under these circumstances, it was ruled that the landlord was entitled to possession of the holding not merely as against the transferee but also as against the transferer. In the case before us, although the mortgagee was placed in possession by the mortgagor, yet the latter continued in occupation of a part of the land of the holding. It is well settled that a usufructuary mortgage of a part of a holding is not equivalent to abandonment [*Mahomed Tuqi* v. *Choa Lal* (3)]. It has been argued by the learned Vakil for the Appellant that he was in possession as a sub-lessee of the transferee, which involved a repudiation of his character as tenant of the landlord. In our opinion, this view cannot be maintained. There is a fundamental distinction between a sale and a mortgage of a holding. A tenant who executes a deed of sale may perhaps be deemed to have severed his connection with the holding, although it would be difficult to maintain this view in the light of the decision of this Court in the case of *Dina Nath Roy* v. *Krishna Bijoy Saha* (4). The case of a mortgage, however, is reasonably free from difficulty. The mortgage is executed on the assumption that the tenant has a transferable interest in the land. The execution of a mortgage by itself does not imply a severance of connection of the tenant with the holding, because it is only on the assumption that the tenancy continues in operation that the mortgagee can have any subsisting interest in the land. Consequently when a tenant executes a usufructuary mortgage in favour of a third party and places him in possession, there is no repudiation of the relationship of landlord and tenant as between himself and the person under whom he holds the land. The decision of the Full Bench in *Narendra* v. *Ishan* (5) is thus of no avail to the Appellant. In the case before us, it has further been found that the second Defendant, after the execution of the usufructuary mortgage, has paid rent to the superior landlord and has throughout expressed his willingness to hold himself responsible for due payment of rent. It cannot consequently be suggested that there has been any severance of his connection with the land. In so far as the right itself is concerned, he has not abandoned it ; in so far as the physical enjoyment of the right is concerned, he is still in occupation of a part of the land of the holding. Under these circumstances, it is difficult to appreciate how the view can be seriously maintained that the tenant has abandoned the holding and that the landlord has become entitled to re-enter. The learned Vakil for the Appellant invited our attention to the provisions of sec. 25, cl. (b) of the Bengal Tenancy Act. That section provides that an occupancy raiyat shall not be ejected by his landlord from his holding except in execution of a decree for ejectment passed on the ground that he has broken a condition consistent with the provisions of the Act and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected. Apart from the question whether the Legislature intended to apply this section to cases of transfers of holdings, it is necessary to observe that the obvious intention of the section is

(3) 13 C. L. J. 499 (1910).
(4) 9 C. W. N. 879 (1904).
(5) 13 B. L. R. 274 ; 22 W. R. 22 (1874).

that the term of the contract should be an express term. It has not been suggested that in the case before us, there was any term in the agreement between the second Defendant and his landlord that the former would be liable to be ejected in the event of an attempt at a transfer of the holding. We must further bear in mind that if reliance is placed upon sec. 25 the provisions of sec. 155 have also to be complied with. There is no suggestion that the landlord has made any attempt to bring his case within the provisions of the latter section. We are therefore of opinion that in the case before us there was no abandonment of the tenancy by the original tenant and that consequently the landlord is not entitled to a decree for ejectment against him.

The result is that the decree made by the Subordinate Judge is affirmed and this appeal dismissed but without any costs as the Respondent has not entered appearance.

Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 2653 OF 1911.

STEPHEN, J.
COXE, J.
1911.
23, November.

A. T. BHUTTACHARYA & Co., Plaintiffs, Petitioners,
v.
CAWNPUR WOOLEN MILLS Co., LD., Defendant, Opposite Party.

Civil Procedure Code (Act V of 1908), sec. 20—Contract between firms at Ranchi and Cawnpore—Goods to be delivered at Ranchi—Suit for damages for breach if lies at Ranchi.

Where the Plaintiffs who owned a shop at Ranchi signed an order form supplied to them at Ranchi by the Defendant Company which had its place of business at Cawnpur, requesting the Company to forward certain specified articles by goods train to their address at Ranchi (packing and freight free) and to be despatched on a specified date, and the Defendant Company agreed to do so:

Held—*That the contract was to be performed by the delivery of the goods at Ranchi and the Court at Ranchi had jurisdiction to entertain a suit by the Plaintiffs for damages for breach of the contract by the Defendant.*

This was a Rule granted on the 15th of May 1911, against the judgment of Mr. M. Mullik, Small Cause Court Judge, Ranchi, dated the 17th of March 1911, dismissing the Petitioners' suit on the ground that the Court had no jurisdiction to entertain it.

The Plaintiffs who owned a shop at Ranchi instituted this suit in the Court of the Small Causes at Ranchi against the Defendant Company who had their place of business at Cawnpore for damages for breach of a contract by which the Defendant Company had agreed to supply a certain quantity of serges, flannel, etc., to the Plaintiffs. Plaintiffs alleged that the contract was made with them at Ranchi by a representative of the Defendant Company of the name of Green who offered to the Plaintiffs "special discounts for forward orders, *i.e.*, orders of Rs. 200 or over placed prior to 31st May for delivery September—October 1910, railway freight by goods train and packing free" and which offer the Plaintiffs accepted by placing orders with the said representative upon forms supplied by him. The order form signed by the Plaintiffs and dated the 18th April 1910 was in these terms:

"Dear Sirs,

Please forward the following by goods train to the undernoted address for deli-

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very as stated. Packing and freight free. Payment against *pro forma* invoice.

Delivery—To be despatched on the 20th october."

At the foot of the form as signed were the following words: "Address—A. T. Bhattacharya & Co., Ranchi, B. N. Ry." The Defendant Company objected *inter alia* that Green was not the Company's agent but merely a traveller who took round samples and showed them to intending purchasers, that the order form signed by the Plaintiffs constituted the latter's offer which was accepted at Cawnpore by the Company acknowledging by their letter of 20th April 1910 the receipt of "your forward order dated 18th instant through our representative." This letter contained the further communication that "the order had been registered and the goods will be despatched by the time indicated."

The Small Cause Court Judge held that the contract was made not by the Company's representative at Ranchi, but that it was completed at Cawnpore when the proposal was accepted. He accordingly held that he had no jurisdiction to entertain the suit which he dismissed with costs.

The Plaintiffs moved the High Court and obtained this Rule.

Babu Nagendra Nath Ghosh for the Petitioners submitted that the contract was made at Ranchi by the company's representative and that in any case it was to be performed by the delivery of the goods at Ranchi so that part of the cause of action if not the whole of it arose at Ranchi. The Court had therefore jurisdiction to try the suit. Sec. 20, C. P. C.

Babu Jogesh Chandra Roy (with him *Babu Sarat Chandra Ghosh*) for the Opposite Party submitted that the contract was completed by acceptance at Cawnpore and Cawnpore was the proper place to sue.

THE JUDGMENT OF THE COURT was as follows:—

In this case a firm at Ranchi was suing a firm at Cawnpore for failure to deliver certain goods on contract. The Munsif held that he had no jurisdiction to try the case. The Rule was granted on the Opposite Party to show cause why the judgment of the Court below should not be set aside and the case tried on the merits.

It seems to be quite clear on the facts before us that the contract was to be performed by the Defendants sending the goods to Ranchi, where they were to be accepted by the Plaintiffs. The contract, therefore, as it stands, was to be carried out at Ranchi. This gives the Munsif jurisdiction which he should have exercised. There is also a question in this case which can only be determined by the evidence, namely, whether a man named Green had or had not the power to make contracts on behalf of the Defendant. But on this point we need not say anything. We think that the contract was to be performed by the delivery of the goods at Ranchi and therefore in part carried out there.

The Rule is therefore made absolute and the case sent back to the Munsif to be tried on the merits.

Costs one gold mohur.

Rule made absolute.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 4504 OF 1911.

CASPERSZ, J.
CHATTERJEE, J.
1911,
Heard,
27, November.
Judgment,
5, December.

KRISHNA DAS ROY, Petitioner,
v.
THE LAND ACQUISITION COLLECTOR OF PABNA, Opposite Party.

Land Acquisition Act (I of 1894), sec. 49—Question whether land under acquisition part of house—Reference to Court—Refusal by Collector—High Court, if may interfere in revision.

Where a Land Acquisition Collector refused to make a reference to the Civil Court under sec. 49 of the Land Acquisition Act, the High Court in revision set aside his proceedings subsequent to the refusal and directed the Collector to proceed according to law.

THE ADMINISTRATOR-GENERAL OF BENGAL *v.* THE LAND ACQUISITION DEPUTY COLLECTOR, 24-PERGUNNAHS (1) *followed.*

BRITISH INDIA STEAM NAVIGATION CO. *v.* SECRETARY OF STATE FOR INDIA (2) *referred to.*

An application for a reference under the section may be made at any time before the award is actually made.

This was a Rule granted on the 8th of August 1911, against the order of Babu J. K. Bose, Deputy Collector (Land Acquisition) of Pabna, dated the 22nd of September 1910, rejecting the Petitioner's application for a reference to Court under sec. 49 of the Land Acquisition Act.

The facts of the case material to this report will appear from the judgment.

Babus Surendra Chandra Sen and *Troilokya Nath Ghosh* for the Petitioner.

(1) 12 C. W. N. 241 (1905).
(2) 12 C. L. J. 505: s. c. 15 C. W. N. 87 (1910).

Babu Ram Charan Mitter for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule arises out of certain proceedings under the Land Acquisition Act.

The Petitioner alleged that he is the owner of a salt godown, for the efficient working of which the land in front is required, and that the Deputy Collector has acquired that frontal land without making a reference, as prayed, to the Civil Court under sec. 49 of the Land Acquisition Act I of 1894.

We are invited in this Rule to set aside the order of the Deputy Collector, dated the 22nd September 1910, and his proceedings up to, and including, an order of the 24th May 1911, wherein he refused to make a reference under sec. 18 of the Act on the ground that the case had been completed and the award confirmed.

It appears that the 19th September 1910 was the date fixed by the Deputy Collector for claims to be put in. On that day, no claim was preferred nor was any petition for time filed. The order-sheet of the Deputy Collector is exceedingly brief and does not embody the details mentioned in his letter of explanation, No. 1977 L.a., dated the 23rd August 1911, upon which the learned senior Government pleader showing cause relies. However that may be, orders were reserved on the 19th September 1910, and the award in this connection was not made until the 21st November 1910. The application of the Petitioner, praying for a reference under sec. 49 of the Act, bears date the 21st September 1910, and apparently reached the Deputy Collector through the post. There are two orders on this petition, the first order is "file with the record,' the second order which is over a date 22nd September 1910, which

has been altered or inked over, is to the following effect: "I have seen the land and the godown. The godown is now closed and no business is being done there now. The land which is now under acquisition is not in the front of the building and its acquisition will not interfere with the business, if the Petitioner intends to start business at any future date. The petition is therefore rejected. Besides the time for filing such petition has expired." In this view of the matter, the Deputy Collector proceeded to complete the proceedings and possession was duly given of the land in question to the Eastern Bengal State Railway.

The first question that arises upon this Rule is whether the Land Acquisition Deputy Collector is subject to the Extraordinary Jurisdiction of this Court.

We have been referred to the cases of *The Administrator-General of Bengal* v. *The Land Acquisition Deputy Collector, 24-Pergunnahs* (1) and *British India Steam Navigation Co.* v. *Secretary of State for India* (2). In the present state of the law, we cannot do otherwise than follow the decision of Henderson and Mitra, JJ., in *The Administrator-General of Bengal* v. *The Land Acquisition Deputy Collector, 24-Pergunnahs* (1). It would, obviously, be unjust that the Deputy Collector should refuse to obey the provisions of the Act, and to provide no remedy for the correction of his mistaken action. Where the law gives a right to a party to a certain procedure, it must also be deemed to give a remedy for the rectification of any irregularities committed in that connection. Sec. 49 of the Act clearly leaves no option to the Collector. It says "he shall refer the determination of such question (whether any land proposed to be taken under this Act does or does not form part of a house, manufactory or building) to the Civil Court." He appears to have recognised the applicability of sec. 49 by framing the second order, of the 22nd September 1910, which we have already reproduced. We entertain, no doubt, therefore, that we have jurisdiction to set right the error committed by the Deputy Collector in not making a reference under sec. 49

The second question involved in this Rule is whether the Petitioner is an owner of any house, manufactory, or building, a part of which house, manufactory, or building is being acquired.

The word owner "is not defined in the Act, but an owner must be deemed to be one of the persons interested in the land being acquired [see sec. 3 (*b*) of Act I of 1894]. Reading sec. 10 of the Act we think that the proprietor sub-proprietor, mortgagee, tenant or sub-tenant are all owners for the purposes of sec. 49. The Petitioner is an under-tenant of some kind. He is therefore, admittedly, interested in the acquisition of the land, which for the purposes of sec. 49, until the Civil Court finds otherwise, may be presumed to be part of his salt godown.

The question for enquiry will be whether the piece of land in front of the godown form the only means of approach to that godown or is reasonably necessary for the proper working of the salt business.

We, therefore, think that the Petitioner was competent to apply under sec. 49 for a reference to the Civil Court.

The third contention of the learned senior Government pleader is that the

(1) 12 C. W. N. 241 (1905).
(2) 12 C. L. J. 505: s. c. 15 C. W. N. 87 (1910).

application for a reference was not filed in time. The first proviso to sec. 49, however, says that the owner may, at any time before the Collector has made his award, withdraw his application, and it would follow that it was equally open to the Petitioner to make a substantive application for a reference at some time before the award was actually made, that is, before the 21st November 1910. As a matter of fact, he made his application two months earlier, that is, on the 21st September 1910, and the Deputy Collector dealt with it on its merits by recording his second order after a local enquiry.

It is unfortunate that the Deputy Collector overlooked the imperative language of the second proviso to sec. 49. We have no alternative but to set aside his proceedings from and after the 22nd September 1910, and to direct him to proceed in accordance with law under sec. 49 of the Land Acquisition Act. Whether any reference will be necessary under sec. 18 is a matter contingent upon the decision of the Civil Court as to whether the land does or does not form part of the Petitioners' salt godown.

The Rule is made absolute.

There will be no costs in this matter.

Rule made absolute.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 3026 OF 1911.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard,
4, September.
Judgment,
5, September.

THE EAST INDIA RAILWAY COMPANY, Petitioner,
v.
SISPAL LAL, Opposite Party.

Railway Company—Goods sent by rail—Delivery to consignee—Clear receipt, grant of—Suit for damages for loss, if lies.

The grant by the consignee of a clear receipt for goods delivered by a railway company and acceptance of delivery by him do not affect the right to compensation for loss or damage actually proved to have been caused to the goods while in the custody of the company. Such a receipt only raises a presumption that the alleged loss has not taken place, but the presumption may be rebutted by the consignee.

This was a Rule granted on the 1st of June 1911, against an order of Mr. S. K. Rahman, Small Cause Court Judge of Buxar, dated the 10th of April 1911.

The facts of the case will appear from the judgment.

Mr. G. B. McNair and *Babu Joy Gopal Ghosha* for the Petitioner.

Babu Biraj Mohun Majumdar for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This Rule raises an important question of law about the liability of a Railway Company to pay compensation for loss of goods or damage caused to them while in their custody, though the claim is not put forward by the consignee till after he has taken delivery and granted "a clear receipt." The circumstances under which the question requires consideration may be briefly narrated as found by the Small Cause Court Judge. On the 7th October 1910, the Opposite Party tendered to the East India Railway Company at Delhi four bales of cloth for despatch to Buxar. The goods arrived at Buxar on the 14th October; the consignee took delivery of the bales which were apparently in good condition, and granted a simple receipt. On the 5th December 1910, another bale was delivered to the Company at Delhi for carriage to Buxar,

and duly carried there in apparent good condition. The consignee took delivery on the 14th December, and granted receipt as before. He subsequently reported to the Company that some pieces of cloths were missing from the bales; the Company refused to entertain the claim, whereupon, on the 7th March 1911, the consignee instituted this suit in the Court of Small Causes at Buxar for recovery of of Rs. 100 as damages for the loss of the pieces of cloth. The Company resisted the claim substantially on two grounds; they denied, in the first place, that the goods had been lost, while the bales were in their custody; they contended, in the second place, that, as the consignee had accepted delivery and granted "a clear receipt" his right to compensation had been extinguished, even if it was proved that the loss had taken place while the goods were in the custody of the Company. The Small Cause Court Judge has found upon the evidence that the articles were taken out of the bales while they were in the custody of the Company, he has negatived the suggestion of the defence that the articles had been abstracted by the Plaintiff himself or his men after delivery of the goods. It may be observed at this stage that the Small Cause Court Judge has recorded the evidence somewhat carelessly, and the notes of the depositions of the witnesses are not always intelligible. The Court is bound, however, to accept his finding upon the question of fact, namely, that a portion of the goods consigned was lost while the bales were in the custody of the Company. Upon this finding, the Small Cause Court Judge has stated that in his view of the law, the Plaintiff is not entitled to succeed, because he has taken delivery and granted a clear receipt; but the Small Cause Court Judge has held that, "in order to safeguard the public interest, the Company is bound to take some step to stop this sort of action" and he has accordingly made a decree in favour of the Plaintiff for Rs. 50. On behalf of the Company, we have been invited to set aside this decree on the ground that it is obviously erroneous and that the judgment itself is not self-consistent. In answer to the Rule, it has been argued on the other hand by the learned Vakil for the Plaintiff, that the view of the law accepted by the Small Cause Court Judge is erroneous, and that, if his decree is open to attack, it is liable to be assailed on the ground that the Plaintiff has not been awarded damages in full. The question, therefore, arises, whether the Plaintiff has lost his right of action, because he has taken delivery and granted a clear receipt.

In support of the Rule, it has been argued that the question ought to be answered in the affirmative and reference has been made to Macnamara on Carriers, 1908, sec. 214, where it is stated that, when goods are delivered by a Railway Company at a proper place and at the proper time, the consignee is bound to examine them and ascertain whether they are in good order, and, if he does not intimate objection, it will be presumed that they were delivered in good order. The learned author relies upon the case of *Stewart* v. *North British Ry. Co.* (1), as authority for this proposition. The principle in question is perfectly sound, but is of no assistance to the Petitioners. The case of *Stewart* v. *North British Ry. Co.* (1) is not an authority for the proposition that if a consignee takes delivery and grants a clear receipt he loses his remedy, even if he is able to establish

(1) 5 Rettie 426 (1878).

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conclusively that the goods were damaged or partially lost while in transit. In fact, the contrary view was adopted in *Johnston & Sons* v. *Dove* (2), where it was ruled that, if a consignee of goods (which as a matter of fact have been damaged in transit though such damage is not visible at first sight) grants a clear receipt, accepts delivery, and breaks bulk without judicious inspection or notice to the carrier, he does not lose his right to compensation ; the fact that he has granted a receipt is an element in the proof of damage, but is no bar to the claim. A similar view was taken in *Pearcey* v. *Player* (3), where Lord Craighill observed as follows :—"The Counsel for the defender has also argued that the neglect of the pursuer to examine the luggage after delivery, and the delay of 24 hours in reporting the loss to the defender, bars his right to recover. The former may affect the proof of the question, was the portmanteau delivered. But assuming non-delivery to be proved, it cannot operate as a bar, there not having been in the contract between the parties a provision or an implication that should the goods delivered be taken without challenge at the time, right to recover for any undelivered article should be forfeited." This is obviously good sense, and based on sound legal principles. The right to compensation has accrued as the result of the loss ; the acceptance of the goods without protest may raise a strong presumption that the alleged loss has not taken place ; but, if it is proved by reliable evidence that, as a matter of fact, there was loss or damage to the goods while they were in the custody of the Railway Company, it is difficult to appreciate how on principle the position can be maintained that the acceptance of delivery operates to extinguish the right to compensation. The question has been repeatedly raised in the Courts of the United States, and the view has been uniformly maintained as well-founded on principle that grant of clear receipt and acceptance of delivery do not affect the right to compensation for loss or damage proved to have been caused to the goods while in the custody of the carriers. One of the earliest cases on the subject is *Pakey* v. *Russell* (4), where it was ruled that, although acceptance of the goods by the consignee without objection and with knowledge of their defective condition precludes recovery for damages thereto [*Munro* v. *Ship Baltic* (5), *Mary* v. *Warner* (6)], yet acceptance will not operate as waiver of objection for damage not apparent. Again, in *Bowman* v. *Teall* (7), it was held that the receipt of the goods alone, with no stipulation that they are accepted in full performance of the contract does not constitute a waiver of claim for damages for which the carrier may be liable [*Alden* v. *Pearson* (8) and *Lesinsky* v. *Great Western Despatch* (9)]. The question was elaborately discussed in the case of *The Elmira Shepherd* (10), where it was ruled that the claim for compensation was not lost though the consignee had granted a clear receipt, accepted delivery, and sold the goods. Woodruff, J., observed that in cases of this description, the conduct of the consignee would be scrutinized carefully and the

(2) 3 Rettie 202 (1875).
(3) 10 Rettie 564 ; 20 S. L. R. 376 (1883).

(4) 6 Martin N. S (La.) 58 (1827).
(5) 1 Martin O. S. (La.) 194 (1810).
(6) 17 La. Ann. 34 (1865).
(7) 23 Wendell N. Y. 306 ; 35 Am. Dec 562 (1840).
(8) 69 Mass 342 (1855).
(9) 10 Mo. App. 134 (1881).
(10) 8 Blatchford 341 ; 8 Fed. Cas. 579.

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Court would receive his evidence with caution; but if the evidence proved that the loss or damage occurred while the goods were in transit, compensation could be claimed notwithstanding delivery and acceptance. To put the matter briefly, a receipt acknowledging the delivery of the goods in good condition is only *primâ facie* evidence of the fact [*Porter* v. *Chicago Ry. Co.* (11), which must be taken to qualify the somewhat broad statement in *Skinner* v. *Chicago Ry. Co.* (12)]. As recent illustration of this principle, reference may be made to the cases of *Mears* v. *New York Ry. Co.* (13) and *Southern Ry. Co.* v. *Ashford* (14). In the former of these cases, a piano was delivered by the carrier to the consignee who signed a clear receipt. When the package was taken home and opened, it was discovered that the piano had been spoiled by water. It was held that the consignee was entitled to damages, notwithstanding the grant of a clear receipt, and acccept-ance of delivery. In the second case, the consignee removed his log from the railway van; but when he took it home, he discovered that it had been injured. It was held that he was entitled to claim damages, and that the fact that he had granted a receipt for delivery in good condition was not a conclusive defence against recovery of compensation. The principle, therefore, that a receipt acknowledging a delivery of the goods in good condition is only *primâ facie* evidence of the fact, and raises a presumption in favour of the carrier which may be rebutted by the consignee, is firmly established; and it is manifestly consistent with rules of justice, equity and good conscience. The inference, therefore, follows that the decree made by the Small Cause Court Judge is correct, though his reasons are erroneous.

(11) 20 Iowa 73 (1865).
(12) 12 Iowa 191 (1861).
(13) 52 Atl. 610; 56 L. R. A. 884 (1902).
(14) 126 Alabama 591; 28 South 732 (1900).

The result is that the Rule is discharged with costs one gold mohur.

CARNDUFF, J.—I agree. The short point of law raised by this Rule seems to be as to whether a bailor, who, in the absence of any agreement on the subject, has given the bailee a receipt for the goods bailed, is, *ipso facto*, precluded from proving that the goods were in reality damaged or deficient in quantity when delivered to him. I have myself been unable to find any authority either in England or here for holding that he is, and my learned brother has shown that it has been held elsewhere, for reasons which seem to me to be most cogent and convincing, that he is not.

Rule discharged.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 2346 OF 1911.

MOOKERJEE, J. CARNDUFF, J. 1911, Heard, 3, August. Judgment, 24, August.	PATRINGA KOER, Petitioner, *v.* MADHAVA NAND RAM and anr., Opposite Party.

Civil Procedure Code (Act V of 1908), Or. XXII, rr. 57, 60—Restoring a dismissed application for execution, effect of—Attachment of property terminated by dismissal of application for default—Sale after dismissal of application, purchaser if affected by restoration order.

A property was attached in execution of a decree. Subsequently the application for execution was dismissed for default. After the dismissal the judgment-debtor sold the property. The proceeding in execution was subsequently restored under Or. XXII, r.

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60 and sale-proclamation re-issued. On an objection by the purchaser to the sale:

Held—*That the attachment having under Or. XXII, r. 57 come to an end the revival of the execution proceedings did not operate as a revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired an interest in the property.*

ZAINUL-ABDIN *v.* MAHOMED ASHGAR (1), JANUKDHARI LAL *v.* GOSSAIN LAL BHAIYA (2), CHETIATTIL *v.* KUMHI (3), SASIRAMA KUMARI *v.* MEHERBAN KHAN (4).

This was a Rule against a decision of Babu Tarak Nath Dutt, Subordinate Judge of Patna, dated the 29th of March 1911.

The facts of the case will appear from the judgment.

Babus Mohendra Nath Roy and *Surendra Kumar Bose* for the Petitioner.

Babu Rajeswari Prosad for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

We are invited in this Rule to set aside an order made under r. 60 of Or. XXI of the Code of 1908. The circumstances under which the order in question has been made are not in controversy. On the 21st July 1910, the Petitioner before us applied for execution of a decree for money which she had obtained on the 19th March 1910. The properties of the judgment-debtor were duly attached on the 1st August 1910. The proclamation subsequently issued was returned unserved, and the Court directed the decree-holder to take necessary steps within five days from the 22nd November. No steps were taken, and on the 30th November the Court dismissed the application for execution for default. On the 12th December 1910, the judgment-debtor transferred the properties which had been previously attached by the decree-holder to one Madhabandaram. On the 23rd January 1911, the decree-holder obtained a review of the order of the 30th November 1910, and the execution proceeding was revived. The decree-holder took steps to have the sale proclaimed for the 20th March 1911 The assignee thereupon preferred a claim under r. 51 of Or. XXV of the Code. He contended that there was no valid attachment in force when he took the assignment, and that the subsequent revival of the execution proceeding could not in law operate as a revival of the attachment to the prejudice of his rights. The Court found on the evidence that the claimant was a *bonâ fide* purchaser for value without notice, and that the contract with him for the sale of the property had been made on the 8th June 1910, long before the decree-holder applied for execution of his decree. In this view the Subordinate Judge allowed the claim under r. 60 of Or. XXI. We are now invited to discharge this order as made without jurisdiction, because it is contended that the properties were under attachment on the date of the assignment. The question raised is one of some novelty and not altogether free from difficulty mainly because the framers of the Code have omitted to provide for the contingency which has happened.

R. 57 of Or. XXI of the Code of 1908—we quote only so much of the rule as is applicable to this case—provides that where any property has been attached in execution of a decree, but by reason of

(1) L. R. 15 I. A. 12 (1887).
(2) I. L. R. 37 Cal. 107 : s. c. 11 C. L. J. 264 ; 13 C. W. N. 710 (1909)
(3) I. L. R. 29 Mad. 175 (1905).
(4) 13 C. L. J. 240 (1911).

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the decree-holder's default the Court is unable to proceed further with the application for execution, it shall dismiss the application; upon the dismissal of such application the attachment shall cease. In the case before us the Court held on the 30th November 1910 that there had been default on the part of the decree-holder and dismissed the application under r. 57. Thereupon the attachment ceased in terms of the Rule. Consequently when the assignment was made in favour of the claimant on the 12th December 1910, there was no subsisting attachment in force; but it is contended on behalf of the decree-holder that when the order of dismissal for default was set aside on review on the 23rd January 1911, the parties were restored to the position they occupied before the execution proceeding was dismissed; in other words, the contention is that the effect of the revival of the execution proceeding was to revive the attachment automatically. It may be assumed that this would be the result in so far as the decree-holder and the judgment-debtor were concerned. But the question still remains whether the revival of the execution proceeding operates as a revival of the attachment so as to prejudice the right of strangers who have in the interval acquired, as here, a title to the property. In our opinion the question ought to be answered in the negative. At the time when the assignment was made there was no attachment in force. The assignee consequently acquired a good title in no way subject to the claim of the decree-holder. It is difficult to appreciate upon what principle his position may be deemed to be affected by a subsequent reversal of the order by a superior Court or by a cancellation thereof on review by the Court that had made it. The principle recognised by their Lordships of the Judicial Committee in *Zainul-abdin v. Mahomed Ashgar* (1) militates against this view. Numerous other instances will be found collected in the judgment of this Court in *Janukdhari Lal* v. *Gossain Lal Bhaiya* (2), in which the reversal of a judicial order has been taken to leave unaffected the rights of *bonâ fide* purchasers who have acquired title on the assumption that such orders were valid in law. Although in the case before us the assignment was by act of parties the same doctrine may well be applied. Here the Court had made an order for the dissolution of attachment: that order was in force at the date of the assignment to the claimant and was cancelled only after his title had been perfected. Reference may be made in this connection to the cases of *Chetiattil* v. *Kumhi* (3) and *Sasirama Kumari* v. *Meherban Khan* (4). In the former of these cases an attachment was issued after an *ex parte* decree had been set aside on the basis of an application made apparently when the decree was in force. The decree was subsequently restored after trial on the merits. It was ruled that this could not validate the attachment so as to prejudice an assignee of the attached property. In the second case an attachment had been effected before judgment and it was dissolved upon dismissal of the suit by the original Court. Upon appeal the dismissal was set aside and a decree made in favour of the Plaintiff. It was ruled that the reversal of the decree of the primary Court did not operate to revive the attachment to the prejudice of an assignee who had

(1) L. R. 15 I. A. 12 (1887).
(2) I. L. R. 37 Cal. 107: s. c. 11 C. L. J. 254; 13 C. W. N. 710 (1909).
(3) I. L. R. 29 Mad. 175 (1905).
(4) 13 C. L. J. 243 (1911).

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acquired a good title during the pendency of the appeal when no attachment was in operation. The true object of an attachment is to place the property in the custody of the Court so as to make it available for the realization of the fruits of the decree. If by reason of the dismissal of the suit or of the default of the decree-holder the Court dissolves the attachment, the property ceases to be in the custody of the Court. Upon reversal of the decree, or upon cancellation of the order of dismissal for default, the decree-holder may no doubt ask the Court to take the property back into its custody: but in the absence of statutory provision to the contrary, we cannot hold that the Court can do so with retrospective effect so as to prejudice a title that may have been acquired in the interval when the property was admittedly not in the custody of the Court. As is pointed out in the case of *Sasirama Kumari* v. *Meherban Khan* (4), the question has been much debated in the Courts of the United States, and though there has been some divergence of judicial opinion the preponderance of decisions is against the revival of attachments with retrospective operation to the detriment of titles acquired in the interval. (Drake on Attachment, Ch. XVI). In some States the difficulty of the situation has been met by legislation, and conditions have been prescribed upon fulfilment of which an attachment, notwithstanding dismissal of the suit, may remain in suspense, and its uninterrupted operation restored upon reversal of the judgment. But in this country, as we have already stated, there is no legislative provision on the subject, and the plain meaning of r. 57 of Or. XXI is that upon dismissal of the application for execution by reason of default of the decree-holder the attachment ceases. We cannot hold that the attachment remains in suspense pending the result of the possible appeal or application for review. It has been suggested that this view may result in hardship to the decree-holder in cases where an erroneous order of dismissal for default has been made by the Court, but that is obviously a matter for the Legislature to consider. We may add that if the view we take may result in hardship to the decree-holer in some instances, the contrary view put forward by the learned Vakil for the Petitioner may equally lead to injustice to an assignee for value who has in the interval acquired title on the faith that the order of the Court has been properly made. We are, therefore, of opinion that there was no attachment in force when the claimant in this case took an assignment of the property which has been properly released under r. 60.

We may add that it was argued that if there was no attachment in force, a claim or an objection could not be preferred under r. 58. This position is no doubt technically correct, *Sasirama* v. *Meherban* (4), but there is no substance in it. As there is no attachment in force the decree-holder ought strictly to be called upon to attach the property. As soon as he proceeds to do so, the claimant will be at liberty to apply under r. 58, and then the Court will be called upon to determine whether the assignment was real, that is whether the assignee was in possession on his own behalf or that of the judgment-debtor. This matter has already been investigated and found against the decree-holder. It would be an idle formality to call upon the parties and the Court to repeat the steps already taken.

(4) 13 C. L. J. 248 at p. 249 (1911).

(4) 13 C. L. J. 248 (1911).

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The result, therefore, is that this Rule is discharged with cost. We assess the hearing-fee at one gold mohur.

Rnle discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1082 OF 1911.

HOLMWOOD, J.
SHARFUDDIN, J.
1911,
6, December.

GURAMEAH and others, Petitioners,
v.
THE KING-EMPEROR, Opposite Party.

Penal Code (Act XLV of 1860, secs. 147 and 332—Resistance to the execution of a warrant—Warrant under sec. 100, Criminal Procedure Code (Act V of 1898), legality of, when drawn up on a printed form under sec. 98.

There being no printed form for search warrants under sec. 100, Cr. P. C., printed forms issued under sec. 98 are always used with the necessary modifications for that purpose.

When a warrant under sec. 100, Cr. P. C., was drawn up on a printed form for use under sec. 98, Cr. P. C., and the warrant was snatched away and destroyed by the persons accused of resisting the execution of the warrant,

Held—*That as the accused destroyed the warrant, it must be presumed that the warrant under sec. 100 was properly drawn up on a form under sec. 98, Cr. P. C., with the necessary modifications.*

That the error, if any, in the warrant, supposing that the necessary modifications had not been made, would be one of form only.

BISU HALDAR *v.* PROBHAT CHANDRA (1) *distinguished.*

This was a Rule granted on the 28th of August 1911, against the order of Mr. A. Majid, Deputy Magistrate of Chittagong, dated the 14th of July 1911, convicting the Petitioners under secs. 147 and 332, I. P. C., and sentencing each of them to rigorous imprisonment for nine months and a fine of Rs. 30, an appeal from which order was dismissed by Mr. J. A. Dawson, Additional Sessions Judge of Chittagong, on the 24th of July 1911.

The facts material to the report are briefly as follows :—

Abdul Majid, complainant, filed a petition to the Joint-Magistrate of Chittagong on 10th April for an order under sec. 552, Cr. P. C., on the allegation that his wife, Manuda Khatun, had been taken to the house of her uncle, Abdul Gani, Petitioner No. 3, with the object of being given away in marriage to somebody else.

On this, a search warrant was issued under sec. 100, Cr. P. C., though it is admitted that a printed form under sec. 98, Cr. P. C., was used in writing out the warrant.

It was in the course of the execution of the warrant that the offences charged against the Petitioners were alleged to have been committed.

They were placed on their trial in the Court of Deputy Magistrate of Chittagong, who convicted the Petitioners under secs. 147 and 332, I. P. C., and sentenced each to rigorous imprisonment for 9 months and to pay a fine of Rs. 30.

Petitioners appealed to the Sessions Judge who dismissed the appeal.

Mr. A. Chaudhuri and *Babu Khitish Chandra Sen* for the Petitioners.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This was a Rule calling upon the District Magistrate of Chittagong to show cause why the conviction and sentence

(1) 6 C. L. J. 127 (1907).

THE

Calcutta Weekly Notes.

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NOTES.

IT IS NOTIFIED IN THE *India Gazette* FOR THE 17th February 1912, that Mr. T. W. Richardson, I. C. S., who has already on two previous occasions officiated as a Judge of the Calcutta High Court, has been appointed to act as an Additional Judge of the said Court for two years under the new High Courts Act with effect from the date on which he will take his seat on the Bench.

THE CASE OF *Corbin* v. *Stewart*, NOTED IN THIS issue, is of special interest to the medical profession. It recognises the immemorial custom amongst medical men of attending to a medical man's family without any charge and the learned judge has held that should any medical man desire to depart from the practice he must inform his professional brother or his family beforehand of his intention of charging for the attendance.

THE BAR COUNCIL AT ITS GENERAL MEETING HELD on the 18th of January last and presided over by Sir Robert Finlay entered its protest against the reduction of the salary of the Lords of Appeal in England from £6,000 to £5,000. It would be interesting in this connection to mention that a puisne Judge of the High Court in England receives an annual salary of £5,000, the Lord Chief Justice £8,000, the Master of the Rolls £6,000, and the Lords of Appeal in ordinary, Lord Macnaghten, Lord Atkinson, Lord Shaw, Lord Robson, £6,000 each. It would also be interesting to note in this connection the pensions that some of the eminent members of the Bench enjoy in England. Lord Halsbury receives a pension of £5,000 per annum, Lord Ashbourne a pension of £4,000, Lord Gorell and Lord Mersey pensions of £3,500 each. Of the Scotch Law Lords, Lord Dunedin receives a salary of £5,000 per annum and Lord Kinnear receives a salary of £3,600 per annum.

AT THE ANNUAL GENERAL MEETING OF THE BAR Council some questions of considerable professional importance were discussed. One of the most important of these was the providing of Counsel and solicitors to poor litigants. The view of the Council that indiscriminate springing up of societies or institutions for the procuring of legal aid to suitors would have the effect of increasing litigation, speculation in law suits and the number of unauthorised law agents over whom the State, the profession and law Courts would be able to exercise little control, seems to us to be eminently reasonable. We are, therefore, not a little surprised to find that the views of the Bar in this respect have been very adversely criticised by some influential sections of the English press. The observation of Sir Robert Finlay that the provision in the draft Rule for the payment of fees in suits brought in *formâ pauperis* only when the case was successful was very unsatisfactory, seems to us to be quite reasonable. We gather that the general trend of socialist opinion in England is that the legitimate costs of the poor man's law suit should be met by Legal Aid Societies by adopting a system of insurance. That is, members making a payment of a penny or so a week would be entitled to legal aid when occasion arose. As was to be expected, the Bar Council and the Incorporated Law Society did not like to express any opinion on such a momentous question, for

good or evil, without making proper enquiries and giving the matter their serious consideration.

Under the Mahomedan law a mother or a brother of an infant is not his natural guardian and cannot dispose of property on his behalf unless specially authorised by the Court. In Mr. Ameer Ali's work on Mahomedan law this view is affirmed but it is added that if the acts of the unauthorised guardian are to the manifest advantage of the infant they should be upheld. Relying on this statement of the law, and also it seems on what was considered to be general grounds of equity and justice, the Calcutta High Court held in two recent cases, *Mafazzal* v. *Basid*, I. L. R. 34 Cal. 36 and *Ram Charan* v. *Anukul Chandra*, I. L R. 34 Cal. 65, that an alienation for the benefit of a minor by a *de facto* guardian should be maintained. This practically annuls the distinction, so far as Mahomedan law is concerned, between a legal guardian and any one professing to be a self-constituted guardian, for even a legal guardian cannot alienate property except for the benefit of the minor.

In a case before the Judicial Committee, reported at p. 338 of this issue (*Mata Din* v. *Sheikh Ahmad Ali*), the Judicial Commissioners of Oudh after examination of the authorities had come to the conclusion that there was nothing in Mahomedan law to warrant the proposition laid down in Mr. Ameer Ali's book upon which the Calcutta decisions were based. Their Lordships of the Judicial Committee however refrained from deciding the question as the alienation in this case was not to the benefit of the minor. But their Lordships expressed the opinion generally that a so called *de facto* guardian could not clothe himself with the rights of a legal guardian. "It is difficult," their Lordships observed, "to see how the situation of an unauthorised guardian is bettered by describing him as a *de facto* guardian. He may by his *de facto* guardianship assume important responsibilities in relation to the minor's property but he cannot thereby clothe himself with legal power to sell it." We presume that this expression of opinion would be sufficient to dispose of the argument that the rule is one supported by considerations of equity and justice, and we may doubt whether after this any argument in its favour derived from ancient Mahomedan texts of doubtful authority would be allowed to prevail.

It appears from the cases of *Suraj Mull* v. *The East Indian Railway Company* and *The Bengal Nagpur Railway Company* v. *Ramprotab*, reported at pp. 356 and 360 of this issue, that certain Railway administrations are being subjected to vexatious litigations based, as it appears, upon a misapprehension of the true scope of the decision of the Calcutta High Court in *Hari Lal* v. *The Bengal Nagpur Railway Company*, 15 C. W. N. 195. It was surely not decided by the High Court in that case, that the Rules of the Bengal Nagpur Railway Company in question were not properly sanctioned and published. The High Court accepted, as in a reference under sec. 69 of the Presidency Small Cause Courts Act it was bound to accept, the finding of the Small Cause Court that the fact of the rules having been duly sanctioned and published had not been made out by the evidence adduced in that case, and it was held in consequence, so far as that particular case was concerned, that the Company could not take the benefit of those rules. The two cases referred to above will, it is hoped, finally remove any misapprehension as to what was actually decided in that case. But we cannot help joining in the regret expressed by his Lordship the Chief Justice in the case of *Bengal Nagpur Railway Company* v. *Ramprotab*, p. 360, that "any doubt on this point should be permitted to continue."

The other Railway case reported in this issue, *Janaki Das* v. *The Bengal Nagpore Railway Co.*, p. 386, is of very great importance to consignees of goods or other persons who may seek to pursue their remedy in Courts of law regarding claims against a Railway Company for damages for loss, detention or deterioration of goods delivered to the Company for purposes of transit, without serving proper notices on the Company. In 99 cases out of 100, the consignees do communicate their grievances to the officer specially employed by the railway administrations to consider such complaints within the time fixed by the Act for the service of notices. And yet when they institute a suit they are met by the highly technical plea that notice was not served on the Agent or the Manager in the manner required by the Act and they are put out of Court on that ground. It seems to us that the language of secs. 77 and 140 of the Railways Act does admit of a more liberal construction and such a construction has in fact been placed on it by the Madras High Court. But the current of authority of the Calcutta High Court has been otherwise, and it is too late perhaps now to expect a departure from it even though it must in a great many cases necessarily lead to a failure of justice. The public should therefore take care in every case to serve the Agent or Manager of a Railway Company with a formal notice of their claim at the same time that they lodge their complaint with the officers specially employed to look into such complaints.

IN *Cave and another* v. *Horsell*, DECIDED BY Phillimore, J., in the King's Bench Division on the 12th of January last, the question was raised how far a lessor's covenant not to let any of the adjoining shops for some specified purposes was enforceable. The Defendant in this suit let to the Plaintiffs No. 4 Lime Paxade, one of five shops numbered 2 to 6 all belonging to him. The lessor's covenant was not to let during the continuance of the lease which was for 20 years any of the said adjoining shops for purposes of certain specified business. The Defendant had by a later lease let No. 6, which was next door but one to Plaintiff's shop, to be used for the specified business. The Plaintiff thereupon sued the Defendant for damages and Phillimore, J., held that there was a breach of the covenant and awarded £120 damages to the Plaintiff. It might be said that the enforcement of such covenants by injunction except in suitable cases would amount to interference with freedom of trade but the award of damages would not be open to any such objection.

THE CASE OF *Lloyd's Bank Ld.* v. *Colston*, decided by Warrington, J., in the Chancery Division on 14th January last, is of importance on a question of practice in mortgage suits. In this case the Court passed a decree for foreclosure of mortgaged property on a motion of the mortgagee after giving directions for sale under the following circumstances. The mortgagee had sued for enforcing an equitable mortgage and obtained an order directing an account of what was due, for costs and enquiry as to the properties comprised in the title-deed and Defendant's interest in them with further directions for the sale of the property with the approbation of the judge and payment into Court of the sale-proceeds and payment of what was due to the Plaintiff. The Master certified that £186 19*s*.-10*d*. was due to the Plaintiff with interests and costs up to the date fixed by Court for redemption. The capital value of the property was estimated at £160 and the mortgagee now moved for a declaration, that he was absolutely entitled to all the Defendant's interest in the property. The Court ordered a decree for foreclosure in lieu of sale but directed that the order should be prefaced by a statement of it having appeared by evidence that the security being of less value than the amount due it would not be to the interest of either party that the cost of an attempted sale should be incurred. In this connection it may be mentioned that in *Exchange and Hop Warehouses* v. *Association of Land Financiers*, 34 Ch. D. 195, the prosecution of accounts and enquiries was ordered to be stayed (unless defendant gave security for costs of the proceedings) on the ground of saving unnecessary cost, it being highly probable that the amount due to the Plaintiff would exceed the value of the property. As foreclosure precludes any action on the covenant, a foreclosure decree in such cases is always beneficial to the mortgagor.

IN THE CASE OF *Steed* v. *Rogers* THE COURT OF Criminal Appeal in England, on 22nd January last, had to decide a curious case of cruelty to animals. In the Cornwall coast a number of bottle-nosed whales were stranded by the incoming tide and left high and dry on the shore. A crowd collected and one of them inflicted gashes with a clasp knife into the body of a whale about two inches deep from the eyes for about four to five feet along the belly. The Society for the Prevention of Cruelty to Animals prosecuted the man under sec. 2 of the Wild Animal in Captivity Protection Act of 1900 under which any person may be fined or imprisoned for cruelty to any "wild animal" "in captivity" by which the animal is "maimed," "pinioned" or "caused unnecessary suffering." Pickford and Avory, JJ., came to the conclusion (with regret) that though whales so stranded were "wild animals" the words of the Statute would not justify a conviction as the stranded whales could not be considered to be animals "in captivity," especially as with the return tide the uninjured whales floated away. Mr. Justice Pickford observed that "in captivity" does not mean temporary inability to get away from the place where they were.

Notes of Cases.

ENGLISH LAW COURTS.

HOUSE OF LORDS.—*Kerrison* v. *Glyn, Mills, Currier & Co.* Before LORDS HALSBURY, ATKINSON, SHAW AND MERSEY. 4th December 1911.

Money paid to a party's banker under a mistake of fact if recoverable—Payment to representative, banker, in ignorance of bankruptcy of principal.

This was an appeal from an order of the Court of Appeal. The facts were as follows:

On October 31st the Appellant, Mr. Kerrison, paid £500 to Messrs. Glyn, Mills, Currie, and Co., the London correspondents and bankers of the firm of Kessler and Co., New York. The object of the payment was to cover accommodation or advances to be made by Messrs. Kessler to an American firm called Bote and Co. On that date, October 31st, Messrs. Kessler and Co. stood completely disabled from making such advances or giving such accommodation, for the reason that on the previous day they had filed a deed of assignment in favour of their creditors and had closed their doors. The money was paid, however, in London under the mistake in fact.

The Plaintiff redemanded the money which the Court below held he could not do. Their Lordships reversed that decision. In the course of his judgment Lord Shaw said:

The case was only of importance on account of an able attempt by the Respondents' counsel to distinguish the position of a banker from the position of any other recipient of money acting as factor or agent, and to attach the authority of this House to such a distinction as applicable to a case like the present. It was for this purpose that the *dictum* of Lord Cottenham in *Foley* v. *Hill* (2 Cl. and Fin., 28) was so strongly founded on. That *dictum* was not capable of the application suggested. In the first place it was pronounced, and indeed the case turned, on a point of procedure, or rather in regard to the respective jurisdictions of a Court of Law and a Court of Equity. This was expressly referred to by the Lord Chancellor when he described the argument:—"Although it is not disputed that the transactions between the parties gave the legal right, it is said a Court of Equity, nevertheless, has concurrent jurisdiction." In the second place, when the general language founded upon, to the effect that "money when paid into a bank ceases altogether to be the money of the principal," and so forth, was used, it was plain that that language was employed solely in regard to the relation between a banker and his own customer. And in the third place, it was not meant to be applied, and did not apply to, or cover the case of, money paid, whether by a customer or not, under a mistake in fact.

His Lordship agreed with the opinion that money so paid could be successfully redemanded. And he did not think that it would be correct, either in law or in business, to permit the recipient, though a banker, to impound money which his principal could not have honestly or legally retained. This rule applied generally, even although the recipient, whether banker or agent, was, as here, ignorant at the time of receipt of the disability of the principal to do the thing for which, and for which alone, the money was deposited, or was himself under a mistaken impression on that subject.

Sir R. Finlay, K. C., and *Mr. Rowlatt* for the Appellant.

Mr. Bailhache, K. C., and *Mr. Macpherson* for the Respondents.

B. D. *Appeal allowed.*

COURT OF APPEAL.—*Rio Tinto, "Ld."* v. *Pena Copper Mines, "Ld."* Before the MASTER OF THE ROLLS AND LORDS JUSTICES MOULTON AND FARWELL. 28th November 1910.

Contract in England in English language—Action in Foreign Court—Chancery Division, its jurisdiction to restrain by injunction in personam *at its discretion.*

This was an appeal against an order of SWINFEN EADY, J., granting an injunction to restrain the Appellants from continuing or prosecuting (except under or in pursuance of an award under the agreement dated 20th October 1898) certain proceedings commenced by them against the Respondents in Spain. The said agreement was an agreement between the Appellants, Rio Tinto, "Ld." and the predecessors of the Respondents. The Appellants worked the railway and under the agreement they were to receive a lower rate for pyrites than other goods carried by them. They claimed a sum of roughly a quarter of a million pounds on the ground that the Respondents had paid to carry ore on the footing that it was pyrites although it was not pyrites at all, and they had brought that action in Spain to enforce that claim.

Cl. 24 of the agreement provided that it was to be construed and take effect as a contract made "in England and in accordance with the law of England." Cl. 25 contained a provision that all disputes were to be referred to arbitration in the manner provided by the Arbitrators Act, 1889, and that the award of the arbitration or umpire as the case might be should be "a condition precedent to any liability of either party in respect of any matter in difference or any right of action against either party in respect of any such matter in difference."

It was contended for the Defendants that the Court had no jurisdiction to restrain the action in Spain, and that the plea as to arbitration could properly be set up there. Mr. Justice Swinfen Eady granted an injunction from which this appeal which was dismissed. In the course of his judgment the MASTER OF THE ROLLS said:—

The jurisdiction of the Court of Chancery acting *in personam* was too well known to admit of question. Beyond all doubt the Court had jurisdiction to restrain the prosecution of proceedings in a foreign Court by an English person if the bringing of those proceedings was in breach of contract. The only authority cited on behalf of the Appellants was *Hamlyn and Co.* v. *Talisker Distillery* ([1894] A. C. 202), but really that case was fatal to their own contention. It was clear that the Court had jurisdiction to grant the injunction. No doubt it was a matter of discretion in each case whether the Court should grant an injunction, but there could be no better case than the present to justify the exercise of that discretion by granting the injunction. The action related to a contract written in English and governed by English law, and it was not a suitable case for the Spanish Courts to try.

Messrs. Grant, K. C., and *Nickalls* for the Appellants.

Messrs. Martelli, K. C., and *Strode* for the Respondents.

B. D. *Appeal dismissed.*

KING'S BENCH DIVISION.—*Corbin v. Stewart.* Before MR. JUSTICE SCRUTTON. 30th November 1911.

Sale of medical practice by a doctor's wife—immemorial custom of medical profession to treat doctor's family without fee.

This was an action by Mrs. Corbin for the balance of price agreed to be paid for introductions to Dr. Corbin's patients, for board and lodging, etc. The Defendant, Dr. Stewart, denied the claim, and counter-claimed among other things £60 for his fees for medical attendance on the Plaintiff's children. He also contended that the Plaintiff had nothing to sell and that all that she purported to sell belonged either to the estate or to the Official Receiver. Until letters of administration were taken out the good-will vested in the Judge of the Court of Probate. The suit was not maintainable. The Plaintiff pleaded that it was an immemorial custom of the medical profession to attend members of the profession, their wives, widows and families without fee. The learned Judge held in favour of the Plaintiff on both points. He said :—

Dr. Corbin carried on business in a house which belonged to his wife. On his death his wife set to work to "sell the practice," using the words in the receipt ; and ultimately an agreement was made to which it did not occur to any one to put into writing. The agreement was that the Defendant should purchase what was called the good-will at nine months' purchase, that he should live in the house and pay something for board and lodging, and that the Plaintiff should give him the ordinary introductions. It was said that the Plaintiff could not sue. He must first see exactly what it was that was sold.

In *Austen* v. *Boys*, 27 L. J. Ch. 714, Lord Chelmsford had pointed out the difficulty of using the word "good-will" with regard to a professional man's business. One could not sell a doctor's patients like slaves, or the clients of a barrister, but there was no doubt that doctors were ready to pay some sum calculated upon the profits of a doctor's business. It seemed to him that they did in respect, firstly, of an unreasonable propensity in human beings to keep on going to the same house, which gave a doctor's house a certain value, and, secondly, of the fact that if people were told that B was the successor of A, they would go to B for that reason. He thought that the Plaintiff sold, first, the right to carry on business in the house which was her own, and, secondly, the right to say, "I am Dr. Corbin's successor." The first had nothing to do with the estate at all, and was purely personal to the Plaintiff. He had some difficulty with and did not intend to decide the question as to the ownership of the second thing sold. He was rather inclined to think it belonged to the estate, but he found that the widow made a contract which included both these things, and, that being so, he saw no difficulty in her suing on that contract, although it might turn out that the estate would say afterwards, "part of that belongs to me."

In the *Law Journal* report of *Smale* v. *Graves*, 19 L. J. Ch. 157, it was held that the house belonged to the estate, and the widow there sold something very similar to what was sold in the present case. The same reasoning applied to any claim by the Official Receiver. It followed that the claim for the balance of the purchase price succeeded. As to the introductions, he was very much impressed by the absence of any written complaints by the Defendant, and by his own words written in October, "I know you have all done all that you could to help me." He could not find that there had been any breach of that part of the agreement towards a man who acted and wrote in that way. He was sorry that any charge of fraudulent misrepresentations had been set up, for which there was no foundation. With regard to the board and lodging, he found that £2 a week was a fair charge, and he availed himself of his privilege as a jury to give no reasons.

The question as to the charges for attending the children and the cook raised a question of general medical interest. The Plaintiff had young children and a cook. During the year of the Defendant's residence all the children were ill, some seriously, and something happened to the cook. The Defendant attended them and now claimed £60. He (the learned Judge) was quite clear that although there was not a binding custom, there was a very general practice among medical men, to their honour be it said, not to charge the widow and children of a deceased medical man for attendance shortly after his death. He need not go further than that. Under ordinary circumstances, where nothing was said there was an implied contract, where one employed a professional man, to pay him the ordinary charges. But that implication fell to the ground where, according to the practice of the profession, the ordinary charge was not made. He thought that, in a case like the present, if a doctor intended to charge he must say so, thus giving the patient the opportunity of declining his services and of going to another doctor who would not charge. If that had been done here the Defendant would have been the first to realize that it would be a very bad thing for him if the Plaintiff had gone to somebody else, for people would have said, "Mrs. Corbin is recommending him to us, but she herself goes elsewhere."

Mr. R. Simpson for the Plaintiff.

Mr. C. L. Attenborough for the Defendant.

B. D. *Claim allowed.*

PRIVY COUNCIL.

[APPEAL FROM FYZABAD.]

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1911,
14, November.

RAJA PERTAB BAHADUR SINGH, Appellant, Petitioner,
v.
LALA GANGA PRASAD and others, Respondents, Opposite Party.

Special leave—Appealable value—Tenant's interest in dispute or value of land to be considered—Claim for mesne profits if to be taken into account.

This was a petition for special leave to appeal. The facts as stated therein were as follows :—

The Petitioner is the talukdar of Kurwar in the District of Sultanpur in the Province of Oudh and situate in the said taluk is a village Nighyawan. At the time of the Regular Settlement of the said Province the predecessor in title of the Respondents, Bhagwant Rai (now deceased), claimed sub-settlement rights in the said village. The claim was settled by a compromise, dated the 17th June 1869, and the Settlement Officer passed a decree in accordance therewith on the 22nd June 1869 in these words :—"Bhagwant Rai is decreed a 30 years lease, that is a lease for the term of the Regular Settlement now being made of the village of Nighyawan. He has no sub-proprietary right in the village."

The said term expired on the 30th June 1899, and the Petitioner issued to the said Bhagwant Rai (since deceased) a notice of ejectment under the provisions of sec. 52 of the Oudh Rent Act, 1886. On default of compliance with the said notice the Petitioner instituted the present suit on the 30th October 1906 in the Court of the Deputy Commissioner of Fyzabad for ejectment of the said Bhagwant Ray (since deceased) from the said village.

The Defendant contested the suit and filed a written statement. He pleaded among other things that he was a perpetual lessee and not liable to ejectment.

The Deputy Commissioner framed several issues but he decided the suit on the determination of one issue only, namely,

"Is Defendant holding under a lease which expired on the 30th June 1899?"

He recorded evidence and delivered his judgment on the 11th April 1907. He was of opinion that the terms of the said decree, dated the 22nd June 1869, were ambiguous and that evidence of surrounding circumstances was admissible to show the true meaning and effect of the said decree. The said decree of the Settlement Officer so construed meant, in his opinion, to give a permanent hereditary lease to the Defendant. He accordingly made a decree dismissing the claim with costs.

The Petitioner appealed against the said decree of the Commissioner of Fyzabad Division wh[illegible] delivered his judgment on the 24th August 19[illegible] He agreed with the finding of the lower Co[illegible] and accordingly made a decree dismissing t[illegible] appeal with costs.

The Petitioner being dissatisfied with the sa[illegible] decree applied to the said Commissioner of Fyzab[illegible] Division on the 7th February 1908 for leave [illegible] appeal therefrom to His Majesty in Council.

Before passing an order on the said petiti[illegible] the said Court directed the lower Court to make [illegible] enquiry as to the market value of the subject-matt[illegible] of the suit. The lower Court recorded eviden[illegible] and submitted its finding which was that t[illegible] subject-matter of the suit was worth Rs. 9,238 od[illegible] In its opinion the subject-matter of the suit w[illegible] not the said village but the quantity of inter[illegible] which the Defendant possessed therein. It fou[illegible] that the gross assets of the said village amount[illegible] to Rs. 804 odd per annum. After deducting t[illegible] putwari rate and the payments of rent includi[illegible] cesses made every year to the superior landlo[illegible] the Court found that the net income of t[illegible] Defendant was Rs. 369 odd and estimating t[illegible] market value at 25 years' purchase arrived at t[illegible] finding mentioned above. On receipt of the sa[illegible] finding the Commissioner of Lucknow ref[illegible] to grant leave to appeal to His Majesty [illegible] Council by an order, dated the 30th Septem[illegible] 1909, in terms following :—"With regard the[illegible] fore to the first clause of sec. 110 of the Ci[illegible] Procedure Code I find that the subject-mat[illegible] of the suit is below Rs. 10,000.

"With regard to the second clause of the sa[illegible] section I am unable, as was Mr. Rogers also, [illegible] accept the contention that the value of the wh[illegible] village is directly or indirectly involved. T[illegible] talukdar already gets a *malikana* allowance [illegible] Rs. 111 and that amount cannot clearly be add[illegible] to the profits of the opposite party for the p[illegible] pose of valuation.

"It is also urged on behalf of the applicant t[illegible] in consequence of the judgment of the Pri[illegible] Council in *Maneshar Prasad* v. *Muhammad E[illegible] Ali Khan* (L. R. 36 I. A. p. 114) special le[illegible] to appeal should be given under cl. (*c*) of [illegible] 109, Civil Procedure Code. I find, however, t[illegible] it has been laid down that this provision is [illegible] tended to meet special cases where the point [illegible] dispute is of importance though not measur[illegible] in money."

Hence this petition.

Mr. L. DeGruyther, K. C. (with him [illegible] *Bhugwandin Dubé*) submitted that the subj[illegible] matter of the appeal was worth over Rs. 10,[illegible] The Court below took no account of the me[illegible] profits to which we shall be entitled in cas[illegible] success; and also refused to take into consid[illegible] tion the income which a zemindar usually der[illegible] from the jungle, village market and trees, [illegible]

laving regard to the decision in *Maneshar Prasad* v. *Ewaz Ali Khan*, L. R. 36 I. A. 114, istice required that special leave ought to be iven.

Their Lordships reserved judgment, and subsequently refused the petition.

Solicitors: *Messrs. Barrow, Rogers and Nevill* or the Petitioner.

B. D. *Leave refused.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important ones to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CARNDUFF, J. APPEAL FROM APPELLATE DECREE No. 312 OF 1909. LAKHI KANTA DAS MAHAPATRA, Defendant No. 3, Appellant *v.* BALABHADRA PROSAD DAS BAIRIGANJAN BHUYAN MAHAPATRA AND OTHERS, Respondents. 13th December 1911.

Bengal Tenancy Act (VIII of 1885), sec. 22 (2) Non transferable jotes.

The parties to the appeal were co sharer landlords. The Appellant purchased two occupancy jotes and the finding was that such jotes were not transferable. The Respondent sought to recover khas possession of them jointly with the Appellant on the ground that they must be treated as having been abandoned. Both the Courts below concurred in decreeing the suit, and the District Judge held on appeal that sec. 22 (2) of the Bengal Tenancy Act on which the Appellant relied, did not apply to non-transferable jotes.

Held—That the District Judge was right.

Giris Chandra v. *Kedar* (I. L. R. 27 Cal. 413) followed.

Moulvi Nuruddin Ahmed for the Appellant.
Babu Provas Chander Mitter for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before COXE, J. APPEAL FROM APPELLATE DECREE No. 1108 OF 1909. MOULA BUX, Defendant No. 2, Appellant *v.* SHEIKH AJAHAR MOLLA AND OTHERS, Respondents. 16th January 1912.

Mahomedan Law—Sale with condition—Condition invalid.

The suit was for recovery of possession of a holding of 6 bighas which originally belonged to one Enyatulla. Enyatulla sold the land in 1301 to his wife Sakhijan in consideration of what was due to her as her dower. The terms of the kobala were that the property should be transferred to Sakhijan and that the rights of Enyatulla in it should come to an end, but there was a condition that, during the life-time of Enyatulla, the land should remain in his *khas* possession and that Sakhijan should not be entitled to alienate the property.

Enyatulla subsequently sold the property again to the Defendant No. 2. Three days after the sale to Defendant No. 2 Sakhijan executed a registered kabuliyat in favour of the landlords in respect of the land. Subsequently the landlords brought a suit for rent against Sakhijan and obtained a decree and in execution the Plaintiff purchased the holding. The Defendants were in possession of the holding and the Plaintiff accordingly brought this suit which was decreed by the Courts below.

The Defendant No. 2 appealed to the High Court.

Held—That the stipulation in the kobala in favour of Enyatulla did not invalidate the original transfer.

Babu Baikuntha Nath Das for the Appellant.
Babu Baidya Nath Dutt for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before COXE, J. APPEAL FROM APPELLATE DECREE No. 852 OF 1910. KUNJ BEHARI LAL MONDAL, Plaintiff, Appellant *v.* PUNCHU LAL AND OTHERS, Defendants, Respondents. 23rd January 1912.

Priority of sale by registered kobala of later date over sale by unregistered kobala valued above Rs. 100 of prior date—Notice.

The Defendant, Punchu Lal, purchased certain land from Jogeswar Mondal for Rs. 500 by an unregistered kobala and got delivery of possession of the same. Subsequent to the said sale Jogeswar sold the land to Plaintiff for Rs. 400 by a registered kobala. Plaintiff went to take possession but was resisted by Defendant and therefore brought the present suit for recovery of possession. The first Court gave Plaintiff a decree. The District Judge on appeal held that Plaintiff purchased with notice of the Defendants' previous purchase and knew that fraud was practised by his vendor upon the Defendant and must be presumed to be a party to this fraud and would not be entitled to any relief and in that view dismissed the suit. The Plaintiff appealed to the High Court.

Held—The transaction in favour of Defendant, Punchu Lal, was a nullity and the Plaintiff was not in any way debarred from buying the property because he knew of the Defendant's invalid purchase. The cases which lay down that a person purchasing property which he knew to have been validly transferred to others cannot question the

transfer have no application where such prior sale was an absolute nullity.

Babus Dwarka Nath Chuckerbutty and *Kshetra Mohun Sen* for the Appellant.

Babu Jogendra Nath Mukerjee for the Respondents.

A. T. M. *Appeal decreed with costs.*

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and N. R. CHATTERJEA, J. APPEAL FROM APPELLATE DECREE No. 915 OF 1909. SATYA SRI GHOSAL AND OTHERS, Plaintiffs, Appellants *v.* KARTICK CHANDRA DAS AND ANOTHER, Defendants, Respondents. Heard, 22nd January. Judgment, 29th January 1912.

Presumption of permanent tenancy—Property debutter at the time the tenancy originated.

The second appeal arose out of a suit to eject the Defendants from a piece of land in Kidderpore on the ground that they were monthly tenants to whom due notice to quit was given. The lower Appellate Court, reversing the decree of the Court of first instance, dismissed the Plaintiffs' suit with costs, holding that the Defendants had a permanent tenancy. The Plaintiffs appealed to the High Court.

Held—"The presumption in favour of a permanent tenancy implies that there is ground for inferring that the tenure was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction assumes its regularity; it cannot be made in favour of that which offends legal principle."

If the property was *debutter* at the time the tenancy originated, it would affect the applicability of the presumption, for to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in a *shebait* and was not therefore presumable.

Moharanee Shibassouree v. *Mothoora Nath* (11 M. I. A. 270) referred to.

Dr. Rash Behary Ghose and *Babu Mohini Mohun Chatterjee* for the Appellants.

Babus Nilmadhub Bose, *Shib Chandra Palit* and *Surendra Chandra Sen* for the Respondents.

A. T. M. *Case remanded.*

CIVIL APPELLATE JURISDICTION. Before STEPHEN and CHATTERJEE, JJ. APPEAL FROM ORIGINAL ORDER No. 268 OF 1910. CHAG MULL AND SURAJ MULL, Appellants *v.* JAI NARAIN AND ANOTHER, Respondents. Heard, 16th and 17th January, Judgment, 29th January 1912.

Appeal—Insolvency Act of 1907, sec. 46—Trial by Deputy Commissioner.

The appeal was from an order of the Deputy Commissioner of Darjeeling, dated the 10th March 1910, made by the first Respondent under sec. 37 of the Provincial Insolvency Act, 1907, setting aside a transfer of his house and shop made by the second Respondent, Nazir Khan, to the Appellants.

The facts of the case were as follows: On the 17th November 1908, the second Respondent transferred the premises in question to the Appellants in order to avoid execution proceedings in a suit brought by them. Six or ten days later the second Respondent filed his petition in insolvency: This he did under the insolvency sections of the Civil Procedure Code of 1882, as Darjeeling is a Scheduled District under the Insolvency Act, which was not then in force there. The present Civil Procedure Code was applied to Darjeeling on the 5th January 1909, and the Provincial Insolvency Act on the 25th January 1909. The second Respondent was adjudged an insolvent on the 27th May 1909 by the District Judge who appointed a Receiver, and transferred the case to the Deputy Commissioner on the 12th June 1909. On the 9th July the first Respondent filed the petition to have the transfer in question set aside, and it was set aside on the 10th March 1910.

On appeal to the High Court:

Held—That appeal lay to the District Court and not to the High Court by force of sec. 46 of the Insolvency Act, as the case was tried by the Deputy Commissioner, as being a Court subordinate to the District Judge, invested with jurisdiction under sec. 3.

Babu Kshetra Mohun Sen for the Appellants.

Babu Probodh Chunder Mukherjee for the Respondents.

A. T. M. *Appeal dismissed.*

GURAMEAH *v.* THE KING-EMPEROR.

passed on the Petitioners should not be set aside on the ground that on the facts proved it ought to be held that the alleged search warrant was illegal and without jurisdiction,, and resistance if any to the execution thereof does not amount to any offence.

We are unable to find on the facts that the alleged search warrant was either illegal or without jurisdiction. The order of the Magistrate passing it was made with jurisdiction and it was an order for a warrant under sec. 100 for Manuda Khatun for immediate appearance. Now that warrant was snatched away and destroyed by the accused persons, and it must therefore be presumed that it contained the substance of what is set out in sec. 100, although admittedly it was drawn up on a form which is printed for use under sec. 98. Now under sec. 100 the only kind of warrant that can be issued is a search warrant, and the person to whom such warrant is directed may search for the person so confined and such search shall be made in accordance therewith and the person if found shall be immediately taken before the Magistrate. Now let us see how this warrant under sec. 100 can be conveyed on a form under sec. 98. It is perfectly clear that the form under sec. 98 after scratching out cls. (*c*) and (*d*) would be perfectly sufficient for the execution of a process under sec. 100. It is in evidence that there is no form printed under sec. 100 and that the form under sec. 98 is always used for these warrants under sec. 100. We must therefore take it that the portions which had to be altered were altered. But a warrant under sec. 98 used for the purpose of sec. 100 would run perfectly correctly in the words of sec. 98, to enter with such assistance as may be required in such place, that is the house where the woman was confined, and to search the same in the manner specified in the warrant and to take into custody and carry before the Magistrate the person named therein. Now the evidence is that the person named therein is this Manuda Khatun. We therefore find that the alleged search warrant was not illegal nor without jurisdiction, and that any resistance thereto was therefore an offence.

Several cases have been cited to us, but there was only one of them which in any way touches this case, and this is the ruling in *Bisu Haldar* v. *Probhat Chandra* (1). There the person applied under sec. 100, Cr. P. C., for a search warrant, but the Magistrate issued warrant under sec. 96, Cr. P. C., under which the Police supposed themselves to be acting: held, that the issue of the warrant under sec. 96 was illegal and the order was a nullity. Reading this finding and the judgment in the case it is clear that the error in that case was an error in substance and not in form. The Magistrate himself with his eyes open issued the warrant under sec. 96. The warrant purported to be for the purpose of sec. 96 and the Police who executed it supposed that they were acting under sec. 96. The case therefore is clearly distinguishable from the present case where the error, if there is any, as to which we know nothing, could have been one merely of form. But having regard to what the learned Judge has said with respect to these cases in the last passage in his judgment we think that the accused have been too harshly dealt with. The learned Judge says,—" This is one of those cases of not infrequent occurrence which show how keenly Mahomedans resent the issue of any process against a woman who

(1) 6 C. L. J. 127 (1907).

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may be an accused or a witness in a 498, I. P. C. case, or analogous case; and it is doubtless because of such cases that the Government of this Province has recently issued an order that such complaints should in the first instance be referred to a Local Mahomedan Marriage Registrar or other gentleman of position for enquiry and report. Probably if this had been done in the present instance the present case would not have arisen."

We think that there is a great deal to be said from this point of view, and while we agree with the learned Judge that the Police when they get a warrant from the Magistrate are bound to execute it and must be fully protected in the execution thereof, we are willing to take a more lenient view of the conduct of the accused in the present case than the lower Courts have found it necessary to do.

We therefore in discharging the Rule direct that the sentence on the Petitioners be reduced to one of three months' rigorous imprisonment, and that the fine of 30 rupees each passed upon them do stand with the alternative sentence of imprisonment. The accused will therefore surrender to their bail and serve out the rest of their modified sentence.

B. C. *Sentence reduced.*

PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1911,
Heard, 2, November.
1912,
Judgment,
16, January.

MATA DIN, Defendant, Appellant,
v.
SHEIKH AHMAD ALI, Plaintiff, Respondent.

*Mahomedan Law—Will—Executor by implication—Devisee, vesting of estate directly in—Guardianship of minor—Brother if guardian of minor brother—*De facto *guardianship if confers power to sell—Necessity and benefit, if justifies sale—Limitation Act (XV of 1877), Sch. II, Arts. 44, 144—Suit to set aside sale by unauthorised guardian.*

Under the Mahomedan Law, in the absence of duly appointed testamentary guardians, the care of a minor's property would devolve first on the father and his executor, next on the paternal grandfather and his executor and, failing these, the right of nomination of a guardian would "rest in the ruling power and its administration."

A brother of the minor would therefore have no right to act as guardian except under the authority of an appointment by the Court.

A person who has without authority been acting as the de facto *guardian of a minor may, by his* de facto *guardianship, assume important responsibilities in relation to the minor's property but he cannot thereby clothe himself with legal power to sell it.*

Quære:—*Whether, according to Mahomedan Law, a sale by a* de facto *guardian if made of necessity or for the payment of an ancestral debt affecting the minor's property and if beneficial to the minor is altogether void or merely voidable.*

Art. 44 of Sch. II of the Limitation Act of 1877 had no application to a suit to set aside a sale by an unauthorised guardian.

Held, *on a construction of the will of a Mahomedan testator who left virtually the whole of his property to his four grandsons (one of whom was a minor) in equal shares, that there was no appointment of any of the sons as executor by implication.*

This was an appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh, dated the 7th

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August 1907, which affirmed a judgment and decree, dated the 9th March 1907, of the District Judge of Lucknow who affirmed on appeal a judgment and decree of the Subordinate Judge of Lucknow, dated the 28th May 1906.

The principal question for determination on the present appeal related to the validity of the disposition of a minor's property by his brother who was not his guardian under the Muhammadan Law but who acted as such under the circumstances hereinafter mentioned.

The facts of the case may be shortly stated as follows :

One Amir Haider possessed considerable property. He mortgaged a 15 annas share in Mouzah Kabirpur to the Defendant-Appellant by a deed dated the 2nd December 1885. He also executed another mortgage, dated the 7th August 1886, in favour of the same creditor, of a 4 annas share in Mouzah Karora. Under the terms of the said bonds the mortgagee was to take possession and to realize his interest from the profits, and to make over the surplus, if any, to the mortgagor. The mortgagee duly obtained possession of the said villages.

The said Amir Haider died on the 12th August 1887, leaving a will, dated the 7th December 1886, by which he devised and bequeathed his entire estate in four equal shares to his grandsons, namely, Mujid Husain, Ashraf Husain, Muhammad Ali and Ahmad Ali (Plaintiff-Respondent). This Respondent was then a minor.

On the 15th June 1889, the said three brothers on their own behalf and Ashraf Husain on behalf of the Respondent sold the entire 16 annas in Mouzah Kabirpur to the Appellant with the result that the Appellant who was a usufructuary mortgagee of a 15 annas share in the said village thereby became an absolute owner thereof. On attaining majority the Respondent refused to recognize the validity of the said sale. He insisted on treating the said mortgage, dated 2nd December 1885, as one still subsisting to the extent of his one-fourth share, but the Appellant denied it.

The Respondent therefore instituted the present suit in the Court of the Subordinate Judge of Lucknow on the 14th September 1905. He stated the facts set forth above, and claimed to redeem the said mortgage to the extent of his share on payment of what was found due after taking an account of the profits received by the Appellant.

The Defendant-Appellant filed a written statement and his pleas so far as they are material to this report would appear from the following amongst several issues fixed by the said Subordinate Judge :—

Is the Plaintiff bound by the sale-deed, dated 15th June 1889 ?

Is the claim for redemption barred by limitation ?

Is the Plaintiff estopped from questioning the acts of Ashraf Husain relating to the property in suit ?

After recording and examining evidence, oral and documentary, the said Subordinate Judge found the first four issues in favour of the Plaintiff-Respondent, and also found that the said sale was neither necessary nor beneficial to the Respondent. He accordingly made a decree allowing the claim for redemption with costs on the 28th May 1906.

The Defendant appealed against the said decree to the District Judge of Lucknow who delivered his judgment on the 9th March 1907. He held that the said sale was void under the Muhammadan Law

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and accordingly passed a decree dismissing the appeal with costs.

The Defendant presented a second appeal to the Court of the Judicial Commissioner of Oudh, which delivered its judgment on the 7th August 1907. That Court agreed with the view taken by the lower Courts and affirmed their decrees with a slight modification of the amount of money payable on redemption.

Mr. Greeven, Judicial Commissioner, in the course of his judgment (with which Mr. Chamier concurred) said :—

"The second plea (grounds Nos. 3 and 4 of the memorandum) is to the effect that, by the ordinary principles of Muhammadan Law, the adult brothers of Ahmad Ali (Plaintiff-Respondent), in the capacity of his *de facto* guardians, were competent to convey his share in the property to discharge a debt incurred by his grandfather. For the sake of this argument, it is not disputed that the brother of a Muhammadan minor is not his natural guardian [*Ruttun* v. *Dhoomee Khan* (1), *Musammat Bukshun* v. *Musammat Doolhin* (2), *Bhutnath Dey* v. *Ahmad Hosain* (3), *Husein Begam* v. *Zia-ul-nisa Begam* (4)]. It is conceded that he is in no better position than the mother whose power, when she is acting as a *de facto* guardian, to alienate the property of her minor son, was recently the subject of a minute examination by a Bench of this Court [*Amba Shankar* v. *Ganga Singh* (5)]. In that case it was mentioned (at p. 99) that no authority was cited by Mr. Ameer Ali for a statement (Muhammadan Law, second edition, 1894, Vol. II, p. 476) to the effect that if a mother deals with the estate of her minor children "without being especially authorised by the Judge or by the father, her act should be treated as the act of a *fazuli*" and "if they are to the manifest advantage of the children, they should be upheld, if not, they should be set aside." We are asked to reconsider that decision on the ground that the missing authority is to be found in the doctrine of the acts of *fazulis* as recently adopted in two judgments of the High Court at Calcutta, *Mafazzal Hosain* v. *Basid Sheikh* (6), *Ram Charan Sanyal* v. *Anukul Chandra Acharya* (7), by which it is argued, not without some show of reason, that a previous ruling of the same Court, *Moyna Bibi* v. *Banku Behari Biswas* (8), has been virtually overruled, though it is described only as having been distinguished. There can be no question that, in the two cases cited Mr. Justice Ameer Ali's observations have been accepted as an authoritative expression of a principle of the Muhammadan Law and it has been held that a Muhammadan mother, though not the legal guardian of the property of her minor children, may, when acting as *de facto* guardian, make transfers of that property which, if they are for the benefit of the minor children, will be maintained by the Courts. In support of this view of the law we have been referred to an original authority (Hamilton, *Hedaya*, 1791, Vol. II, Book XVI, Ch. X, p. 508) which, as interpreted by the Appellant, formulates the principle that by a consensus of opinion amongst the doctors with the single exception of

(1) 3 Agra 21 (1868).
(2) 12 W. R. C. R. 337 (1868).
(3) I. L. R. 11 Cal. 417 (1885).
(4) I. L. R. 6 Bom. 467 (1882).
(5) 9 O. C. 97 (1905).
(6) I. L. R. 34 Cal. 36 (1906).
(7) I. L. R. 34 Cal. 65 : s. c. 11 C. W. N. 160 (1906).
(8) I. L. R. 29 Cal. 473 : s. c. 6 C. W. N. 667 (1902).

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shafai, a contract of a *fazuli* is complete in itself even without the consent of the real owner. It may be observed for the sake of completeness that, in the present instance, it is contended that almost the whole consideration of the transaction impugned was borrowed for the purpose of extinguishing ancestral debt which, according to the Muhammadan Law, is a legal necessity. On this ground we are asked to distinguish two cases, *Hurbai* v. *Hiraji Byramji Shanja* (9), *Pathummabai* v. *Vittil Ummachabi* (10), which were prominently cited as authorities in the previous decision of this Court, *Amba Shankar* v. *Ganga Singh* (5), but which are now questioned as relating to money taken for purposes not contemplated by the Muhammadan Law. That the discharge of debts attaching to the estate of the deceased is sufficient warrant for a sale by an executor, can be defended by ample authority (Baillie's Digest of Muhammadan Law, I, 1875, p. 688; Shama Charan Sarkar's Muhammadan Law, 1875, p. 106). We are pressed with a further argument that an elder brother, though he may not be a natural guardian under the Muhammadan Law, derives some authority in dealing with the minor's property from the circumstance that he belongs to the 'paternal kindred,' *Mafazzal Hosain* v. *Basid Sheikh* (6).

"I venture to think that the decision of this Court, *Amba Shankar* v. *Ganga Singh* (5), which we are asked to review, was correctly decided. It will be observed that all the materials, including the observations of Mr. Justice Ameer Ali, were before the Court when the decision was given. The question for determination lies, therefore, in a very narrow compass, and we have really only to ascertain whether the recent decisions in Calcutta have added anything, hitherto unconsidered, to the discussion. It is manifest to my mind that the observation of Mr. Justice Ameer Ali was the only authority for the view taken by the High Court at Calcutta for the application of the doctrine of *fazulis*. Mr. Justice Rampini, no doubt, refers (page 38) to two other authorities (Macnaghten's Precedents, p. 306; Shama Charan Sarkar's Tagore Lectures, p. 480); but the first of these passages relates exclusively to personal property with reference to a case stated (page 305, case II) in which a guardian has been duly appointed; and the second appears to be a false reference inasmuch as the page quoted occurs in the index. Mr. Justice Woodroffe confines himself (p. 41) to citing Mr. Ameer Ali as his sole authority for holding the supposed principle to be 'a rule of Muhammadan Law.' The second decision of the High Court at Calcutta, *Ram Charan Sanyal* v. *Anukul Chandra Acharya* (7), merely follows the view taken. This view derives no support whatever from the original text-books; and it will be observed that a *fazuli's* contract, though in other respects complete, does not become binding upon the real owner of the property until he has given his consent (Hamilton, *Hedaya*, loc. cit.). Thus the case of a minor, who cannot give a valid consent, is entirely excluded. There is absolutely no doubt, upon the authorities cited, that a person acting as *de facto* guardian of a Muhammadan minor, is not invested with the

(5) 9 O. C. 97 (1905).
(6) I. L. R. 34 Cal. 36 (1906).
(7) I. L. R. 34 Cal. 65: s. c. 11 C. W. N. 160 (1906)
(9) I. L. R. 20 Bom. 116 (1895).
(10) I. L. R. 26 Mad. 734 (1902).

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power of selling that minor's immoveable property.

"The first of the cases recently decided by the High Court at Calcutta, *Maffazzal Hosain* v. *Basid Sheikh* (6), so far as it seeks to invest the paternal kindred with the powers of a guardian for the minor's property, is founded upon a passage (Macnaghten's Principles and Precedents of Muhammadan Law, eighth reprint, revised by Sloan, 1897, p. 304, case I) which recognises investiture of the paternal kindred with certain powers. These powers relate only to matrimony and are restricted in their exercise to the father and grandfather and their executors. So far as the learned judges appear to have been disposed to invest the paternal kindred with power to deal with a minor's property, their observations would seem to be opposed to authority (Wilson's Muhammadan Law, 1903, pp. 207 and 208). It is clear that the paternal kindred are invested with powers only for the custody of the minor's person, while they do not figure amongst the guardians competent to deal with his property (*ibidem*, pp. 208 and 209, Art. 112)."

Against this decision the Defendant preferred this appeal.

Mr. Kenworthy Brown (with him *Mr. A. P. Sen*) for the Appellant.—The sale-deed, dated the 15th June 1889, was at the most voidable and not void. The Respondent ratified it on attaining his majority. Further the major brothers were appointed executors to their grandfather's will, and being also heirs could sell the property to pay the testator's debts. The provisions of the will (cl. 9) show that the testator's intention was that his debts were to be paid and the estate administered by his grandsons. To appoint an executor it was not necessary to use the word "executor" or any particular word. Reference was made to secs. 3 and 7, Probate and Administration Act, 1881; Ameer Ali's Mahomedan Law, pp. 556 and 557; Baillie's Mahomedan Law, p. 632. All brothers were appointed joint-executors but only three being able to act they administered the estate. No grant of probate was necessary. Being executors any one of them could have acted as the guardian of the minor and had power to sell his share in the estate. Reference was made to *In the goods of Russel* (11). Sec. 90, Probate Act, as amended by Act VI of 1889. *In the goods of Indra Chandra Singh* (12). The next point is that Ashraf Husain was the *de facto* guardian of the Respondent.

[LORD MACNAGHTEN.—What is a *de facto* guardian?]

In an Irish case the word was explained to mean a person who holds possession of property on behalf of an infant, and when so connected with him as to protect this infant's interests.

[LORD ROBSON.—Such a person has liabilities, but has he any rights.].

It has been held that under the Mahomedan Law a mother's act is that of a *fazuli*, but it is not void. He referred to *Abdul Kader* v. *Amtal Karim* (13), *Mafazzal Hosain* v. *Basid Sheikh* (6), *Ram Charan Sanyal* v. *Anukul Chandra* (7), *Majidan* v. *Ram Narain* (14), *Hamir Singh* v. *Must. Zakia* (15), *Hasan Ali*

(6) I. L. R. 34 Cal. 36 (1906).

(6) I. L. R. 34 Cal. 36 (1906).
(7) I. L. R. 34 Cal. 65: s. c. 11 C. W. N. 160 (1906).
(11) [1892] P. D. 380.
(12) I. L. R. 23 Cal. 580, 588 (1896).
(13) L. R. 15 I. A. 220, 222 (1888).
(14) I. L. R. 26 All. 22 (1903).
(15) I. L. R. 1 All. 57 (1875).

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v. *Mehdi Husain* (16), *Hurbai* v. *Hiraji Byramji* (9), *Baba* v. *Shivapa* (17), *Balakrishna* v. *Muthusami* (18).

[LORD MACNAGHTEN referred to *Sita Ram* v. *Amir Begam* (19).]

Further a *de facto* guardian's act is not void, but voidable. It could be ratified and was so ratified by the Respondent's taking advantage of the redemption of Mouzah Karora. The Respondent came of age in 1893 and the present suit was instituted more than 12 years after attaining majority. It was barred by time.

Mr. L. DeGruyther, K. C., and *Mr. Bhugwandin Dubé* for the Respondent.—The sale in question was a totally unauthorized act, and was void. A sale even by a guardian is not permitted except for extreme necessity. Reference was made to *Must. Bukshan* v. *Must. Maldai Kooeri* (20), *Moyna Bibi* v. *Banku Bihari* (8), *Nizamuddin Shah* v. *Anandi Pershad* (21). *Ruttun* v. *Dhoomee Khan* (1) was similar to the present case, and it was held that no title passed. In Oudh in the case of *Amba Shankar* v. *Ganga Singh* (5), it has been held that a mother's transfer is void altogether.

The cases cited on behalf of the Appellant are distinguishable. They were based on the nature of the transaction, and not on any supposed authority or power in the guardian. The principles of equity and good conscience were applied in

(1) 3 Agra 21 (186).
(5) 9 O. C. 97 (1905).
(8) I. L. R. 29 Cal. 473: s. c 6 C. W. N. 667 (1902).
(9) I. L. R. 20 Bom. 116 (1895).
(16) I. L. R. 1 All. 533 (1877).
(17) I. L. R. 20 Bom. 199 (1895).
(18) I. L. R. 32 Mad. 271, 276 (1908).
(19) I. L. R. 8 All. 325 (1886).
(20) 3 B. L. R. 423 (1869).
(21) I. L. R. 18 All. 373 (1896).

Mofazzal Hosain v. *Basid Sheikh* (6), but it was a case relating to moveables only. There was no authority whatever of text-writers or commentators on Mahomedan Law which laid down that an unauthorized act of a *fazuli* dealing with immoveables could be upheld by the Court in a case of necessity. In any case both the Courts have found that there was no necessity for the sale, and that it was not for the minor's benefit. There was no acquiescence on the part of the Respondent, and the suit was well within time. The mortgage, dated the 2nd December 1885, was for a fixed term of 10 years which expired in 1895.

Mr. Brown replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ROBSON.—In this case the Appellant has been unsuccessful, first, before the Subordinate Judge at Lucknow, next, before the District Judge of Lucknow, and, lastly, before the Court of the Judicial Commissioner of Oudh. The Court of the Judicial Commissioner granted a certificate for an appeal to their Lordships' Board on the ground that the case raised a question of law as to whether the transfer of a Mahomedan minor's property by a person who was not his natural guardian should be upheld, if made to discharge a debt payable by the minor.

The facts of the case are these:—

Sheikh Ahmad Ali, the Respondent, was the grandson of Amir Haider, who, in his lifetime, was possessed of two villages, Kabirpur and Karora. Amir Haider mortgaged a 15 annas share in Kabirpur to the Defendant-Appellant on the 2nd December 1885, and on the 7th August 1886 he executed another mortgage in

(6) I. L. R. 34 Cal. 3 (1906).

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favour of the same creditor of a 4 annas share in Karora. The mortgages provided that the mortgagee should take (and he duly took) immediate possession of the mortgaged property for the purpose of realizing the agreed interests out of the annual profits, making over the surplus, if any, to the mortgagor. The terms of the said mortgages were for ten and seven years respectively.

Amir Haider died on the 12th August 1887, leaving a will, dated the 7th December 1886, by which he bequeathed his entire estate to his four grandsons equally. The Plaintiff was about 12 years old when his grandfather died. Afterwards, on the 15th June 1889, the three elder grandsons on their own behalf, and one of them, Ashraf Husain, purporting to act also as the guardian of the Plaintiff, sold the village at Kabirpur to the Appellant in consideration of the discharge by him of the debts secured thereon and on Karora, together with certain other smaller sums, making up a total of Rs. 18,500. The effect of this sale, if held good, was that the Plaintiff lost his interest altogether in the village of Kabirpur, which was the larger and more important property, while the smaller village Karora was thenceforth free of the mortgage.

The Plaintiff on attaining his majority in 1892 or 1893 made no at empt to impeach this transaction, though he knew of it, but in September 1905 he tendered to the Defendant the amount of mortgage money necessary to redeem his share of the mortgage property, and the Defendant refusing to accept it, he brought this action for redemption.

He contends that the sale-deed of the 15th June 1889 is void as against him, on the ground that his brothers had no authority under the grandfather's will to act as executors or to sell his share, and that Ashraf Husain who purported to represent him in that transacaion as his guardian was not entitled so to act. The Appellant contends that the four grandsons were entitled to act as executors under Amir Haider's will, but their Lordships agree with the Courts below in finding that there is nothing in the will justifying that view.

The testator left the whole of his property (with certain unimportant exceptions) to his four grandsons in equal shares, and subject to equal obligations in respect of his debts and expenses, but he did not expressly appoint any executors of his will or guardians of his minor grandchildren. It was argued that an express appointment was not necessary if the testator had clearly shown by his will an intention to entrust its administration to particular individuals, but on a fair construction of this will no such intention can be gathered from it. He left his property to his grandsons so that each share thereof vested at once in the devisee, subject to the obligations attaching thereto, and there appears to be no necessity for any act of an executor to complete the operation of the will No doubt the testator contemplated a partition by the grandsons themselves of the property devised to them, and in that case it would be necessary for his grandson, if s ill an infant, to have a guardian, but there is nothing whatever to show that he intended all or any one of the brothers to act in that capaci y. So far as his intention is concerned, it may well have been that if, and when, the necessity for a guardian arose, the selection should be made by the Court.

The family were Muhammadans and

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were governed by the Muhammadan Law relating to guardianship. According to that law, in the absence of duly appointed testamentary guardians the care of Ahmad Ali's property would devolve first on the father and his executor, next on the paternal grandfather and his executor, and failing these, the right of nomination of a guardian would "rest in the ruling power and its administation." (Macnaghten's "Principles of Mahomedan Law," 5th Ed., p. 304). The brothers had, therefore, no right whatever to act except under the authority of an appointment by the Court. Both they and the Appellant seem to have had that fact in their minds when they executed the deed of the 15th June 1889 effecting the sale of Ahmad Ali's share in the land, for they stipulated that if Ahmad Ali at any time brought a claim on the ground of minority, and any dispute thereby arose in respect of Mata Din's possession, the three elder brothers should be answerable for the same together with costs.

It is urged on behalf of the Appellant that the elder brothers were *de facto* guardians of the Respondent, and, as such were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a "*de facto*" guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it.

There has been much argument in this case in the Courts below, and before their Lordships, as to whether, according to Muhammadan Law, a sale by a *de facto* guardian, if made of necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case. To begin with, the Appellant has not succeeded in showing that the disputed sale of 1889, although made for the payment of an ancestral debt was made of necessity, or was beneficial to the minor. On the contrary, the Courts below have all found on the evidence that it was unnecessary and cannot be said to have been beneficial so far as Ahmad Ali was concerned.

It is next found as a fact, (and their Lordships see no sufficient reason to find otherwise), that the Plaintiff on coming of age never acquiesced in the transaction which he now seeks to impeach, and that there was nothing in his conduct on which the Defendant's plea of estoppel could be justified against him. Unless, therefore, the Plaintiff's remedy is barred by the Indian Limitation Act IX of 1877, he is now entitled to the relief prayed for, as modified by the judgment of the Court of the Judicial Commissioner.

As to the plea of limitation, the Appellant-Defendant placed reliance on Arts. 44 and 144 of the Indian Limitation Act, 1877.

Art. 44 prescribes a period of 3 years within which a ward who has attained majority may set aside a sale made by his guardian, the time running from the date of the ward's majority. This provision has no application to the present case, for the sale here was effected, not by a guardian, but by a wholly unauthorised person.

Art. 144 deals with immoveable property not otherwise specially provided for by the Act, and prescribes a period of 12 years from the time when the pos-

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session of the Defendant becomes adverse to the Plaintiff. In this case, the Appellant was entitled under his mortgage to full possession of Kabirpur and receipt of its rents and profits for 10 years from the 2nd December 1885. The Respondent came of age on some date in 1892 or 1893. He was then certainly entitled to treat, (and by his subsequent tender of the mortgage money it is shown that he has in fact treated), the mortgage as subsisting so far as he was concerned. Under these circumstances, the possession by Mata Din of Kabirpur did not become adverse to the Respondent until the 2nd December 1895, and as this action was begun in 1905 it was well within the period of limitation.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors: *Messrs. Barrow, Rogers & Neill* for the Respondent.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 424 OF 1909.

STEPHEN, J.
COXE, J.
1911.
29, November.

RAMPAL SINGH,
Judgment-debtor,
Appellant,
v.
NAND LAL MARWARI,
Decree-holder,
Respondent.

Limitation Act (IX of 1908), sec. 19—Judgment-debt, acknowledgment of—Debt specified in insolvency petition.

An application for execution of a decree was not time-barred though made more than three years after a previous application, where it appeared that the judgment-debtor had in the meanwhile filed a petition of insolvency in which the judgment-debt in question was specified.

The petition though it might not have been addressed to the creditors was nevertheless an acknowledgment within sec. 19 of the Limitation Act.

MANIRAM SETT *v.* SETH RUPCHAND (1) *relied on.*

This was an appeal preferred on the 31st of August 1909, against an order of Babu J. N. Mitter, Subordinate Judge of Monghyr, in Zillah Bhagulpur, dated the 12th of July 1909.

The material facts of the case will appear from the judgment.

Babus Jogesh Chandra Roy and *Kshetra Mohun Sen* for the Appellant.

Babus Sarat Chandra Ray Chowdhury, Joy Gopal Ghosha and *Manmotha Nath Mukherjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal from an order made by the lower Court on an application in an execution case. The only point we have to consider is whether the execution proceedings was barred by limitation. An application for execution in respect of a certain debt was made on the 9th September 1905. The next application that was made was on the 27th April 1909. The question is whether this second application was barred by the provisions of the Limitation Act. The point before us is whether an application of insolvency, which was made on the 14th May 1906, contained such an acknowledgment of the liability as to bring the case under sec. 19 of the Limitation Act. The judgment-debtor filed a petition of insolvency in which he set out, in compliance with the

(1) I. L. R. 33 Cal. 1047: s. c. 10 C. W. N. 874 (1906).

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statute, a list of his debts. The debt which forms the subject-matter of the execution proceedings was mentioned in that petition. Under the last part of explanation (1) to sec. 19 it is not necessary that the acknowledgment under the section should be addressed to the person entitled to the property in respect of which the acknowledgment is made. This seems to prevent the only argument that can be raised under the section, namely that the acknowledgment was not made to the creditors. Whether it was in fact made to the creditors or not we need not consider, for the terms of the section amply cover the statement in the insolvency proceedings. Such authority as is quoted in the matter seems to rest on English cases which we need not consider here, as we have to consider the terms of the Indian Limitation Act. This construction of sec. 19 seems to be referred to in the case of *Maniram Sett* v. *Seth Rupchand* (1) decided by the Privy Council. We hold therefore that the lower Court is right in deciding that the second petition for execution of the decree was not barred, as the petition of insolvency contained a sufficient acknowledgment to keep alive the decrees.

The appeal is therefore dismissed with costs.

This judgment governs appeal from original order No. 446 of 1909. In each of these appeals the hearing-fee is assessed at one gold mohur.

Appeal dismissed.

(1) I. L. R. 33 Cal. 1047: s. c. 10 C. W. N. 874 (1906).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3907 OF 1910.

MOOKERJEE, J.
TEUNON, J.
1911,
Heard, 6 and 22, February.
Judgment, 1, March.

DWARKA MISSRA and ors., Defendants, Appellants,
v.
RAMPRATAP MISSRA and others, Plaintiffs, Respondents.

Right to perform religious ceremonies, if may be enforced—Agreement to share profits of religious services, suit if lies to enforce.

Parties who require religious ceremonies to be performed for their benefit are at liberty to choose the priest by whom they shall be performed and no declaration can be given that any person is exclusively entitled to officiate at ceremonies at a particular place.

Where the Plaintiffs claimed under an agreement executed by the ancestors of the Plaintiffs and Defendants that whoever amongst them might perform ceremonies on a particular occasion on the banks of the river Punpun at Gaya he should bring whatever he might earn thereby into a common fund to be enjoyed by all the members of the family:

Held, *that such agreement cannot be obligatory on the successors of the parties for all time in spite of the wishes of the members who might desire to terminate it and a suit does not lie to enforce the claim.*

DINO NATH v. PROTAP CHANDRA (2) *and* BHEEMA v. KOTHA KOTA (3) *distinguished.*

This was an appeal preferred on the 30th of November 1910, against the decree of Babu Kali Kumar Sarkar, Subordinate Judge, 1st Court of Zillah Patna, dated the

(2) I. L. R. 27 Cal. 30: s. c. 4 C. W. N. 79 (1899)
(3) 17 Mad. L. J. 493 (1907).

DWARKA MISSRA *v.* RAMPRATAP MISSRA.

29th of August 1910, affirming the decree of Babu Nutbehari Chatterjee, Munsif, 4th Court at Bankipore, dated the 22nd of December 1909.

The material facts will appear from the judgment.

Babus Baldeo Narain Singh and *Bibhusan Dutt* for the Appellants.

Babus Mohendra Nath Roy and *Kulwant Sahay* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal on behalf of the Defendants in a suit of a novel description. The Plaintiffs Respondents allege that they are the descendants of one Sham Nath Misser, and that along with the Defendants, who are other descendants of the same person, they are entitled to officiate as priests at the offering of *pindas* on the banks of the sacred river Punpun in the District of Gaya. According to orthodox Hindu notions, it is the duty of the pilgrim to Gaya to shave his head on the bank of the river Punpun, to perform the sradh ceremony of his ancestors and to bathe in the waters of the river on his way to the holy city. The Plaintiffs allege that, as the descendants of Sham Nath Misser, they and the Defendants are exclusively entitled to officiate as priests at the offering of *pinda*, and that whoever amongst them may be employed by a particular pilgrim, he is bound to share with the other members of the family the offerings received and the emoluments earned by him. The Defendants resist the claim of the Plaintiffs, deny that the Plaintiffs are the descendants of Sham Nath Misser, and claim to be exclusively entitled to officiate as priests on the occasion of the ceremony mentioned. The Courts below have concurrently made a decree in favour of the Plaintiffs by which they are declared entitled to be restored to possession of the right claimed by them, to recover mesne profits and to have formal possession of the share of the disputed property, to be enjoyed jointly with the Defendants or alternately on different dates as might suit their convenience. The Defendants have appealed to this Court, and on their behalf, the decision of the Subordinate Judge has been assailed substantially on two grounds, namely, *first*, that the Courts below have erroneously found on evidence inadmissible in law that the Plaintiffs are descendants of Sham Nath Misser, and, *secondly*, that the decree made in favour of the Plaintiffs is contrary to law, and grants them relief not enforceable in a Civil Court. In our opinion, the first of these grounds is unsustainable, but the second must prevail in part.

In so far as the first contention is concerned we are unable to hold that the Courts below have relied upon any evidence inadmissible in law. Objection has been principally taken to statements made by the predecessors of the parties, but these statements are clearly admissible under sec. 32, sub-sec. 5 of the Indian Evidence Act. Consequently there is no substance in the first objection taken by the Appellants.

In so far as the second ground urged by the Appellants is concerned, it is manifest that the Courts below have completely overlooked the principles applicable to cases of this description. It is well-settled, as was pointed out by this Court in the case of *Gourmoni Debi* v. *Chairman of the Panihati Municipality* (1), that parties who require religious ceremonies to be

(1) 12 C. L. J. 70: S. C. 14 C. W. N. 1057 (1910).

DWARKA MISSRA *v.* RAMPRATAP MISSRA.

performed for their benefit are at liberty to choose the priest by whom they shall be performed. The Plaintiffs are, therefore, not entitled to any declaration that they along with the Defendants are exclusively entitled to officiate as priests, when pilgrims, on their way to the holy city, perform the sradh ceremony of their ancestors on the bank of the sacred river Punpun. The Plaintiffs, however, can obtain a declaration that they are entitled to officiate as priests for such pilgrims as may choose to employ them for the purpose of religious ceremonies, and that the Defendants are not entitled to prevent the Plaintiffs from the exercise of their calling. This, however, is not the most important aspect of the case: the Plaintiffs seek a declaration that if any one among the Defendants assists in the performance of ceremonies by a pilgrim, the Plaintiffs are entitled to share with them the offerings and emoluments. To put the matter in another way the Plaintiffs allege that the right to officiate as priest is vested in the entire body of descendants of Sham Nath Misser, and that whoever amongst them may perform the ceremonies on a particular occasion and whatever sum or article he may earn thereby, he is bound to bring that into a common fund to be enjoyed by all the members of the family. In support of this extraordinary position, reliance was placed upon a decree in a suit of 1821 and a deed of partition of 1837. It appears that about the year 1821 there was a dispute between two families of Brahmins who may be called the Pandeys and the Missers, residents on opposite banks of the river Punpun. The Pandeys claimed that they as well as the Missers, the ancestors of the parties to this suit, were entitled jointly to perform religious ceremonies for the pilgrims on the banks of the river Punpun, and to divide the earnings amongst themselves. This claim was negatived on the 27th May 1822, and it was declared that the Pandeys were not entitled to officiate as priest. Subsequently, on the 28th October 1837, a deed of partition was executed amongst the predecessors of the parties to the present suit, in which it was arranged that each of the three branches of the family formed by the descendants of the three sons of Sham Nath Misser should have one-third share of the emoluments or the fees of the officiating priest at the performance of ceremonies on the bank of the river Punpun. The documents in question obviously do not establish the right now claimed by the Plaintiffs. It is intelligible that members of a family may agree amongst themselves, that whoever amongst them may earn anything by officiating as a priest, the income is to be brought into a common fund and divided in certain proportion amongst them but such an arrangement cannot be obligatory upon the parties and their successors for all time and in spite of the wishes of members who may desire to terminate it. The learned Vakil for the Respondents has contended upon the authority of the cases of *Dino Nath* v. *Protap Chandra* (2) and *Bheema* v. *Kotha Kota* (3) that the members of this family are entitled to a religious office and that it is open to one of them to maintain a suit against his co-sharers for recovery of his share of whatever may be given by pilgrims by way of offerings or emoluments. The cases relied upon however are clearly distinguishable; they are cases in which offerings were made to an idol or some other image of

(2) I. L. R. 27 Cal. 30: s. c. 4 C. W. N. 79 (1899).

(3) 17 Mad. L. J. 493 (1907).

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the deity, and it was ruled that the offerings belonged to the entire body of *shebaits*. In such a contingency, it is rightly held that although a suit by the rightful owner of a religious office against an usurper for recovery of voluntary gratuities is not maintainable, a suit brought by a sharer in religious office against his co-sharers for recovery of his share of the voluntary gratuities is maintainable, because in the latter class of cases the basis of the claim is an arrangement, express or implied, that all the sharers should have a share in the gratuities. In the case before us, however, the initial difficulty of the Plaintiffs is that they have not established that there is any religious office to which they have a claim. It has not been proved that they have a hereditary right to officiate as priests at the worship of an idol and to have a share in the offerings made to the deity. The case, on the other hand, is more analogous to that of *Jowahur Misser* v. *Bahgoo Misser* (4), where it was ruled that a claim was not maintainable for a share in the gratuity or voluntary gift to a priest officiating at a sradh ceremony, because the fee paid was in the nature of a voluntary gift to the person to whom it was directly paid. The reason assigned in support of this view is that where voluntary offerings were made to a priest who officiated at a sradh ceremony, they must be taken to have been intended for the very person who was then actually performing the ceremony, *Kashi Chandra* v. *Kailash Chandra* (5), *Sitaram* v. *Sitaram* (6), *Shivapa* v. *Krishna Bhai* (7). See also *Chamru Dutt* v. *Babu Nandan* (8). The Plaintiffs have neither alleged nor established that they have any right to the holy spot, by grant or otherwise, nor have they alleged and proved that they have a hereditary right to officiate as priest at the worship of an idol to whom offerings are made, and to have a share in such offerings. Consequently the decree in so far as it declares such right cannot be supported, nor can the decree be maintained in so far as it entitles the Plaintiffs to recover mesne profits. The Courts below have neither realised the effect of such a decree, nor considered how the mesne profits can be determined in execution proceedings. If what was paid to the officiating priest was paid to him personally by a particular pilgrim the Plaintiffs would not be entitled to claim a share in such sum. But it would be impossible to discover now, from any evidence that might be available, whether a particular pilgrim made a payment for the personal benefit of the officiating priest or whether it was intended to be paid to him as representative of a family.

The result, therefore, is that this appeal must be allowed in part, and the decree of the Court below modified. The Plaintiffs will have a declaration that they are entitled to officiate at the *pinda dehani* ceremony on the southern bank of the river Punpun and that the Defendants are not entitled to obstruct the Plaintiffs when they officiate as priests at such ceremony. A perpetual injunction will also issue prohibiting the Defendants from interfering with and offering resistance to the Plaintiffs in the performance of the *pinda dehani* ceremony. The question, however, whether the Plaintiffs are entitled by grant or otherwise to joint possession, with the Defendants, of the spot where the ceremonies are performed and

(4) S. D. A. for 1857, p. 362.
(5) I. L. R. 26 Cal 356 (1899).
(6) 6 Bom. H. C. R. 250 (1869)
(7) I. L. R. 3 Bom. 232 (1879).
(8) 7 All. L. J. 529 (1910).

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whether the Plaintiffs are entitled as *shebaits* of any deity to have a share of the offerings given by pilgrims, is left open for consideration in a future suit, if occasion should arise. Each party will pay his own costs throughout this litigation.

Decree modified.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1386 OF 1909.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard, 26 & 29, May.
Judgment, 14, July.

NANDA KUMAR DEY and others, Appellants,
v.
AJODHYA SAHU, Respondent.

Limitation Act (XV of 1877), sec. 28—Dispossession by landlord of raiyat for 2 years, if extinguishes tenant's title—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—Mortgage of holding to Government for agricultural loan—Sale under Public Demands Recovery Act (I of 1895, B. C.)—Interest which passes—Adverse possession against mortgagor if adverse to mortgagee.

An occupancy raiyat borrowed money from Government for agricultural purposes on the security of his holding, but having failed to pay up, a certificate under the provisions of the Public Demands Recovery Act was issued for the realisation of his debt and the holding was sold:

Held—*That only the right, title and interest of the raiyat passed under the sale, as the Secretary of State for India in Council in adopting the procedure of the Public Demands Recovery Act, which does not contemplate the realisation of a security, must be taken to have abandoned the security.*

That the Secretary of State for India in Council could enforce the security only by a regular suit.

Where a landlord keeps a raiyat out of possession of his holding for the period specified in Art. 3 of Sch. III of the Bengal Tenancy Act, the raiyat's title in the holding is extinguished by adverse possession, on general principles, if not under sec. 28 of the Limitation Act.

Quære:—*Whether adverse possession against the mortgagor for the statutory period operates to extinguish the rights of the mortgagee under a previously executed mortgage.*

This was an appeal preferred on the 6th of July 1909, against the decree of Babu Troilakya Nath Shome, Officiating Subordinate Judge, 1st Court of Zillah Mozufferpore, dated the 5th of April 1909, affirming the decree of Babu Ashutosh Ghose, Munsif of Matihari, dated the 22nd of August 1908.

The facts of the case will appear from the judgment.

Babus Umakali Mukherjee and *Surendra Nath Guha* for the Appellants.

Moulvi Syed Shamsul Huda and *Babu Kumar Sankar Roy* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—The subject-matter of the litigation, which has given rise to this appeal, is a parcel of land which admittedly belonged originally to one Biku Dhobi as his occupancy holding. On the 4th March 1889, Biku borrowed money from Government for agricultural purposes, and executed a mortgage of his holding to the Secretary of State for India in Council. He was unable to re-pay the loan on the day fixed and the result was that, in execution of a certificate made under the Public Demands Recovery Act, 1895, the holding was brought to sale, and

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was purchased on the 6th August 1902 by the Plaintiff, now Respondent before us. On the 11th November 1907, the Plaintiff commenced this suit for declaration of his title and for recovery of possession against two sets of Defendants; the second set of Defendants comprised the landlords of the holding, and the first set was composed of mortgagees from them, who, in execution of a mortgage decree, were about to sell the estate within which the disputed holding is situated. The Plaintiff sought for a declaration that the land was the occupancy holding of Biku, and not the proprietor's private land as falsely alleged by the second set of Defendants; and that, consequently, it was not liable to be sold in execution of the mortgage decree held by the first set of Defendants. The Defendants denied that the disputed land was the holding of Biku, and asserted that it was the private land of the proprietor who had been in direct possession since at least 1892. The Defendants further contended that, if Biku had at any time a tenancy-interest in the land, it had been extinguished by adverse possession on the part of the landlords; and that, in any event, the Plaintiff had not, by his purchase at the sale under the Public Demands Recovery Act, acquired a title capable of enforcement against the landlords or their representatives in interest. The Courts below have concurrently overruled these contentions and, in the view that the claim is not barred by limitation, have made a decree in favour of the Plaintiff. The Defendants have now appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed on the ground that, in the events which have happened, Biku Dhobi had no subsisting interest in the disputed land at the time of the sale under the Public Demands Recovery Act, and that, consequently, it was not competent to the Secretary of State for India in Council to confer on the auction-purchaser any title which may be deemed valid against the landlords. This contention has been sought to be supported from two distinct points of view, namely, *first*, that the effect of the sale, under the Public Demands Recovery Act, was to transfer to the purchaser the right, title and interest of the judgment-debtor, and that, before that date, such right, title and interest had been extinguished by adverse possession of the landlords for the statutory period of 2 years; and, *secondly*, that, even if the certificate-sale be deemed to be a sale held for the enforcement of the security in favour of the Secretary of State for India in Council, the auction-purchaser could not acquire any title, because by reason of the adverse possession of the landlords, the equity of redemption of the mortgagor as also the interest of the mortgagee had been extinguished.

In so far as the first of these contentions is concerned, it is well-settled by a series of decisions of this Court, beginning with the case of *Shekaat Hussain* v. *Sashi Kar* (1), and ending with the case of *Raja Koer* v. *Ganga Singh* (2), that the effect of a sale under the Public Demands Recovery Act is to pass to the purchaser merely the right, title and interest of the persons named as the judgment-debtor in the certificate. See also *Rupram* v. *Iswar* (3), *Ashanulla* v. *Manjura Banu* (4), *Raja Baikuntha Nath* v. *Udoy Chand* (5),

(1) I. L. R. 19 Cal. 783 (1892).
(2) 13 C. W. N. 750 (1909).
(3) 6 C. W. N. 302 (1902).
(4) I. L. R. 30 Cal. 774 : s. c. 8 C. W. N. 357 (1903).
(5) 2 C. L. J. 311 (1905).

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Abdul Hai v. *Gujraj* (6), *Baij Nath* v. *Ramgut* (7). Sec. 10 of Public Demands Recovery Act, 1895, further provides that the certificate, after it has been filed and duly notified, binds all immoveable property of the judgment-debtor situated within the jurisdiction of the District Collector, in the same manner and with like effect as if such immoveable property had been attached under the provisions of the Code of Civil Procedure. Consequently, if on the date of the service of notice, the judgment-debtor has no subsisting interest in a particular parcel of land, the purchaser at the certificate sale which follows can acquire no valid interest therein. Now, in the case before us, it is reasonably plain, upon the proceedings of the Collector, that the certificate was made for recovery of the debt and not for the enforcement of the security held by the Secretary of State for India in Council. In fact, the Public Demands Recovery Act does not contemplate the realisation of a security. The steps taken are analogous to those provided by the Civil Procedure Code for the enforcement of a money-claim. This is clear from sec. 10, sub sec. (2) of the Public Demands Recovery Act, 1895, which lays down that the certificate may be enforced and executed, in the manner provided by Chap. XIX of the Civil Procedure Code of 1882, for the enforcement of decrees for money. The substance of the matter is that if the Secretary of State for India in Council intends to enforce the security, he must proceed by way of a regular suit; but he may practically abandon the security and realise the loan as money claimed, by the summary procedure of a certificate under the Public Demands Recovery Act. This view is in accord with that taken in the case of *Luchmi Narain Singh* v. *Raghu Nandan Sahi* (8). Upon the first branch of the contention of the Appellants, therefore, the question arises, whether the judgment-debtor Biku had any subsisting interest in the disputed land when the notice of the certificate under the Public Demands Recovery Act was served upon him. Now it has been found that, in 1892, that is, 10 years before the date of such notice, Biku had been dispossessed by his landlords, who have continued in possession up to the present time. Under Art. 3 of Sch. III of the Bengal Tenancy Act, Biku, as an occupancy raiyat, dispossessed from his holding by his landlords, was bound to sue for recovery of possession within two years from the date of dispossession. He failed to do so. What, then, was the effect of this dispossession upon the title of Biku? It has been argued, on behalf of the Defendants-Appellants, that his title was extinguished at the end of the period prescribed for the institution of a suit by him. In answer to this contention, it has been argued by the Plaintiff that secs. 184 and 185 of the Bengal Tenancy Act, read together, do not make sec. 28 of the Limitation Act applicable to cases of this description. It has been suggested, in fact, that the terms of sub-sec. (2) of sec. 185—which lays down that subject to the provisions of Chap. XVI of the Bengal Tenancy Act, the provisions of the Indian Limitation Act shall apply to all suits, mentioned in sec. 184, that is, suits governed by Sch. III annexed to the Act —are not wide enough to attract the operation of sec. 28 of the Limitation Act to such suits; that section lays down that, at the determination of the period limited by the Indian Limitation Act to any

(6) I. L. R. 20 Cal 826 (1893).
(7) I. L. R. 23 Cal. 775 (1896).
(8) 6 C. W. N. 484 (1902).

person for instituting a suit for possession of any property, his right to such property shall be extinguished. We are not impressed by the soundness of this contention of the Plaintiff-Respondent ; but even if it be held that sec. 28 of the Limitation Act has not been made specifically applicable to suits of this description by sub-sec. (2) of sec. 185 of the Bengal Tenancy Act, it is clear that the same doctrine must be held applicable on first principles. It was ruled by the Judicial Committee in the case of *Gunga Govinda Mandal* v. *Collector of 24-Pergunnahs* (9), that if a person suffers his right to be barred by the law of limitation, the practical effect is the extinction of his title in favour of the party in possession. [See also *Luchmee* v. *Ranjeet* (10), *Fatimaatulnissa* v. *Sundar* (11), *Jagamba* v. *Ram Chandra* (12)]. The tendency of modern decisions is undoubtedly in favour of this view, even in the absence of a statutory provision (for the extinguishment of the right to property) of the type we find embodied in sec. 28 of the Limitation Act : [*Dalip* v. *Deoki* (13) and *Sarafuddin* v. *Chandra Mani* (14)] ; the contrary view, sometimes maintained, [*Doe* v. *Kuppu* (15), *Secretary of State* v. *Vira* (16)] is opposed to the decisions of their Lordships of the Judicial Committee just mentioned, and cannot be supported. We are of opinion, therefore, that, even if it be held that sec. 28 of the Limitation Act does not directly apply to cases governed by Art. 3, of Sch. III of the Bengal Tenancy Act, the principle is applicable ; and that, consequently, the title of Biku in the case before us was extinguished in 1894. In 1902, when proceedings were taken under the Public Demands Recovery Act, he had consequently no subsisting interest which could be attached and sold. In this view, the Plaintiff, as purchaser at the certificate sale, has not acquired any interest which he can enforce against the landlords, who by adverse possession have acquired an indefeasible title to the property. The first branch of the contention of the Appellants must, therefore, prevail.

In so far as the second contention of the Appellants is concerned, it has been argued that, if the certificate proceedings be assumed to have been appropriately taken for the enforcement of the security held by the Secretary of State for India in Council, the Plaintiff-Respondent has not acquired any title to the disputed property, because before the security was sought to be enforced, the interest of the mortgagor as also of the mortgagee had been extinguished by adverse possession for the statutory period by the landlords. In support of this proposition, reliance has been placed upon the cases of *Ramkumar Sen* v. *Prasanna Kumar Sen* (17) and *Karan Singh* v. *Bakarali Khan* (18). The question raised is of considerable nicety and by no means free from difficulty, and we may observe that there has been some divergence of judicial opinion upon it. The contention of the Appellants in substance is that the adverse possession on the part of the landlords operated to extinguish not merely the equity of redemption but also the interest of the mortgagee. There can be no room for controversy that if such adverse possession

(9) 11 M. I. A. 345 ; 7 W. R. 21 P. C. (1867).
(10) 13 B. L. R. P. C. 177 (1873).
(11) L. R. 27 I. A. 103 (1900).
(12) I. L. R. 31 Cal. 314 (1903).
(13) I. L. R. 21 All. 204 (1899).
(14) 5 C. W. N. 405 (1900).
(15) 1 Mad. H. C. 89 (1862).
(16) I. L. R. 9 Mad. 175 (1885).
(17) W. R. Gap. No. 375 (1864).
(18) L. R. 9 I. A. 99 : S. C. I. L. R. 5 All. 1 (1882).

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had commenced before the execution of the mortgage, its operation would not have been arrested by the grant of the mortgage security, on the elementary principle that the effect of a statute of limitation, in the absence of legislative provision to the contrary, must be determined with reference to the actual state of the title when time begins to run, and that, when the time has once commenced to run against the absolute owner, no subsequent alteration in the title will postpone the bar. Where, however, as here, the mortgagor has been dispossessed after the grant of the mortgage, the view has sometimes been maintained that the adverse possession does not operate against the mortgagee, see *Aimadar Mandal* v. *Makhan Lal Dey* (19), which was accepted as good law in *Vencatachala* v. *Subramania* (20). There is, however, considerable force in the contention of the Appellants that the contrary view ought to be maintained on principle. The learned Vakil for the Appellants has argued, that the right of the mortgagee to the security subsists only so long as the mortgagor's right to the property subsists, and both are in the same position if the interests of the mortgagor and mortgagee are equally invaded by the trespasser. This view is supported not only by the case of *Ramkumar* v. *Prasanna Kumar* (17), but also by the observations in *Sheoumber* v. *Bhowanee* (21), *Ram Lal* v. *Masum Ali* (22), *Ammu* v. *Ramakrisna* (23), *Karan Singh* v. *Bakarali Khan* (18), *Anando Moyee* v. *Dhonendra Chandra* (24), and *Prannath* v. *Rookea Begum* (25); see also, *Chinto* v. *Janki* (26) and *Kanhu Lal* v. *Manki* (27). We are not unmindful that in England it has been ruled that, where land is subject to a mortgage, the statute does not run against the mortgagee in favour of a stranger in possession of the land so long as the mortgagor pays interest to the mortgagee, or more strictly, such payment of interest continually checks the operation of the statute, *Doe* v. *Eyre* (28), *Doe* v. *Massey* (29) and *Ford* v. *Ager* (30), provided the adverse possession began after the creation of the mortgage: *Thornton* v. *France* (31). See also *Eyre* v. *Walsh* (32). It is worthy of note, however, that the decision of the House of Lords in *Heath* v. *Pugh* (33), upon which reliance is placed in *Aimadar Mandal* v. *Makhan Lal Dey* (19), is clearly distinguishable, because there the mortgagee had commenced his action to foreclose the mortgagor before the adverse possessor had been able to extinguish the equity of redemption; under these circumstances, it was ruled that for the purposes of an action in ejecment by the mortgagee, who had become full owner, time must be taken to run against him from the date when his title was perfected. In the case before us, the certificate proceedings, even if they be assumed to be proceedings for enforcement of the

(17) W. R. Gap. No. 875 (1864).
(18) L. R. 9 I. A. 99; s. c. I. L. R. 5 All. 1 (1882).
(19) I. L. R. 33 Cal. 1015; 10 C. W. N. 904 (1906).
(20) 8 Mad. L. T. 377; 8 I. C. 264 (1910).
(21) 2 All. H. C. R. 223 (1870).
(22) I. L. R. 25 All. 35 at p. 38 (1902).
(23) I. L. R. 2 Mad. 226 (1879).
(19) I. L. R. 33 Cal. 1015; 10 C. W. N. 904 (1906).
(24) 14 M. I. A. 101 at p. 110 (1871).
(25) 7 M. I. A. 323 at p. 352 (1859).
(26) I. L. R. 18 Bom. 51 (1893).
(27) 6 C. W. N. 601 (1901).
(28) 17 Q. B. 366; 85 R. R. 468 (1851).
(29) 17 Q. B. 373; 85 R. R. 493 (1851).
(30) 2 H. and C. 279 (1863).
(31) [1897] 2 Q. B. 143.
(32) 10 Ir. C. L. 346.
(33) 6 Q. B. D. 345 (1881); on appeal 7 A. C. 235 (1882).

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security, were not taken till the equity of redemption at least had been extinguished by adverse possession on the part of the landlords. The view may, therefore, well be maintained that the certificate-sale passed no title to the purchaser. That the question, however, is not free from difficulty, is obvious from the divergence of judicial opinion which has prevailed upon it, and in American Courts, where the question has been much debated, contrary views have been maintained. For instance, in *Dadmun* v. *Lamson* (34), *Menair* v. *Lot* (35) and *Glasen* v. *Haskins* (36), the view appears to have been taken that, as regards a third person not in privity with the mortgagor or mortgagee, the existence of the mortgage does not affect the character or effect of the adverse possession by him as against the mortgagee. On the other hand, in *Martin* v. *Jackson* (37), it was held that no adverse possession by the consent or connivance of a mortgagor can affect the mortgagee, unless it be so open as to give the latter notice that his rights are invaded. In so far as the Courts in this country are concerned, as we have already explained, there is a conflict of authorities, and if it were necessary for us to rest our decision on this point, we should have to consider whether the matter ought not to be referred to a Full Bench. In the view, however, we take of the first contention of the Appellants, it is clear that their appeal must succeed.

The result, therefore, is that this appeal is allowed, the decrees of the Courts below set aside, and the suit dismissed with costs in all the Courts.

(34) 9 Allen 85.
(35) 34 Miss 285; 84 Am. Dec. 78.
(36) 23 R. I. 601; 51 Atl. 219.
(37) 27 Pa. 584; 67 Am. Dec. 489.

CARNDUFF, J.—I agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 988 OF 1909.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1911,
Heard, 22, December.
1912,
Judgment,
19, January.

JANAKI DAS and others, Plaintiffs, Appellants,
v.
THE BENGAL NAGPORE RAILWAY Co., Defendant, Respondent.

Railways Act (IX of 1890), secs. 77, 140—Notice of claim to Goods Superintendent, if sufficient—Irregular sale of left goods, if conversion—Damage.

Held—*That the notice of claim for loss of goods despatched by rail given in this case to the Goods Superintendent did not comply with the requirements of secs. 77 and 140 of the Railways Act.*

Quære:—*Whether a failure to observe the provisions prescribed in the Railways Act with regard to sales of articles of which no delivery has been taken would make the sale an act of conversion by the Railway.*

This was an appeal preferred on the 15th of May 1909, against the decree of Mr. F. Roe, District Judge of Zillah 24-Pergunnahs, dated the 10th of February 1909, affirming the decree of Babu Raj Krishna Banerjee, Subordinate Judge of Alipore, dated the 10th of August 1908.

The Plaintiffs instituted this suit against the Defendant Company for the recovery of 580 maunds of rice together with 290 bags in which the rice had been packed or in the alternative for the price thereof. The goods in question had been despatched from Raigurh for delivery at Shalimar and the Plaintiffs' case was that out of

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the 290 bags only 288 arrived at the last-mentioned railway station, that Bhagat Ram their servant when he went to take delivery of the bags found two bags missing and others partly empty, that he asked the goods clerk to re-weigh the goods and to grant him a shortage certificate but this request was disregarded and the goods were wrongfully sold by the Company for Rs. 1,498 wherefrom the Company deducted Rs. 413-12 for wharfage and Rs. 329-4 for freight and remitted the balance Rs. 755 to the Plaintiff's solicitors.

The Defendant Company *inter alia* objected that the suit was barred by limitation under sec. 77 of the Railways Act, the goods having been delivered at Raigarh on the 11th January 1907 whereas the notice to the agent was not given till the 12th September 1907. The Plaintiffs, however, relied on a notice given by them to the Goods Superintendent on the 15th March which concluded as follows:—"Unless you forthwith comply with the request contained herein, our clients will hold the Railway Company liable for all loss which they may sustain for such non-delivery and they will not be liable to pay any demurrage for the goods owing to the default on the part of the Railway Company." The Subordinate Judge held that the Company was not bound to re-weigh the goods and give a shortage certificate, that sec. 77 of the Railways Act was a bar to the suit as regards the two missing bags and the shortage in the other bags. As regards the sale he found that it was not held after full 15 days' notice but he did not consider the irregularity to be of sufficient importance, and moreover found that the price fetched at the sale was not inadequate. In this view he dismissed the suit. On appeal the District Judge held that the letter to the Goods Superintendent was sufficient notice under sec. 77, Railways Act. On this point he observed :—

I take it that the Agent is not required to receive every such notice with his own hand and to sign receipt himself for every such notice. It is sufficient if the notice is received by an officer of the Company whose duty it will be to lay the matter before the Agent. Under Rule 57 of the Goods Tariff published by the Bengal Nagpur Railway we find that written claims must be made to the Goods Superintendent. Throughout the correspondence, we find the Goods Superintendent writing for the Company, offering terms for the Company, and finally on behalf of the Company making payments to the Appellants of the sum which he as the representative of the Company considers to be due. Surely the Company have placed themselves in the position that they cannot deny that the Goods Superintendent is the person who will receive on behalf of the Agent claims and notice of suits upon claims, and that for the purpose of all claims to compensation for damage and loss the Goods Superintendent is the representative of the Agent.

On the other points he affirmed the findings of the Subordinate Judge and in the result dismissed the appeal.

The Plaintiffs preferred this second appeal.

Mr. Hyam and *Babu Probodh Chandra Roy* for the Appellants.

Mr. S. P. Sinha and *Babu Monmatha Nath Mukherjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—On the 11th January 1907, the Plaintiffs delivered to the Defendant Company 290 bags of rice, weighing 580 maunds for carriage from Raigarh to Shalimar. The goods have not been delivered, and the Plaintiffs now claim either delivery of the goods or Rs. 2,280-10 by way of damages.

The Subordinate Judge dismissed the

suit and his decree was confirmed by the District Court. From this confirming decree the present appeal has been preferred.

As the case comes before us by way of appeal from appellate decree it is necessary to see what the facts are as found by the lower Appellate Court, for by its findings we are bound.

It is common ground that of the 290 bags all but 2 reached shalimar, and these 2 were lost.

The Plaintiffs' case is that the 288 bags that arrived were partly empty and according to the District Judge "their only real complaint is that the Goods Clerk refused to re-weigh the goods and issue a short-certificate." And the learned Judge goes on to say "On this we must find that the facts were that when the Appellant went to take delivery of the goods demurrage was due and that they refused to take delivery without re-weighment and also refused to pay demurrage. Clearly on such a finding the Railway Company were not bound to deliver the goods." Later in his judgment the District Judge says of the Plaintiffs: "They refused to take delivery of the goods which were consigned to them except on certain conditions with which the Railway were not required by law to comply. They demanded a re-weighment and a certificate of shortage. The Railway is not required by law either to re-weigh or to certify shortage."

The result then is that of the 290 bags, 2 were not delivered because they were lost, and non-delivery of the rest was due to the fact that the Plaintiffs would only take delivery on a condition they were not entitled to impose.

I will first deal with the two lost bags.

Where a Railway administration fails to deliver goods entrusted to it for carriage, it may be shewn that the goods were lost and then the provisions of Ch. VII of the Indian Railways Act, 1890, apply. Among those provisions is that contained in sec. 77 which enacts that "a person shall not be entitled to compensation for the loss . . . . . of goods delivered to be so carried unless his claim to the compensation has been preferred in writing by him or on his behalf to the Railway administration within 6 months from the date of the delivery of the . . . goods for carriage by Railway." By sec. 140 it is provided "any notice or other document required or authorized by this Act to be served on a Railway administration may be served, in the case of a Railway administered by the Government or Native State, on the Manager and, in the case of a Railway administered by a Railway Company, on the Agent in India of the Railway Company—"(*a*) by delivering the notice or other document to the Manager or Agent, or (*b*) by leaving it at his office, or (*c*) by forwarding it by post in prepaid letters addressed to the Manager or Agent at his office and registered under Part III of the Indian Post Office Act, 1866." The method of service permitted by this section has not been followed; nor has it been shown that the claim has been otherwise preferred to the Railway administration so as to satisfy the requirements of sec. 77.

The correspondence with the Goods Superintendent was manifestly insufficient for that purpose and on this point I accept the view of the Subordinate Judge in preference to that of the District Judge.

The suit therefore as to the 2 lost bags must fail on this ground.

The position as to the 288 bags is different. The inference suggested by receipt,

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Ex. I, is that each bag at the time of delivery to the Railway administrators contained 2 maunds and the discussion before us has proceeded on that footing.

Now it is no one's case that these 288 bags were lost, on the contrary they have been sold by the Railway Company. But though they were sold the weight of the rice sold was only 427 maunds and not 576 maunds, as it should have been. How there was this difference in weight has not been clearly explained, nor is there any definite finding by the lower Appellate Court on the point. There is however no suggestion that the Railway administration is in possession of the goods or that it has been guilty of wilful misfeasance in regard to them and the only inference appears to be that the difference in weight represents goods which have been lost or destroyed.

The position then would seem to be that the suit must fail either for failure to comply with the provisions of sec. 77 of the Indian Railways Act or because the goods were at the Plaintiffs' risk by reason of their failure to take delivery.

As to the rest of the goods, that is to say the 427 maunds, the position is this :— The goods were sold by the Railway Company as the Plaintiffs failed to take delivery, but in so selling the Railway Company failed to observe the provisions prescribed by the Indian Railways Act. The sale was therefore not in accordance with law.

But even if it be treated as a conversion, what is the consequence ? The Plaintiffs would be entitled to damages. But according to the findings of the lower Appellate Court no damages have been suffered.

Then it is objected by the Plaintiffs that the Railway Company was not entitled to deduct wharfage. This rests on their contention that the notification of the 3rd July 1902 was of no legal effect. But the Plaintiffs cannot be allowed to advance this argument at this stage for the first time seeing that it depends on proof of facts.

It clearly was not taken before the Subordinate Judge ; it is not to be found in the grounds of appeal to the District Court ; and there is no reference to it in the judgment of that Court.

The result then is that the decree of the lower Appellate Court must be confirmed with costs.

N. R. CHATTERJEA, J.—I agree.

Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 4979 OF 1911.

JENKINS, C. J. N. R. CHATTERJEA, J 1912, Heard, 9, January. Judgment, 19, January.	SURAJ MULL NAGAR MULL, Plaintiff, Petitioner, *v.* THE EAST INDIAN RY. CO., Defendant, Opposite Party.

Indian Railways Act (IX of 1890), sec. 47—Rules made by Railway Company, validity of—Sanction of Government and publication.

Upon the finding of the Small Cause Court that the rules of the East Indian Railway Company in question regarding the recovery of demurrage charges from consignees of goods despatched by the Railway, were made sanctioned and published as prescribed by sec. 47 of the Railways Act:

Held—*That there was no case for the exercise of the Court's power of revision with reference to the Small Cause Court's decision dismissing the suit for refund of demurrage charges paid.*

This was a Rule granted on the 28th of August 1911, against the order of the Babu J. N. Chuckerbutty, Small Cause

Court Judge at Howrah, dated the 27th of June 1911.

The suit was for refund of Rs. 93 which the Plaintiff was obliged to pay to the Defendant Company as demurrage for making a delay of 9 days in taking delivery of jute-bales sent from Badshapur to Howrah by Plaintiff's agent, on the allegation that the levying of the charge was unauthorized and illegal as the Rule under which the charge was levied was not framed by the Company and not sanctioned by Governor-General in Council and not published in the *India Gazette* in the manner provided in sec. 47 of the Railways Act.

The Defendant Company in defence produced a mass of documentary evidence. The Small Cause Court Judge after going through them came to the conclusion that the Rules of the Company were duly framed by the Company and approved by the Governor-General in Council and published in the *Gazette of India*, and that the Company is entitled to retain the demurrage charges levied by it from the Plaintiff. In this view he dismissed the suit.

Mr. Garth and *Babu Probodh Chandra Roy* for the Petitioner.

Messrs. S. P. Sinha, *Graham* and *G. B. McNair* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—In my opinion the Rule should be discharged. The Judge of the Small Cause Court finds on the evidence before him that the Rules under which the Railway Company acted were made sanctioned and published as prescribed by sec. 47 of the Indian Railways Act, 1890, and in the circumstances no case arises for the exercise of our powers of revision. The applicant should pay the costs of the application which we assess at one gold mohur.

N. R. CHATTERJEA, J.—I agree.

Rule discharged.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 4273 OF 1911.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
Heard, 10, January.
Judgment, 19, January.

THE BENGAL NAGPUR RAILWAY Co., Defendant, Petitioner,
v.
RAMPROTAB GONESHAM DASS, Plaintiff, Opposite Party.

Indian Railways Act (IX of 1890), sec. 47—Rules "made" by a Railway Company, what are—Sanction of Government—Publication—General rules framed by Government.

Rules adopted by a Railway Company though not originally prepared by it would satisfy the requirements of sec. 47 of the Railways Act, if they were subsequently sanctioned by the Governor-General in Council and published in the Gazette of India.

HARI LAL SINHA v. THE BENGAL NAGPUR RAILWAY Co. (1) *referred to.*

This was a Rule granted on the 28th of July 1911, against the order of Babu Nistaran Banerjee, Small Cause Court Judge at Sealdah, dated the 29th of April 1911.

The suit was brought against the Bengal Nagpur Railway Company for refund of wharfage charges alleged to have been illegally realised from the Plaintiff. The claim was laid at Rs. 158.

The Defendant admitted that the money was realised agreeably to the Rules of the Company.

The consignment in question arrived at its destination on 5th August 1910, and

(1) 13 C. L. J. 150; s. c. 15 C. W. N. 195 (1910)

THE

Calcutta Weekly Notes.

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NOTES.

IT HAS BEEN ANNOUNCED IN THE PUBLIC PRESS that Mr. Sivaswamy Iyer has been appointed a member of the Executive Council to the Governor of Madras in the place of the late Mr. Krishnaswamy Iyer. Mr. Sivaswamy Iyer is a vakil of long standing and high position in the Madras Bar and has for the last four years held the office of the Advocate-General of Madras. He has not the record of public life which Mr. Krishnaswamy had but for four years he did good work in the Madras Legislative Council where he represented the Madras University. He is one of the foremost lawyers of his province and we have no doubt that he will amply justify his appointment. In conferring this responsible office on him the Government has shown both wisdom and regard for the opinion of the educated community. While congratulating Mr. Sivaswamy Iyer on his elevation to this position of distinction, we would at the same time express our appreciation of the recognition of the principle, in Madras at any rate, that such appointments should go by merit and qualities of character and public service which would enable the recipient to command public confidence.

THE QUESTION AS TO THE PRINCIPLE ON WHICH costs in an action where there is claim and counter-claim should be awarded came up in a recent case before the Court of Appeal in England. The general principle on this question has been laid down by Lindley M. R. in the case of *Atlas Metal Co.* v. *Miller*, 2 K. B. (1898), p. 500. The principle laid down there is that the costs in respect of the claim or the counter-claim are to be awarded quite independently of the one or the other. That is, the party ordered to pay or receive the costs of the claim receives or pays the cost as if there was no counter-claim. On the other hand the party ordered to pay or receive costs in counter-claim pays or receives costs occasioned by the counter-claim. This latter would not include such costs as those for the issue of the writ or of other proceedings that were not actually incurred by the person counter-claiming.

Sharpe v. *Haggith*, IN WHICH THIS QUESTION came up, was a suit where the Plaintiff claimed damages for the sale of a business by fraudulent misrepresentation by the Defendant. The Plaintiff admitted however that £90 was due to the Defendant for the stock-in-trade and for which sum she pleaded that she was willing to give credit to the Defendant against the damages claimed. The Defendant counter-claimed £90 and the Plaintiff in defence to the counter-claim admitted the amount was due as stated above. The case was tried before Coleridge, J., with a jury and the jury awarded the Plaintiff only £50 as damages. Thereupon the Judge passed a judgment for the Defendant for £40 the nett balance due to the Defendant and gave costs against the Plaintiff. On appeal from this judgment Alverstone, L. C. J., and Vaughan Williams and Farwell, L. JJ., on the 19th of January last, reversed the judgment of Coleridge, J., and entered judgment for the Plaintiff for £50 and for the Defendant for £90 and ordered that Plaintiff was to get the costs of the claim and the Defendant of the counter-claim. This evidently follows the principle we have explained above. It is to be noted here that when the Plaintiff was successful in recovering damages it is quite reasonable that he should be entitled to the costs of his suit and it would be obviously unjust to saddle him with the whole of the costs. The Defendant, according rule above-stated, would only be entitled to the costs occasioned by the counter-claim. Of course there may be instances where the Plaintiff or the Defendant may be deprived of his costs in respect of the claim or the counter-claim. What we have stated above is the usual and ordinary practice.

HOW CRIMINAL PROCEDURE IS SOMETIMES PUT into operation for determining summarily people's

civil rights is illustrated by the proceeding under sec. 144, Cr. P. C., reported in I. L. R. 38 Cal. 876 (*Kamini Mohun Das Gupta* v. *Harendra Kumar Sarkar*). It is reported that the party first named, in February 1911, "commenced excavating a tank on his own land about 10 feet from his residential house, but the latter who had a house about the same distance from the western bank of the tank objected to the excavation on the ground that it would render his house unsafe." What particular form his objection assumed does not appear, but it is clear he did not carry his complaint to the law Courts, civil or criminal, but the local Sub-Inspector of Police felt compelled to intervene and report to the Sub-Divisional Magistrate that the parties were "contesting regarding the excavation of a tank" and that "if the tank is excavated then sooner or later the house of the first party which is adjacent to it will go down to its bed." Upon this, the Magistrate, moved no doubt by a genuine regard for the welfare of the parties, was induced to hold personal interviews with both and was satisfied therefrom as also from his "personal knowledge" and "local inspection" that there was a likelihood of the parties breaking the peace, and passed an order under sec. 144, Cr. P. C., forbidding further excavation of the tank and the exercise thenceforth by either party of any right of possession on the western bank of the tank.

THE OWNER OF THE TANK MOVED THE HIGH Court and obtained a Rule which was not contested by the other party. Their Lordships for reasons which are obvious held that sec. 144, Cr. P. C., was not intended for the purpose it had been made to serve in this case and observed that "if the Opposite Party had been so advised he might have obtained an injunction to prevent the Petitioner from continuing the excavation of the tank."

IT IS NO DOUBT TRUE THAT EVERY OWNER OF land has a right that his neighbour should not cause a subsidence of it by excavations on his own land; and when this being a natural right incidental to ownership, the land has been built upon or otherwise altered a right to the additional support called for may also be acquired by prescription or grant. In either case, however, according to English precedents, no cause of action arises until there has been subsidence or other damage, for the wrong consists not in the withdrawal of the support which the dominant tenement is receiving but in doing damage by means of such a withdrawal (*Blackhouse* v. *Bonomi*, 9 H. L. C. 503). It seems to follow from this that no injunction can issue to stop excavation merely because it is apprehended that there will be a subsidence or damage in consequence. This rule if strictly applied in all cases may at times result in great hardship and it remains to be seen, whether this rule of English law will be strictly applied in this country.

COTTON FIGURE GAMBLING IN CALCUTTA:

A growing evil of Calcutta has now assumed proportions which make it impossible to view the matter with indifference any longer. Within the last few months the whole city has been studded over with innumerable stalls where betting on cotton figures in carried on openly and publicly on a very extensive scale. People with scanty resources are risking their daily earnings and running into debt on account of this pernicious game. Even women and children in daily growing numbers are resorting to these places. It is high time, therefore, that Government should intervene to put an end to these dens of iniquity which are working the moral and material ruin of all classes of people. Gambling has not been a common vice amongst the people of this Province. We strongly object, therefore, to the gambling shops being allowed to corrupt the morals of our people and carry on a profitable trade in this new form of vice with the Police gazing on and the local Government holding its hands in apparent helplessness.

The game takes the shape of betting on the prices of cotton in America which are daily telegraphed by Reuter and other news agencies to this country. We are not quite sure of the *bonâ fides* of these transactions and from what we know of similar institutions we shall not be surprised to find dark truths disclosed if the methods of these people are subjected to a searching enquiry. But even assuming all that is professed by them to be true and assuming the whole business to be transacted in a fair and straight-forward manner, we are confident that this form of gambling ought to be put down with a strong hand in the interests of public morality and for the protection of the poor and ignorant people of Calcutta.

The game, to put it most mildly, is one of pure chance. What the last figure telegraphed from America will be can never be a matter of calculation or even of intelligent forecast at this distance. On principle there is nothing to distinguish it from lotteries such as are provided for by sec. 294A of the Indian Penal Code, or from the various kinds of gambling specified in the definition of "common gaming house" in the Bengal Gambling Act.

In Calcutta such matters are provided for by sec. 44 of the Calcutta Police Act (IV of 1866, B. C.). That section provides that an owner occupier, &c., of a common gaming house is liable to be punished and the succeeding sections provide for several matters of procedure and evidence. But there is no definition of common gaming house in the

Act itself. But these provisions of the Police Act are analogous to those of the Bengal Gambling Act (II of 1867, B. C.) and in the latter Act "common gaming house" has been defined as "any house, tent room, space, or walled enclosure in which cards, dice, table or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying or using or keeping such house, tent, room, space or enclosure whether by way of charge for the use of the instruments of gaming or of the house enclosure room or place or otherwise howsoever; or in which rain gambling, that is to say, wagering on the occurrence or non-occurrence of rain is carried on for the profit or gain of any such person." It is possible that this definition of gambling may be adopted by the Courts when they are called upon to interpret Part X of the Calcutta Police Act. In that case, the cotton figure dens cannot very well be dealt with under the present law.

It is therefore necessary that the Legislature should at once move in the matter and amend the law so as to put a stop to this evil. Indeed it seems that the whole law relating to betting, wagering and gambling is in a most unsatisfactory condition besides being spread over a number of Statutes in the most confusing manner. It is surely time that the law on this subject should be consolidated and placed on a more satisfactory basis by bringing together the divers provisions on the analogous subjects of lotteries, gambling and wagering and making provisions for other cases not dealt with by the existing law so as to effectively check the growing evil of gambling.

With reference to this particular evil legislation on the lines of the English Betting Act, 16 and 17 Vict., Cap. 19, may be suggested. Sec. 1 of that Statute provides as follows:

"No house, office room or other place shall be opened, kept or used for the purposes of the owner occupier or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier or keeper or person using the same or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto. . . . ." Some of the provisions of the Act which follow would be very effective to prevent and suppress the evil. Thus for instance it is an offence for the owner or occupier of a betting-house or any person assisting in the management of a betting-house to receive a deposit of any bet; and the exhibition or publication of any placard or advertisement showing that any house is used as a betting house and the sending of any letter, telegram, circular, placard with a view to betting are made punishable by secs. 7 and 3 of the Act respectively.

Legislation on these lines may easily be undertaken and we think that having regard to the rapid strides with which the evil has been growing, no time should be lost to pass a law to a similar effect, and we shall be happy to see the occasion availed of to remodel the entire law relating to gambling, betting and wagering so as to avoid confusion and place the whole thing on a rational basis.

Reviews.

A COMMENTARY ON THE BENGAL TENANCY ACT (VIII of 1885). *By M. Finucane, M. A., C. S. I., P. C., LL.D., and Ameer Ali (Syed), M. A., B. L., C. I. E., P. C. Second edition. Edited by J. Byrne, B. A., I. C. S., late Assistant Settlement Officer, Bihar Settlement. Calcutta: The Cranenburgh Law Publishing Press, 3 to 5, Bow Street. 1911.*

The first edition of this work appeared in 1904 and was noticed at some length in these columns. As we then observed this edition of the Bengal Tenancy Act contained certain features of great value which were not to be found in other editions. Since then some very important amendments of the Act were effected by Act I, B. C. of 1907 and Act I of 1908 of the Eastern Bengal and Assam Council. It would have been a matter for regret if a new edition of the book incorporating these amendments and the recent decisions on the provisions of the Act had been held over indefinitely. We are therefore glad to welcome this edition by Mr. Byrne who has brought it up-to-date both with reference to amendments by the Legislature and judicial decisions which he has digested with a very intelligent discrimination. We do not wish to repeat what we said of the commentaries in our notice of the first edition. But we think we ought to draw some attention to the appendices which should prove of great value to lawyers and judges and other officials concerned in the administration of the provisions of the Act. Appendix I reproduces notifications concerning the commencement and local extent of the Bengal Tenancy Act. Appendix II gives a list of enactments other than the Act which regulate agricultural tenancies in Bengal. Appendix III gives a statement of the agricultural years prevalent in different parts of the Provinces. Appendix IV gives a glossary of terms in Hindi and Bengali used in authorised translations of the Act, and a list of the many varieties of tenures, under-tenures and raiyati holdings prevalent in the different parts of the Provinces with full explanation thereof furnished from authorised sources. It need hardly be added that the rules framed under different provisions of the Act by the Governments of the two Provinces and the High Court are also given in the book.

THE INDIAN LIMITATION ACT (IX of 1908). *By Trekamlal R. Desai, B. A., LL. B., assisted by Rangrav B. Mogre, B. A., LL. B. Third edition. 1911. Bombay: The Lawyer Office, Girgaon. Price Rs. 3-8.*

The book originally intended for use by candidates for law examinations still retains its character of a students' manual, though in successive editions increasing attention appears to have been paid to the requirements of practitioners. The notes are necessarily brief. They are not and could not with profit to students be exhaustive so far as the case law is concerned. Nevetheless the book will be found useful by practitioners as book of ready reference.

THE LAW OF DISCOVERY. *By R. E. Ross, LL. B. London: Butterworth & Co., 11 and 12, Bell Yard, Temple Bar, Law Publishers. Calcutta: Butterworth & Co. (India), Ltd., 8/2, Hastings Street. 1912. Price 15s. = Rs. 11-4 net.*

Since Judge Bray's handbook on the Law of Discovery went out of print, the want of a comprehensive treatise on this important branch of law and practice has been keenly felt. His Honour Judge Bray was induced in 1904 to issue an abridged practice manual based on his previous treatise which has proved so useful that a new edition of it was called for in 1910. The book under notice contains a full and comprehensive treatment of the subject in its various branches, *viz.*, the principles and practice relating to Interrogatories, Discovery of Documents and Inspection of Documents in proceedings in the High Court and County Courts. The exposition of principles is marked by lucidity of statement as well as by clearness of arrangement, and they are illustrated by facts and extracts from judgments which should make the book of special value to lawyers in this country who may not find the original reports always within reach. In two Appendices the rules of the High Court and of the County Courts are reproduced with forms. At the end of each chapter is added what is described as "Canadian notes" for the use of legal practitioners in Canada. We have no doubt that the book will be appreciated wherever the English procedure for trial of cases obtains.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.
(The important ones to be fully reported hereafter).

CIVIL APPELLATE JURISDICTION. Before COXE, J. APPEAL FROM APPELLATE DECREE No. 1130 OF 1909. ARJUN RAM PAL, Plaintiff, Appellant *v.* ROHIMA BANU AND OTHERS, Defendants, Respondents. Heard, 29th January. Judgment, 6th February 1912.

Acknowledgment—Mortgage—Parties—Debt acknowledged by a party, if binds another.

The suit was on a mortgage executed by one Akram on the 20th August 1895. The due date was the 28th November 1895, and the suit was instituted on the 28th November 1907. The Defendants Nos. 6 to 12 who claimed through Akram's daughters, were made parties more than 12 years after the due date. The delay was due to the Plaintiff's laches. The Plaintiff obtained a partial decree with which he was dissatisfied and hence the appeal.

In appeal it was contended that limitation was saved by a payment of interest by Akram's widow.

Held—That as Defendants Nos. 6 to 12 did not claim through the widow but through the daughter, the payment by the widow would not save limitation against the daughter, much less against the purchasers from the daughter. Hence the Plaintiffs could not get a decree to sell the land in the possession of those Defendants in satisfaction of his mortgage.

Babu Brojendra Nath Chatterjee for the Appellant.

Babu Harendra Narayan Mitter for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before COXE and IMAM, JJ. APPEALS FROM APPELLATE ORDERS Nos. 80 TO 84 OF 1910. NAND LAL MARWARI, Defendant, Appellant *v.* RAMPAL SING AND OTHERS, Judgment-debtors, Respondents. 6th February 1912.

Acknowledgment—Limitation Act (IX of 1908), sec. 19—Insolvency petition—Decrees mentioned in schedule.

The five appeals arose out of as many applications for execution of decrees which were held by the lower Appellate Court to be barred by limitation. The decree-holder appealed.

The decree-holder filed applications for execution in July 1905. An application was made by the judgment-debtor Rampal on the 14th May 1906 to be declared an insolvent. In March 1909, the present applications for execution were filed. The judgment-debtor in his application for insolvency mentioned that four other decrees of Nandlal were still existing. Those four decrees were in execution.

Held—That as the existence of the decrees was acknowledged by the judgment-debtor in his petition of the 14th May 1906, the period of limitation was extended and the decree-holder was entitled to proceed with his execution against the acknowledging judgment-debtor.

Babu Monmatha Nath Mukherjee for the Appellant.

Babu Kshetra Mohun Sen for the Respondents.

A. T. M. *Appeal allowed against Rampal, but dismissed as against others.*

THE BENGAL NAGPUR RAILWAY CO. *v.* RAMPROTAB GONESHAM DASS.

Plaintiff obtained delivery of the goods on 9th August 1910, on payment of freight and other charges legally payable. The goods, however, were not removed from the Railway premises till 27th August. This the Plaintiff was allowed to do on payment of wharfage or godown rent. The delay in the delivery of the goods and their removal from the godowns was due to some dispute between the parties, the Plaintiff insisting on the weighment of the goods. The Defendant Company objecting to the same.

The Plaintiff claimed the refund on the ground that the Railway Company could not legally recover wharfage under the Rule relied upon inasmuch as they were not made and published in the *Gazette of India* in the manner prescribed by sec. 47 of the Act.

The trial Judge held that the Rules were not made as contemplated by the Act by the Railway Company. Nor were they published as such in the Gazette and he accordingly decreed the suit.

The Defendant Company thereupon moved the High Court and obtained this Rule.

Mr. Bagram and *Babu Monmatha Nath Mukherjee* for the Petitioner.

The Opposite Party appeared in person.

THE JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J,—This application arises out of a suit brought against the Bengal Nagpur Railway Company for the refund of wharfage charges alleged by the Petitioner to have been illegally realised from him.

A decree was passed against the Railway Company in the Petitioner's favour.

The Railway Company then obtained a Rule under sec. 25 of the Provincial Small Cause Courts Act, 1887, questioning the validity of the decree, and it is with that application that we are now concerned.

Having regard to the circumstances of the case and the materials on the record the only point that arises for decision is whether Rules have been made, sanctioned and published as prescribed by sec. 47 of the Indian Railways Act, 1890, which entitled the Railway Company to make the wharfage charges claimed by them.

Sec. 47 provides that "every Railway Company . . . . . shall make general Rules consistent with this Act . . . . . for regulating the terms and conditions on which the Railway administration will warehouse or retain goods at any station on behalf of the consignee or owner." It is however enacted by sub-sec. (3) that a Rule made under this section shall not take effect until it has received the sanction of the Governor-General in Council and been published in the *Gazette of India*.

The Rules on which the Railway Company relies are those which were published in the *Gazette of India* on the 3rd of July 1902, and those Rules were sanctioned by the Governor-General in Council.

But the question is whether they were made by the Railway Company.

Rules adopted by the Railway Company, though not originally prepared by it, would come within this description, and Rules so adopted, if then sanctioned by the Governor-General in Council and published in the *Gazette of India* would satisfy the requirements of sec. 47.

It is not clear that the learned Judge considered the case from this point of view. Moreover he appears to have regarded the decision in *Hari Lal Sinha*

v. *The Bengal Nagpur Railway Co.* (1), as in some measure governing this case.

But that is not so: that case came before the High Court on a reference under sec. 69 of the Presidency Small Cause Courts Act, with the limitations that procedure implies, and the decision turned wholly on the finding of the Small Cause Court that it had not been proved that these were Rules made, sanctioned and published as required by the Act.

Here, on the other hand, the question is whether the Rules were so made, sanctioned and published, and this question must be considered afresh by the Court of Small Causes in the light of the above remarks.

It is to be regretted that any doubt on this point should be permitted to continue.

The remedy is simple and it may reasonably be hoped that it will be applied, so that Railway Companies may be spared the expense and annoyance of that class of litigation of which the present suit is a type.

The Rule is therefore made absolute, the decree of the Small Cause Court is set aside, and the case sent back to the Small Cause Court for a fresh hearing in the light of the above remarks. The parties will be at liberty to adduce further evidence for the purpose of establishing or negativing the identity of the Rules (if any) made by the Railway Company with those sanctioned and published; and I would here remark that it is not necessary, as the learned Judge seemed to suppose, that this identity should appear on the face of the Circular or the Gazette.

The costs of this application, which we assess at two gold mohurs, and of the suit up to this stage will abide the result of the re-hearing.

N. R. CHATTERJEA, J.—I agree.

Rule made absolute.

(1) 13 C. L. J. 150; s. c. 15 C. W. N. 195 (1910).

[PRIVY COUNCIL.]

[APPEAL FROM CENTRAL PROVINCES.]

LORD MACNAGHTEN.
LORD SHAW.
LORD MERSEY.
MR. AMEER ALI.
1911,
Heard, 27, 28 and 29, June.
1912,
Judgment, 16, January.

BIR BIKRAM DEO, Appellant,
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL*, Respondent.

Zemindars of Central Provinces, status of—British subjects with delegated Judicial and Police powers not feudatory chiefs—Resumption of Police and excise functions—Abolition of private pounds—Suit by zemindars in Civil Court, questioning legality—Executive acts—Zemindars, removal of, forfeiture of their privileges, discontinuance of nazarana, *provisions as to, in* wajib-ul-arz, *if legal—Jurisdiction of Civil Courts.*

In 1864 when certain petty chiefs of the Central Provinces were declared to be feudatory chiefs and the rest were classed as non-feudatories and declared to be ordinary British subjects certain judicial and administrative powers were entrusted to the latter or left in their hands as a matter of convenience or economy of administration. These zemindars in exercising Police and excise functions were not acting as of right but were so acting either by sufferance or by delegation. The resumption of these functions by the Government was a thing done

* Several other appeals by other zemindars against the Secretary of State for India in Council, and cross-appeals by the Secretary of State for India in Council were consolidated and heard together.

by the Government in exercise of sovereign powers and no action was maintainable in a Civil Court in regard to such resumption.

The maintenance of private cattle-pounds is incompatible with the provisions of the Cattle Trespass Act, and the establishment and maintenance of cattle-pounds under the superintendence and control of Government officials empowered to obtain the assistance of the Police when required may be considered essential for the maintenance of law and order and the peace and good Government of the country, and therefore an act of the Executive Government with which it is not competent for the Civil Court to interfere.

Where such non-feudatory zemindars accepted a fresh assessment of the takoli *or revenue payable by them to Government under sec. 54 of the Central Provinces Land Revenue Act (XVIII of 1881) for 11 years from 1st July 1890 to 30th June 1901 or until a fresh settlement was made, and agreed to be bound by all the conditions of the* wajib-ul-arz *of their zemindari as laid down by Government; and at the new settlement of May 1903, the zemindars were required to execute* wajib-ul-arzes *which amongst other things provided for the resumption of the Police and Excise administration and cattle-pounds by Government and also provided for the removal of zemindars and forfeiture of their privileges and the discontinuance of* nazarana *on grant or renewal of leases, and the zemindars executed the* wajib-ul-arzes *as required but under protest:*

Held—*That the resumption of the Police and Excise administration and of cattle-pounds by Government could not be questioned by Civil Courts, but the District Judge's decree cancelling the clauses relating to the removal of the zemindars and the forfeiture of privileges as also concerning the discontinuance of* nazarana *on the grant or renewal of leases was proper.*

These were consolidated appeals from judgments and decrees of the Court of the Judicial Commissioner of the Central Provinces, dated the 14th May 1907, which reversed and modified judgments and decrees of the Court of the District Judge of Raipur, dated the 6th August 1906.

The appeals raised for determination the question of the rights and privileges of the Chiefs of the following States, *viz.* :—1. Khariar, 2. Suarmar, 3. Dhondi Lohara, 4. S. Narra, 5. Fingeshwar, 6. Sahaspur Lohara, 7. Parpodi, 8. Bindra Nawagurh.

It will be convenient to set out in the first place the nature of the litigation relating to the State of Khariar.

The Chief of Khariar was one of the Sambalpur Garhjat Chiefs. At first they were independent, then they held in subordination to the most powerful of their number the Maharaja of Patna. In later times the Maharaja of Patna was forced to share his supremacy among the Chiefs with the Maharaja of Sambalpur and this was the situation when all fell under the dominion of the Mahrattas in the year 1755 as tributaries. In the year 1818, the Garhjat States were ceded to the East India Company and in the year 1862 they were placed under the control of the Chief Commissioner for the Central Provinces.

On cession to the East India Company a small tribute was exacted from each State which for a great many years was unaltered while the judicial and executive administration of each State remained without any interference in the hands of the Chiefs. In the year 1863, enquiries were instituted by the Government of India in regard to the status and position of the various Chiefs. The result of these

enquiries is incorporated in correspondence between the Chief Commissioner of the Central Provinces and the Supreme Government. It began with a report of the Chief Commissioner, dated the 31st October 1863, and ended with the final orders of the Governor-General in Council, dated the 3rd April 1865, by which it was decided that while certain of the Chiefs should be regarded as feudatories and possessing sovereign powers the remaining Chiefs including all the parties to the present appeal should be classified as ordinary subjects.

No attempt was then made to determine the rights, privileges, powers or authority of the latter class of Chiefs in the Raipur Division nor was their position defined at the time of the settlement of the Central Provinces made in the year 1869. In regard to the Chanda zemindaris, an arrangement was made and the status and rights of these zemindars was settled by a document known as the Chanda Patent.

On the 25th November 1874, a *sanad* was granted by the Chief Commissioner to the zemindar of Khariar confirming his proprietary rights "subject to the payment of such land revenue and cesses as may from time to time be assessed according to the terms of settlement and to the conditions specified in the Administration Paper and other Settlement Records." As a matter of fact, however, no conditions had been so specified, for no Administration Paper had been prepared in regard to Khariar at the Settlement of 1869.

In the year 1892, another settlement was made and an Administration Paper was then prepared. In the year 1903, a further settlement was made and in the new Administration Paper the Settlement Officer made various amendments and alterations to the prejudice of the rights of the zemindar, which caused him on the 6th May 1904 to institute the first of the present suits in the Court of District Judge of Raipur. The clauses objected to were

Part I. Clause 3. Removal of zemindar and forfeiture of privileges.

Clause 6. Ferries and pounds.
" 7. Forests.
" 10. Mines.

Part II. " 2. *Nazarana.*
" 11 (1). Forests within the boundary limits of villages.

Clause 7. Power to dismiss a Kotwar.

" 15. The right to appropriate the income from the hides of dead cattle.

The plaint after reciting the matters already mentioned claimed the following relief, *viz.*: a declaration that the Plaintiff was not bound by the said provisions in the Administration Paper.

The Defendant to the suit was the Secretary of State for India in Council on whose behalf a written statement in defence was lodged. The nature of the pleas sufficiently appears from the following issues which were fixed by the District Judge.

1. Did the treaty of 1826, between the Honourable the East India Company and the Bhonsla Raja entitle the Honourable Company or their successors to confiscate the private rights of persons living in the territories ceded by that treaty?

2. Did the zamindars enjoy the rights the subject-matter of suits as of right and independently or by sufferance or by delegation from the Defendant?

If so, for what period were the rights so enjoyed?

3. Can the Defendant confiscate or modify any rights enjoyed by any persons in the ceded territories by executive order or is any legislative enactment necessary for the modification of such rights?

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4. Have the zamindars acquired the rights claimed in the suits by adverse possession for more than 60 years?

5. Were the zamindars informed that they were allowed to exercise the rights claimed either by delegation of Government authority or by sufferance?

When was such intimation given to the zamindars and how?

6 Did the Defendant ever object before 1903 to the zamindars exercising any of the rights and privileges claimed in the suits?

7. What rights and privileges were exercised by the zamindars at the grant of the *sanad* dated 25th November 1874?

8. What rights were conferred on the zamindars by the *sanad* dated 25th November 1874?

Did the *sanad* in any way affect the rights and privileges exercised by the zamindars before that date? And what were the rights which were so affected?

9 Did the zamindars or any of their predecessors in title ever acknowledge that they exercised the rights claimed in the suits under the terms of the Chanda Patent subject to certain modification as stated in para. 5 of the Defendant's written statement?

10. What is the effect of such acknowledgment?

How far are the parties bound by the Chanda Patent with its modifications?

11. What modifications were made in the Chanda Patent at the time the Patent was ordered to be issued or soon after or before it was accepted and acknowledged by the zamindars in order to make it applicable to the Raipur zamindars?

12. Is the Defendant entitled to make any further modifications in the Chanda Patent after it was issued, and understood by the zamindars to be binding on them?

13. Were the terms of the Patent in its amended state embodied in the *wajib-ul-arz* for 1889, 1892 and 1903 with or without any modifications?

Has the Defendant any right to modify the terms of the amended Chanda Patent?

14. Is the cl. 3 of Part I of Mr. Scott's *wajib-ul-arz* in accordance with the Patent and is it binding on the zamindars?

15. Are the provisions in the *wajib-ul-arz* relating to ferries and pounds in accordance with the provisions of the Ferries and Cattle Pounds Acts? And are they binding on the zamindars?

16. Is the provision relating to forest made in Part I, cl. 7 and Part II, cl. 11, sub-cl 1 of the *wajib-ul-arz* in accordance with the amended Patent and the Land Revenue Act, and is it binding on the zamindars?

17. Is the provision relating to minerals contained in Part I, cl. 10 of the *wajib-ul-arz* consistent with the Land Revenue Act, sec. 151, and the amended Chanda Patent, and is it binding on the zamindars?

18. Is the provision relating to the payment of *nazarana* contained in Part. II, cl. 2 of the *wajib-ul-arz* beneficial to the zamindars?

Can it be retained in face of the zamindar's objection or should it be declared to be not binding on them?

19. Is the provision relating to Kotwars made in Part II, cl. 7 of the *wajib-ul-arz* in accordance with the provisions of sec. 147-A of the Land Revenue Act, and the rules made thereunder?

Is it binding on the zamindars?

20. Were the zamindars in receipt of profits arising from the sale of hides and bones of cattle dying in their zamindaris?

Is the Settlement Officer justified in introducing a provision in respect to the matter in Part II, cl. 15 of the *wajib-ul-arz*?

Is the clause of the *wajib-ul-arz* binding on the zamindars?

21. Are any of the provisions in the *wajib-ul-arz* repugnant to the terms of the amended Chanda Patent held applicable to the Raipur zamindars?

22. If so, are the provisions binding on the zamindars?

23. Are the Acts passed by the Legislative Department of the Government of India not specifically extended to the scheduled districts binding on the Raipur zamindars?

24. Is the Land Revenue Act binding on the Raipur zamindars, and do they hold their estates subject to it and to rules made thereunder?

25. Does the Land Revenue Act not affect any of the vested rights and privileges of the zamindars?

26. If it does, is it *ultra vires*, and did it transgress the legislative powers of the Government of India?

27. Was Mr. Scott, the Zamindari Settlement Officer, justified in making or legally authorised to make the entries in the *wajib-ul-arz* referred to in para 6 of the plaint and are the zamindars bound by such entries?

28. Are any of the entries in the *wajib-ul-arz* prepared by Mr. Scott superfluous, or made in contravention of any Acts of Legislature?

29 Are the zamindars entitled to the declaration sought?

30. Did the zamindars enjoy the privileges and the rights the subject-matter of suit as of right and independently or by sufferance or by delegation from the Native Rulers before the acquisition of the Raipur District by the Defendant?

If so, for what period were the rights so enjoyed?

31. How did the acquisition of the District by the Defendant affect the rights and privileges in dispute of the zamindars?

Did the enjoyment of such rights and privileges by the Plaintiff become dependent upon and subject to the pleasure of the Defendant after such acquisition?

32. If the Defendant could confiscate the rights and privileges of the Plaintiff at the time of the acquisition of the district, did the Defendant confiscate such rights and privileges? Or did the Defendant signify or inform the Plaintiff at or about the acquisition of the territories that the exercise of such rights was subject to, and dependent upon his pleasure?

33. If the Defendant did not confiscate the rights and privileges, and did not intimate to the Plaintiff that his enjoyment thereof had become permissive and subject to the pleasure of the Government, can the Defendant now withdraw the rights and privileges from the Plaintiff so long enjoyed?

After recording evidence which was entirely documentary the District Judge delivered his judgment on the 6th August 1906. He decided that this Zemindari was not held on the terms and conditions provided by the Chanda Patent and that, of the alterations made in the Administration Paper, all were binding on the Plaintiff except cls. 3 and 7 of Part I. A formal decree was accordingly made.

Against the said decree both parties appealed to the Court of the Judicial Commissioner of the Central Provinces, who disposed of both the said appeals by one judgment delivered on the 14th May 1907. The said Court allowed the appeal of the Plaintiff so far as it related to pounds in cl. 6 of Part I of the Administration Paper; and allowed the appeal of the Secretary of State in regard to cl. 7 of Part I. In other respects it affirmed the judgment of the District Judge, and made a decree accordingly.

Against the decree of the Court of the Judicial Commissioner the Plaintiff, Bir Bikram Deo, appealed to His Majesty in Council.

The second of the suits was instituted by the Zemindar of Khariar on the 5th August 1904 in the Court of the District Judge of Raipur in consequence of Orders of the Government of India removing as and from the 1st September 1892 the management and control of the Police from the Zemindar, and further Orders of the Government of India depriving the Zemindar of his revenue from excise as and from the 1st April 1894. The plaint after reciting the rights of the Zemindar claimed as relief a declaration that the action of the Government of India in connection with the Police and Excise was illegal; the recovery of Rs. 1,656 illegally levied from the Zemindar towards the cost of Imperial Police; an account of the profits derived from excise by the Government and the recovery of Rs. 3,100 as profits for the year 1903-1904.

The Defendant the Secretary of State for India filed a written statement and on the pleadings the District Judge fixed the following issues:—

1. How have the Raipur zamindaris come to be incorporated in the Central Provinces of British India?

Were they ceded to the British Government in 1818?

2. What, if any, was the effect of such cession on the zamindārs' rights in suit?

3. Were the zamindars exercising the Police and Excise rights at the time of cession?

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If so, for how long were the rights exercised?

4. Were the rights exercised as of right or were they exercised on sufferance or at the pleasure of the then sovereign power before and after the cession?

5. What was the effect of the conferral of the proprietary rights on the zamindars on their rights in suit?

6. Was the conferral of the proprietary rights subject to the Chanda Patent?

7. Does the fact that the said Chanda Patent was not issued to or accepted by the zamindars render the Chanda Patent inoperative against them?

8. Was the fact that the conferral of proprietary rights on the zamindars was subject to the terms of the Chanda Patent communicated to them, and did they accept the terms?

9. Was the *sanad*, dated the 25th November 1874, conferring proprietary rights on the zamindars subject to the Chanda Patent?

Is there anything in the *sanad* of 1874 to give notice to the zamindars of the conditions subject to which it was issued and to the Plaintiff who succeeded to the estate in 1889?

10. If there was no such notice to the zamindars, what is the effect of want of such notice on the rights of the zamindars in respect of the subject-matter of dispute?

11. Was the resumption of the Police and Excise administration from the hands of the zamindars by the Defendant made by the Government in its executive capacity and in the exercise of its sovereign powers?

Is a suit on that account not maintainable?

12. Is the resumption of the Police and Excise rights by the Government in its executive capacity legal, and has this Court no power to declare its illegality?

13. Is the right of the zamindars to maintain the Police force illegal under Act V of 1861?

Does that Act apply to the Raipur zamindari?

14. Is the administration of Excise by the zamindars within their estates illegal under Act XXI of 1856, Act X of 1871 and Act XXII of 1881? And how far are these Acts or any of them applicable to the zamindaris?

15. Are the zamindaris scheduled under Act* XV of 1874?

If so, how far do the Police and Excise Acts mentioned by the Defendants apply to them?

16. Is the recovery of the amount of the Police contribution included in the *takoli* payable by zamindars illegal?

17. Is the question of the legality or propriety of the payment on account of Police charges beyond the jurisdiction of this Court?

18. Are the zamindars entitled to the net profits realized by the Defendant from the administration of Excise in their estates?

If so, what amount has been thus recovered from the several zamindaris?

19. Is the suit barred by time?

20. Was the inclusion of the Excise and Police rights in the Chanda Patent by the Government in excess of its powers?

If so, is the Defendant justified in resuming them on that ground?

After recording evidence which was only documentary the District Judge delivered judgment on the 6th August 1906, and decided that the Chanda Patent was not binding on the Zemindars, that the exercise of police and excise rights by the Raipur Zemindars after the cession of the Gurhjat States to the East India Company was not by virtue of any right but that the rights were exercised on sufferance or by delegation from the sovereign power and that the act of resumption of the excise and police administration by the Government was an act done in the exercise of its sovereign powers. He therefore held that the suit was not maintainable. He was also of opinion that the legality of the additional assessment on account of the cost of the police could not be considered by a Civil Court in consequence of sec. 151, cl. 3 and cl. 10 of the Central Provinces Land Revenue Act. He further decided that the suit was barred by Art. 120, Sch. II of the Indian Limitation Act. In accordance with the above findings he made a decree dismissing the suit with costs.

* Sic.

Against their decree the Plaintiff appealed to the Court of the Judicial Commissioner for the Central Provinces and on the 14th May 1907 the Judicial Commissioner delivered his judgment. He decided that the suit was not barred by limitation and that the Civil Courts were precluded by the provisions of the Land Revenue Act from considering the validity of the extra assessment for cost of police. He however was of opinion that the rights claimed by the Plaintiff in regard to the administration of police and excise had been validly granted to him and were incapable of resumption by executive act. He accordingly made a decree modifying the decree of the District Judge granting the Plaintiff the declaration prayed for and directing the repayment to him of the profits from excise for the year 1903-1904. The full text of the judgment is as follows :—

"This and the cross-appeal (No. 61 of 1909) arise out of a suit (No. 6 of 1904) brought by the zemindar of Khariar in the Raipur District against the Secretary of S ate for India in Council. The object of the suit was to obtain cancellation of certain clauses in the *wajib-ul-arz* sanctioned for zemindari in Revenue Secretariat letters No. 2390, dated the 25th April 1902, and No. 1244, dated the 18th March 1903. A copy of this document will be found printed as Ap. XIII to the 'Report on the Land Revenue Settlement of the zemindari Estates in the Raipur District effected during the years 1899—1902.'

"The plaint begins by alleging that before the advent of British Rule the Plaintiff's ancestors were sovereign rulers and that when the zemindari was transferred to the Central Provinces in 1862 the zemindar was still in active enjoyment of various rights and privileges detailed in a separate list. In 1865 the British Government, when deciding the status of many important landholders, divided them into two classes, namely, Feudatory Chiefs and Non-feudatory Chiefs. The zemindar of Khariar fell into the latter and inferior class, but he was not otherwise interfered with. On the 25th November 1874, a *sanad* recognizing the zemindar's proprietary rights was issued with the permission of the Government of India. The zemindar continued to exercise the aforesaid rights and privileges till the 1st September 1892, when the British Government took over the right of managing the local police and levied from him an annual sum of Rs. 1,656 on account of maintaining the necessary force. On the 1st April 1894 the same Government took over the administration of all excise matters, proposing to pay as compensation the inadequate sum of Rs. 3,000 yearly. The *wajib ul-arz** framed at Carey's Settlement (1885—1889) contained nothing inconsistent with the *sanad* of 1874 or incompatible with the continued enjoyment of the aforesaid rights and privileges; but the corresponding document of 1902 is of a very different character, being inconsistent with the *sanad* of 1874. Further, the clauses complained of are invalid because they prevent or tend to prevent the enjoyment of the aforesaid rights and privileges and are such as could not legally be prescribed without an express enactment in that behalf. The serial numbers and the subjects of these clauses are as under :—

In Part I.

3. Removal of zemindar and forfeiture of privileges.

* Page 183—185 of the printed report as first published in 1891.

6. Provision that the zemindar be given reasonable compensation, if it is considered expedient at any time to assume the management of ferries and pounds.

7. Provision that the forest *mahals* shall be managed in accordance with rules framed by the Chief Commissioner under sec. 124-A, Land Revenue Act.

10. Declaration that all minerals are the property of Government.

IN PART II.

2. Direction that the zemindar shall discontinue the practice of levying *nazarana* on grant or renewal of leases.

7. Declaration that the appointment, suspension and removal of village watchmen (kotwars) are governed by the rules framed under sec. 147-A, Land Revenue Act.

11 (*i*). Direction that forest lands not included in forest *mahals* be managed in accordance with any rules which may be made by the Chief Commissioner.

15. Declaration that the hides and carcases of dead cattle are the property of the respective owners of the cattle.

"The defence and other pleadings are set out at length in the lower Court's judgment, and I think it unnecessary to recapitulate them here in detail. The gist of the defence seems to be that the British Government were not bound to and did not on acquiring the zemindari recognize the zemindar permanently and indefeasibly as possessing the rights and privileges mentioned in the annexure to the plaint; that those rights and privileges were in fact exercised on sufferance or by delegation and subject to the pleasure of Government as declared from time to time; that the zemindar is bound by terms identical with those of a document known as the "Chanda Patent" (modified in a detail not material for present purposes); that the *sanad* of 1874 was expressly granted subject to those terms; and that none of the clauses complained of were invalid either as being illegal or as infringing any indefeasible right of the Plaintiff.

"No fewer than 33 issues were framed, but the evidence to be considered is wholly of a documentary nature and the lower Court came to a decision on issues 9—12, 14—20 and 23—29 only. The decree passed declared cls. 3 and 7 in Part I and cl. 2 in Part II of the *wajib-ul-arz* of 1902-03 not to be enforceable against or binding upon the Plaintiff and directed their deletion. For the rest the claim was dismissed. Both sides have come up in appeal.

"Dealing first with the Plaintiff's appeal, I observe to begin with that the 11th ground was not pressed in argument. Khariar is a Scheduled District appearing as serial No. 1 in Part VI of the first schedule to Act XIV of 1874. As originally framed the second sentence of sec. 1, Land Revenue Act, included the words and figures 'except those specified in Part VI of the first schedule of the Scheduled Districts Act, 1874,' which were repealed by the amending Act, No. XVI of 1889. It follows that since the 29th October 1889, when the last-mentioned Act came into force, the Land Revenue Act, 1881, has been running in Khariar.

"*4th, 16th and 17th grounds.*—Following the order of the arguments advanced by the Plaintiff's learned counsel I take up next the 4th, 16th and 17th grounds of appeal. The argument here is that the *wajib-ul-arz* or administration paper referred to in sec. 77 (*d*) of the Land Revenue Act is identical with the record-

of-rights prescribed by sec. 79 *ibid.*; that the entries complained of do not represent the outcome of inquiries made under Chap. VI of the Act; that no rules of the kind contemplated by sec. 79 (*b*) *ibid.* have been made; that consequently the clauses in question could not legally be included in the *wajib-ul-arz*; and that the form of Chaps. III—VI indicates that the procedure therein laid down was not intended to apply to zemindaris. I do not think there is any substance in the last part of this contention. For Settlement purposes a zemindari is treated simply as an aggregate of villages; the assets of each village are determined and made the basis of a *kamil jama*, *i.e.*, the revenue which would be payable if the village were an ordinary *malguzari* one; and finally a certain share of the aggregate of these *kamil jamas* is made payable by the zemindar in the shape of what is technically called a *takoli*: see para. 157 of Carey's and para. 3 of Scott's Settlement Report. The term "mahal" as defined in sec. 4 (7) of the Land Revenue Act is a perfectly general one and may therefore be applied to a zemindari as a whole. In the absence then of anything to indicate that the Settlement of 18-9—1902 was not effected under the Land Revenue Act I would assume that it was so effected. That the administration paper and the record-of-rights are not identical seems clear from sec. 80 of the Act read with paras. 278, 279, 280 and 266 of the Settlement Code, and also from the fact that two such different expressions are used in sections so close together. The results of inquiries prescribed by secs. 68—70 and 72 must find place in the record-of-rights, which moreover is to consist of 'papers,' not of only one paper; but it is certainly not the practice to include in the *wajib-ul-arz* the results of inquiries under those sections, the obvious place for recording those particular results being the *khewat*, *khasra*, *jamabandi*, etc. The fact, however, remains that there is no section except No. 79 which gives the Settlement Officer power to make entries in any part of the record-of-rights. Rules under sec. 79 or sec. 80 to have the force of law must be published as required by sec. 162 and admittedly no such rules have yet been so published: see in this connection para. 2 of the preface to the Settlement Code. On the 27th issue the lower Court treated sec. 77 as giving power to prepare the administration paper, whereas it does no more than authorise the determination of certain disputes. On the 28th issue the view taken seems to be that inasmuch as the Chief Commissioner sanctioned the *wajib-ul-arz* in the Secretariat letters above cited all entries in it were legally made. I am unable to concur in this view, and I hold that, failing effective rules of the kind contemplated by sec. 79 (*b*), no clause in the *wajb-ul-arz* can be justified unless it embodies a result of the kind covered by sec. 79 (*a*). This conclusion does not, however, help the Plaintiff; for unless his suit relates to entries as to matters referred to in sec. 78 and so comes within the scope of sec. 83 it is incompetent, inasmuch as sec. 152 (*b*) (8) deprives the Civil Court of jurisdiction over the formation of the record-of-rights. In short, as I understand the position, the Plaintiff's suit would have to be dismissed altogether, if it were once conceded that the clauses in the *wajib-ul-arz* of which he complains do not embody decisions as to matters referred to in sec. 78. He certainly did not

plead in the lower Court that the clauses were not the outcome of inquiries, and it is too late for him to raise such an objection now.

"*14th ground*.—The 14th ground seems to me to state what the law is without thereby furnishing much aid to the decision of the present dispute. If a particular right was expressly or impliedly granted by the British Government to the zemindar, it certainly could not be taken away otherwise than by legislation or by agreement. And it is a rule of interpretation that when an enactment changes or takes away rights it is not to be construed as affecting existing rights, unless there are express words to that effect: *Doolubdass* v. *Ramloll* (1), *Papa* v. *Anuntarama* (2), *Javanmal* v. *Muktabai* (3). See also Maxwell on the Interpretation of Statutes, page 427 (4th edition). But in respect of each right in dispute the question will be—has there been an express or implied grant? And in answering this the Court will have to bear in mind that the British Government is not to be necessarily regarded as having maintained the zemindar, after cession of his territory in 1826, in the enjoyment of all the rights allowed him by the Mahrattas: *Secretary of State in Council of India* v. *Kamachee* (4), *Cook* v. *Sprigg* (5).

"In dealing with the rest of the Plaintiff's appeal I will assume—for a reason already stated—that the Chief Commissioner was competent to order insertion in the *wajib-ul-arz* of all the clauses to which the Plaintiff objects, subject, however, to the power of the Civil Court to cancel or amend any entry under sec. 83 of the Land Revenue Act.

"*1st, 2nd and 3rd grounds*.—The three opening grounds relate to cl. 6 in Part I of the *wajib-ul-arz* which runs thus:—

'If at any time it is considered expedient to assume the management of ferries and pounds, the zemindar shall receive reasonable compensation in respect of any loss of income resulting from such transfer.'

"The Plaintiff, in connection with this and all the other clauses he objects to, repudiates altogether the Chanda Patent. He points to the *sanad* of the 25th of November 1874 (Ex. P-2) as recognising that absolute proprietary rights over hi zemindari were already vested in him. He urges that the concluding words—'and (subject) to the conditions specified in the administration paper and other settlement records'—should be altogether ignored, as there are no such papers embodying any conditions in the case of his zemindari. It is admitted* by the Defendant that no administration paper for Khariar existed in 1874 and also that any settlement records there may have been then contain nothing relevant to the matter in hand. Would it in these circumstances be reasonable to treat the *sanad* as recognizing all that the zemindar now claims in respect of pounds and ferries? I think not. Reading together the letters of August and September 1874 copies of which form the Defendant's Exs. 13, 14 and 15, it seems clear that the Plaintiff was intended to receive not only a copy of the ordinary *malguzari sanad* modified by substituting the word 'zemindari' for the word 'mouzah,' but also

(1) 5 Moo. I. A. 109 at p. 126 (1850).
(2) I. L. R. 3 Mad. 98 at p. 101 (1880).
(3) I. L. R. 14 Bom. 516 at p. 525 (1890).
(4) 7 Moo. I. A. 476 (1859).
(5) 68 L. J. P. C. 144 (1899).

* See the remarks on Raipur District in Fuller's "Translations of specimen forms of *wajib ul-arz*" (1885).

one of a *wajib-ul-arz* similar to that issued to each Bilaspur zemindar. That intention was for some reason not now ascertainable left unfulfilled. But I cannot think that the Plaintiff is entitled to take the *sanad* as it stands alone, for it does not convey the real intention of the grantor. If it is not to be regarded as subject to the Chanda Patent (slightly modified), on what principle is it to be construed as recognizing a right to control ferries and pounds? No reference to such rights is ever made in the *wajib-ul-arz* of the ordinary *malguzari* village, and it is significant that even in the Chanda Patent the rules obtaining in the *khalsa* tracts are expressly cited as applicable to the levy of fees at ferries and pounds. I would therefore treat the *sanad* of 1874 as doing no more than vest the formal and legal title to the villages of the zemindari in the then zemindar: see *Loknath* v. *Bissessarnath* (6). Nor do I see sufficient *primâ facie* reason to hold that in 1874 the Plaintiff was not governed as to ferries by the Saugor and Nerbudda Rules applied in 1855 to the Nagpur Province (pages 92 and 324, Nicholl's Law of the Central Provinces) or as to pounds by the Cattle Trespass Act, 1871. The latter Act undoubtedly extended to Khariar, for the preamble excluded from its operation only 'the Presidency Towns and such districts or tracts of country as the Local Government, with the sanction of the Governor-General in Council, may exclude from its operation.' With these exceptions the Act was in character general and applicable to the whole of British India. Further it was not included in the first schedule of the Laws Local Extent Act, 1874. Consequently there was no need for the Chief Commissioner to issue a declaration under sec. 3 (*a*) of the Scheduled Districts Act, 1874, in order to keep it in force. In this connection I have further to remark that when the *sanad* of November 1874 was given the Scheduled Districts Act had not received the assent of the Governor-General. The Northern India Ferries Act, 1878, came into force in the Central Provinces on the 1st April 1879 (Notification No. 1457, dated 26th March 1879): sec. 4 (*b*) expressly empowers the Local Government to take possession of any private ferry, and sec. 5 requires compensation to be paid. Assuming that all ferries in Khariar were private ferries in 1903 and that they belonged to the zemindar, his rights may under this express provision be taken away, and so far as cl. 6, Part I of the *wajib-ul-arz*, contemplates this and the grant of reasonable compensation I hold that the clause cannot be interfered with. With regard to cattle-pounds the position is to my mind appreciably different. Act I of 1871 followed and repealed Act III of 1857 *in pari materiâ*; yet we find that the modified Patent approved in 1874 by Ex. D-13 for the Raipur zemindars allowed them to levy pound fees under the rules obtaining in the *khalsa* tracts, while it is nowhere suggested that the pounds in the zemindaris were established as required by the later Act (sec. 4). Clearly therefore the pounds in Khariar were both established and managed by the zemindar. The Act does not expressly provide for confiscating private rights, nor does it lay down that there shall be no pounds save those established by the District Magistrate. In the face of these facts I am unable to see how the action of the Government in 1874 is explicable except as a recognition of rights vested in the zemindar. To say that the zemindari is a rugged and remote

(6) I. L. R. 27 Cal. 103 at p. 114 (1899).

tract where it would have been difficult for the District Magistrate to make and enforce such arrangements as are contemplated by secs. 4, 5 and 6 of the Act is to furnish a reason for allowing the zemindar to take the District Magistrate's place, not to show that this course was the outcome of something other than an admission that the zemindar had a right to occupy that position. Not till 1892 were any steps taken indicative of a denial that the Khariar pounds had been placed permanently under the zemindar and even then the denial took the shape of a clause in a *wajib-ul-arz* which the zemindar has not at any time accepted as binding upon him. I hold that there was an implied grant to the zemindar of the right to manage the pounds established by him and to receive the fees therefrom and that there is nothing in the Cattle Trespass Act to affect that grant. The words 'and pounds' will accordingly be deleted from cl. 6 of the *wajib-ul-arz* as prayed.

"*6th, 7th, 8th, 9th and 10th grounds.*—I come next to five grounds of appeal relating to cl. 10 of the *wajib-ul-arz* of which the terms are these :—

'All minerals are the property of Government which has a right of free access and egress thereto and therefrom.'

"The lower Court has found on its 17th issue that sec. 151, Land Revenue Act, gives the minerals to Government, that the zemindar had no proprietary rights of any kind till November 1874 when he received his *sanad*, and that the *sanad* cannot be regarded as even giving at its date the mines and minerals. In this Court the Plaintiff relies again upon *Sriram* v. *Hari* (7) and cites also *Megh Lal* v. *Girdhari Singh* (8). In my opinion sec. 151, Land Revenue Act, is by itself a sufficient answer to this part of the claim. That the section was intended to operate on records and grants already made is indicated by the fact that in any other view the commencement of its operation would have been long postponed. Settlements in the Central Provinces ran for the most part for 30 years from 1865 or thereabouts and had it been desired to provide only for the future executive orders would have amply met the object in view. That the general policy of Government was everywhere to retain the right to mines and minerals appears from the *wajib-ul-arzes* in Fuller's Collection (1885) and from the Chanda Patent issued in 1868 (Exs. D-7 and D 8).

"*12th ground.*—The 12th ground of appeal is directed against the following clause (No. 7) in Part II of the *wajib-ul-arz* :—

'The appointment, suspension and removal of village watchmen are governed by the rules framed under sec. 147-A of the Central Provinces Land Revenue Act.'

"With this may be compared the corresponding clause in the *wajib-ul-arz*. originally issued with Carey's settlement which was reproduced *verbatim* in the revised form of November 1892 :—

'The zemindar may, subject to appeal to the Deputy Commissioner, dismiss a kotwar for continued misconduct or failure to perform his duties, and may appoint a man in his stead. The Deputy Commissioner may call upon the zemindar to dismiss a kotwar offending in any such way, and if the zemindar fails to comply, the power of dismissal is vested in the Deputy Commissioner.'

"The issue in this connection is No. 19 worded thus :—

'No. 19. Is the provision relating to kotwars made in Part II, cl. 7 of the

(7) I. L. R. 33 Cal. 54 (1905).
(8) 5 C. L. J. 208 (1906).

wajib-ul-arz in accordance with the provisions of sec. 147-A of the Land Revenue Act and the rules made thereunder? Is it binding on the zemindar?'

"The lower Court held that these rules, being binding on the Plaintiff and framed on the lines of Carey's original *wajib-ul-arz*, have properly been entered in the new *wajib-ul-arz*. As to this part of the claim I do not think there is any proof of an express or implied grant empowering the zemindar to appoint and dismiss kotwars at his pleasure, which is the position he contends for. It is true that Carey's *wajib-ul-arz* (Ex. D-19), which appears to have been signed by the Plaintiff on the 6th March 1891, was prepared after sec. 147-A was added to the Land Revenue Act. On the other hand no rules were framed till August 1891. R. 5 is the one which chiefly prejudices the Plaintiff:—

'The appointment of village-watchmen shall rest with the Deputy Commissioner. Provided that in zemindaris the zemindar may nominate to a vacancy, and the Deputy Commissioner shall appoint the person so nominated if he be qualified in accordance with r. 4.'

"R. 8, moreover, gives a zemindar no power of dismissal:—

'A village-watchman may be suspended or removed by the Deputy Commissioner on the report of the mukaddam or of his own motion, etc., etc.'

"The Plaintiff then is worse off than under the *wajib-ul-arz* of 1891, and unless it can be held that sec. 147-A of the Land Revenue Act empowers the Government to alter such an arrangement as the one embodied in that document the Plaintiff will, I think, be entitled at least to some amendment of the clause in question. On the whole I incline to hold that the section does give the necessary power. To take the opposite view would land one in the admission that each landholder who till 1891 appointed and dismissed his kotwars would be entitled to continue doing so, the result being a large exception to the scope of what to be of real use ought to have a general application. I conclude that the Plaintiff must submit to the rules, though they reduce his authority below even what it was from 1891 to 1903.

"*5th ground.*—The 5th ground of appeal attacks the finding on the 16th issue which was in the following terms:—

'Is the provision relating to forest made in Part I, cl. 7, and Part II, cl. 11, sub-cl. (*i*) of the *wajib-ul-arz* in accordance with the amended Patent and the Land Revenue Act and is it binding on the zemindars?'

"The lower Court has deleted cl. 7 of Part I. Cl. 11 (*i*) of Part II has been retained on the ground that it merely reproduces *verbatim* cl. 10 (*i*) of Carey's original *wajib-ub-arz*. There appears to have been some confusion in the Judge's mind, for he deals with waste as distinguished from forest land, though the issue has no relation to the former. The Plaintiff contends that he is not concluded by the agreement of 1891, inasmuch as it was for the period of Carey's Settlement only. I do not see my way to accepting this view of the agreement. By it the Plaintiff admitted that he held forest within village-boundaries subject to any rules the Chief Commissioner might make, and the effect of the admission cannot reasonably be restricted, like the period of the assessment, to a limited time in the future.

"*13th ground.*—Cl. 15 of Part II is word for word the same as cl. 14 in the *wajib-ul-arz* of 1891. I agree with the lower

Court in holding that the Plaintiff cannot go behind what he accepted as binding in the former Settlement. In this instance to allow him to do so would affect injuriously the rights of others.

"*15th ground.*—I need not separately consider the 15th ground of appeal. It is concerned with the lower Court's findings on issues 23—26 and particularly with the effect of the Scheduled Districts Act upon (*i*) the Land Revenue Act, (*ii*) the Cattle Trespass Act. I concur generally with the District Judge on these points with which I have also dealt already to some extent in connection with the first three grounds of this appeal.

"The Plaintiff's appeal having now been disposed of I turn to the cross-appeal (No. 61 of 1906). Here the main contention is that the Plaintiff must be regarded as bound by the Chanda Patent as modified in 1874 for application to all the Raipur zemindars. This is rested on three grounds :—

(*i*) that in para. 8 of the plaint in a cognate suit (No. 27 of 1904) brought by the Plaintiff he admitted that Government intended to apply the Chanda Patent to him ;

(*ii*) that in paras. 9 to 13 of a petition (Ex. D-20) addressed in 1897 to the Secretary of State for India the Plaintiff indicated his acceptance of the said Patent ;

(*iii*) that as a matter of law it suffices for the validity of a grant that the Government should determine on its terms, acceptance by the grantee not being essential.

"Para. 8 of the plaint in suit No. 27 of 1904 runs thus :—

'That on the other hand these (*quasi*-sovereign) rights (to maintain police and control Excise monopolies) were further ratified and confirmed by the Government of India who issued fresh *sanads* the terms of which were similar to those issued and delivered to the Chanda Chiefs. But it appears, and so the Plaintiff has been informed, that the *sanads* issued for the zemindars of Chhattisgurh were owing to some accident or mistake never delivered to them. Nevertheless the Government of India had expressly ordered that the Chanda Patent shall be taken as a general model for continuing the existing arrangements in respect to the non-feudatory zemindars of Chhattisgurh.'

"I am clearly of opinion that this paragraph contains no sort of admission which can help the Defendant, who moreover does not appear to have relied on it in the lower Court. From paragraphs 5—8 of the Plaintiff's written reply in suit No. 27 of 1904 the extent of his reliance on the Chanda Patent may be gathered, namely that it shows the minimum of rights which must be conceded to the Plaintiff. As to the effect of the passages in Ex. D-20 I concur entirely with the lower Court. They describe the terms of the Chanda Patent as wrongly held applicable to Khariar, but use them as an argument to prove that in 1874 the Plaintiff was treated as entitled to manage his own police and administer Excise in his zemindari. The position taken was this—as ruler of Khariar the Plaintiff's ancestor enjoyed a position superior to that of the zemindars of Chanda, yet they were allowed to maintain police and administer Excise: *a fortiori* those rights must have been and were recognized as vested in the Plaintiff's ancestor. That the terms of the Chanda Patent were not communicated to the Plaintiff in 1874 as attaching to the *sanad* (Ex. P-2) given him in that year seems perfectly clear. By 1897 his position had been minutely

examined, the inquiry having begun at least as far back as 1891. In any view then of the language used in the petition it would be unsafe to use it as proving acceptance of the Patent which the Defendant cannot prove to have been delivered. Then as to the point of law I am not shown any authority for the position that a grantee from the Crown can be bound by conditions which were never communicated to him. *In Re Antaji* (9), the following is quoted from a judgment of Westropp, C. J. :—

'In respect to Crown grants upon a question of the meaning of words, the same rules of common sense and justice must apply whether the subject-matter of construction be a grant from the Crown or from a subject, and it is always a question of intention, to be collected from the language used with reference to the surrounding circumstances.'

"It is—I venture to think—a requirement of the same rules of common sense and justice that a person should not be bound by conditions which have never been brought to his notice. Under sec. 122, Transfer of Property Act, acceptance by or on behalf of the donee is necessary to the validity of a gift, and in *Sheo Singh* v. *Raghubans Kunwar* (10) their Lordships of the Privy Council appear to have assumed (at p. 650 of the report) that a *sanad* to be binding must be accepted.

"I hold then that the Plaintiff is not bound by any term of the Chanda Patent. What he got in 1874 was a recognition or conferral—for present purposes it matters not which—of proprietary right. The devolution of that right would—in the absence of stipulation to the contrary—be governed by the ordinary law and the Government cannot legally alter that without express legislation. If the Government could alter the terms of its grant at pleasure, it could also revoke the grant likewise. To a gift divesting a private donor of all his interest in certain property a condition cannot afterwards be attached: *Hussain Khan* v. *Nateri Srinivasa* (11), *Ram Sarup* v. *Bela* (12). And Government cannot, by issuing a subsequent proclamation, resume a grant made by a previous proclamation, inasmuch as it cannot, any more than a private person, without the consent of the donee, revoke a gift actually made: *Collector of Ratnagiri* v. *Vyankatrav* (13). It follows that the lower Court has rightly deleted cl. 3 from Part I of the *wajib-ul-arz*: to depose a zemindar, would obviously be to derogate from the original grant to his predecessor.

"*4th ground.*—It remains to deal with a contention that the lower Court was wrong in deleting cl. 7 of Part I which runs thus :—

'The Forest mahals shall be managed in accordance with the rules which may from time to time be framed by the Chief Commissioner under sec. 124-A of the Land Revenue Act.'

"In dealing with this the District Judge entirely ignored cl. 10 (*i*) of Carey's original *wajib-ul-arz* wherein it is expressly stipulated that the forest lands in the estate will be managed in accordance with any rules which may be made by the Chief Commissioner. I hold that the Plaintiff cannot resile from this agreement merely because the term of Carey's Settlement has expired. The direction to delete this clause will therefore be reversed.

(9) I. L. R. 18 Bom. 670 (1893).
(10) I. L. R. 27 All. 634 (1905).
(11) 6 M. H. C. R. 356 (1871).
(12) I. L. R. 6 All. 318 (1883).
(13) 8 Bom. H. C. R. (A. C.) 1 (1871).

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"The net result of the two appeals is that the lower Court's decree will be modified by

(*i*) adding a direction that the words 'and pounds' be deleted from cl. 6, Part I of the *wajib-ul-arz*;

(*ii*) substituting for the words and figures 'cls. 3 and 7 of Part I' the words and figures 'cl. 3 of Part I.'

"The success of the Plaintiff being insignificant I direct that he pay the entire costs of his own appeal. In the Defendant's appeal success has been equally divided: each side will bear half the total costs. In the lower Court each party will bear his own costs as already ordered."

Against the said decree the Secretary of State appealed to His Majesty in Council.

On the 6th August 1904, the Zemindar of *Suarmar* instituted a suit against the Secretary of State for India in Council claiming reliefs similar to those claimed by the Zemindar of Khariar in regard to the contested clauses of the Administration Paper and the Administration of Police and Excise. On the 6th August 1906, the District Judge delivered his judgment. He followed his decision in the Khariar cases and made a decree accordingly. Against the said decree the Zemindar and the Secretary of State appealed to the Court of the Judicial Commissioner of the Central Provinces and on the 14th May 1907 the said Court made decrees similar to the decrees already passed in the Khariar appeals. Against the said decrees both parties appealed to His Majesty in Council.

On the 15th July 1904, the Local Government took possession of the cattle-pounds in the Khariar zemindari and on the 9th May 1905 the zemindar instituted a suit against the Secretary of State to obtain a declaration as to his right to the income derived from cattle-pounds within the limits of his zemindari and to recover damages. On the 6th August 1906, the District Judge of Raipur relying on his principal judgment made a decree dismissing the suit with costs. On appeal the Court of the Judicial Commissioner on the 14th May 1907 made a decree reversing the said decree of the District Judge and granting the zemindar the relief claimed by him. Against the said appellate decree the Secretary of State appealed to His Majesty in Council.

Sir R. Finlay, *K. C.*, *Mr. L. DeGruyther*, *K. C.*, and *Dr. Gour* for the Appellants.—The Appellants were originally independent ruling chiefs, till the assumption of power by the East India Company. It was conceded that they were now ordinary British subjects. But at the time of assumption of power the policy of the Government was to ascertain what rights and privileges were enjoyed by the zemindars from time immemorial and to leave them when ascertained untouched. *Vide* Nicholl's Law of Central Provinces (1870), pp. 1, 5, 13, 30, 42, 43, 442 and 443. Aitchison's Treaties and Sanads, Vol. 3, p. 91. The correspondence that subsequently took place between the Government and the zemindars resulted in the Government conferring on some zemindars the status of feudatory chiefs, while others became ordinary British subjects. But the rights and privileges of both were left untouched. There was nothing to show that the Government ever confiscated the rights and privileges of the Appellants. By secs. 77, 78, 79 of Act XVIII of 1881, a settlement is empowered but the function of a Settlement Officer is to make a record of rights as they exist and not to vary them. He has no power to impose new conditions by inserting them in the *wajib-ul-arz*.

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He is to decide disputes summarily as the result of an inquiry. But he is not "to create new rights nor to abolish old rights." It is the first principle of international law that a power taking over property takes it with existing rights. A Settlement Officer cannot exceed the powers which he gets under the Statute. The Government could have confiscated the rights but it did not. And in the settlement of 1869 no conditions were imposed nor the rights varied. The functions of a Settlement Officer appear from Fuller's Settlement Code, 1883. There is express provision in the introduction that the rules of Settlement Code were not to apply to the chieftains or zemindars. In any case the Settlement Officer was bound to hold an inquiry as to our rights and to decide accordingly. He did not do so. Our objection therefore is that in the absence of some Acts of the Legislature which confiscated our existing rights they still subsist and the Government was wrong in interfering with them. The rights are the following:—

(1) Ferries. Act XVII of 1878, § 5 does not apply to us. The Government could not resume our private rights. In the Scheduled Districts Act XIV of 1874, Khariar is included.

The preamble to the said Act shows that those Acts only will apply to the scheduled districts which the Local Government will declare applicable to them by notification. This has not been done. For the same reason the Cattle Trespass Act I of 1871, § 18 does not apply.

[LORD MACNAGHTEN.—May not General Acts apply without the declaration? The Act does not say that General Acts will not apply to the scheduled districts unless and until the notification is made.]

Mr. DeGruyther.—I submit that was the object of the Act. It appears from the preamble.

(2) Pounds. Our pounds have existed long prior to the passing of the Cattle Trespass Act. The Act applies to British India but it has not been extended to the scheduled districts.

[LORD MERSEY.—Then there can be two pounds.]

Mr. DeGruyther.—Yes.

(3) Forests. We do not come under the Act XVI of 1889, § 22. There is no *sanad* or record-of-rights to limit our rights.

(4) Mines. The Central Provinces Land Revenue Act XVIII of 1881, § 151, was not applied to the scheduled districts until 1891. Further if the right to minerals did not vest in the Government before the Act then unless the Act were retrospective (which it is not) our ancient rights subsist. The Act would apply only when there was no proprietor of the minerals before the Act. Every grant of proprietary interest would include minerals also. In fact the Chanda Patent also recognizes the zemindar's proprietary right to the minerals.

(5) Kotwars, (6) Police and (7) Excise.

Sir E. Richards, K. C., and *Mr. Dunne* for the Secretary of State for India.—The Appellants have shifted their ground. They first claimed as sovereign—the rights of Police, pounds and excise are sovereign rights and were taken away by the Government in 1865. It was an Act of State. A *sanad* is not a recognition of previously existing rights, it is a fresh grant. An ordinary subject can have no rights of Police and Excise. The Plaintiffs' real case is, *quasi*-sovereign rights are maintained to them, but the fact is they have been determined by the Government by the mere fact of assumption of sovereignty. The argument based on the Scheduled Districts Act has no force. The Genera

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Acts apply to Khariar without the declaration. The Act was for convenience only. The Court below was wrong about the pounds. There could not be two pounds—one private and the other public. The maintenance of pounds is a necessary administrative function and is intimately connected with the Police.

Mr. L. DeGruyther in reply.—Our main contention is that the Government in its executive capacity has no power to interfere with the rights of a subject. No limitations on our rights were placed by the Government at the settlement of 1869. There must have been a *wajib-ul-arz*. Indeed the evidence on the record indicates that a *wajib-ul arz* was prepared in 1869. We challenge the Government to produce the proceedings of the settlement of 1869. This settlement was like any other settlement in Bengal or Oudh. It is impossible to make a settlement without preparing a *wajib-ul-arz*. See Directions for Settlement Officers in North Western Provinces, p. 22, Nicholl's Law of Central Provinces, pp. 169, 329, Fuller's Central Provinces Settlement Code. A settlement having been made once our rights could not be changed at the subsequent settlement. After a settlement we got proprietary rights on payment of revenue and a *sanad* is not necessary for title. It is only a certificate of title. If the terms of Chanda Patent do not apply to us (as they do not) our ancient rights must be maintained in the absence of a clear act of confiscation. The Settlement Officer had no jurisdiction to alter or modify the rights, position or status of any zemindar.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—These are consolidated appeals and cross-appeals from judgment and decrees of the Judicial Commissioner of the Central Provinces in part affirming, in part varying, and in part reversing judgments and decrees of the District Judge of Raipur.

The zemindar of Khariar in the district of Raipur, and other zemindars in that district, proprietors of estates varying in extent and importance, have sued the Secretary of State for India in Council, complaining that they have been illegally deprived of rights to which they were indefeasibly entitled from time immemorial, and that by the requirement of Government officials they have been compelled to execute *wajib-ul-arz* or administration papers containing provisions in derogation of their undoubted privileges. Their contention is that the provisions of which they complain are illegal and ought to be expunged or annulled, and that the rights of which as they allege they have been improperly deprived ought to be restored by the Civil Court.

It was agreed between the parties to this group of litigation that decisions in the suit brought by the zemindar of Khariar should govern all the rest of the cases.

The status of the zemindar of Khariar and the Plaintiffs in the other suits is simply the status of an ordinary British subject. That matter was determined by the Government in 1864 after an exhaustive enquiry into the position of the petty chiefs of the Central Provinces. A few were recognised as feudatories having some of the attributes of sovereignty. The rest were classed as non-feudatories and declared to be ordinary British subjects.

Before these petty chiefs came under British rule they held their possessions at the will and pleasure of the ruler for the time being in power. When their coun-

try became British territory, whether by conquest and cession as in the case of Khariar and in the case of Bindra Nawagurh in Chattisgurh, or by lapse as in the case of the other zemindars in Chattisgurh, they were left much in the position they occupied before. The district was wild and for the most part uncultivated, thinly populated, and very difficult of access. They paid to the paramount Government the tribute they had been in the habit of paying to their native rulers reduced in some cases on account of the poverty of the district. They managed their estates as best they could, binding themselves to use rightly the judicial and administrative powers entrusted to them or left in their hands as a matter of convenience or economy of administration. In no case were they recognised as entitled to independent power or as possessing any sovereign rights.

In 1867, the Government determined to confer upon the non-feudatory zemindars in an adjoining district known as the Chanda District proprietary rights in the soil on certain terms and conditions which were embodied in a document referred to in these proceedings as the Chanda Patent. It was the intention of the Government at that time that *sanads* should be granted to other non-feudatory zemindars, in the Central Provinces, including the Raipur zemindars, framed on the model of the Chanda Patent, with such variations as the circumstances of the case might require. However, it seems that when *sanads* were issued to the Raipur zemindars in the year 1874 the matter was overlooked or forgotten, and proprietary rights in the soil were vested in them, expressed in the *sanad* to be "subject to the payment of such land revenue and other cesses as may, from time to time, be assessed according to the terms of settlement and to the conditions specified in the administration paper and other settlement records." In point of fact these *sanads* were not accompanied by any administration papers or any other record. This mistake or omission has given rise to much argument. The Government contended that the Plaintiffs had recognised and were bound by the terms of the Chanda Patent. The Plaintiffs, while relying on the terms of the Chanda Patent which were to their advantage, maintained that the terms of the Chanda Patent in their entirety, and so far as they tended to their disadvantage, were not binding upon them. In the result both Courts below have held that the Chanda Patent is not to be treated as embodied in or affecting the *sanads* granted to the Raipur zemindars. In this conclusion their Lordships agree. For the purposes of these cases they think that the Chanda Patent may be disregarded.

In 1888, the Government decided that Police administration in the non-feudatory zemindaris in the Chattisgurh division including those belonging to the Plaintiffs other than the zemindars of Khariar and Bindra Nawagurh should be withdrawn from the zemindars, and that an addition should be made to the *takolis* or revenue payable by the zemindar when thus relieved of Police duties.

In March 1891, the zemindar of Khariar accepted a fresh assessment of the *takoli* or revenue payable by him to Government under sec. 54 of the Central Provinces Land Revenue Act (XVIII of 1881), for 11 years from the 1st of July 1890, to the 30th of June 1901, or until a fresh settlement should be made. He then agreed to be bound by all the conditions laid down in the *wajib ul-arz* of his zemindari and duly executed that document.

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In September 1892, the police administration of the zemindaris of Khariar and Bindra Nawagurh was assumed by the Government, and on that account an addition was made to the *takolis* of the two zamindaris.

In November 1892, a new form of *wajib-ul-arz* applicable to the case of the non-feudatory zemindars was approved by the Government. It was not, however, brought into use until some years later.

In 1893, the Chief Commissioner, with the sanction of the Government, determined to assume the administration of Excise. At the same time it was proposed to pay compensation for loss of income and for the present to farm out to the zemindars the Excise Administration, the *takolis* to run with their Land Settlements.

Some of the zemindars accepted compensation and took farms of the Excise. Some, including the zemindar of Khariar, and others of the Plaintiffs refused both offers.

In May 1903, the Chief Commissioner of the Central Provinces decided to assume the administration of cattle-pounds in the case of the non-feudatory zemindars in the Chattisgurh Division, including the Plaintiffs, paying compensation for the withdrawal of this source of revenue.

In 1903, in connection with the new assessment, the non-feudatory zemindars in the Chattisgurh Division, including the Plaintiffs, were required to execute *wajib-ul arz* in the form sanctioned by Government in November 1892 with some further amendments.

The proposed *wajib-ul-arz* was executed by the zemindar of Khariar and the other Plaintiffs in compliance with the requirement of the Government. It was however executed under protest. It bears date the 6th of August 1903. After an ineffectual appeal to Government this litigation was commenced.

The principal ground of complaint relates to the withdrawal of police and Excise administration. That head of complaint in the case of the zemindar of Khariar is the subject of Suit No. 27 of 1904.

The withdrawal of cattle-pounds is the subject of complaint in Suit No. 31 of 1905.

The clauses in the *wajib-ul-arz* of the 6th of August 1903, to which objection is taken are the subject of Suit No. 6 of 1904. One of those clauses deals with cattle-pounds.

Suits No. 6 of 1904 and No. 27 of 1904 were heard together. It was agreed that the decision in those suits should govern the decision in Suit No. 31 of 1905.

On the 6th of August 1906, the District Judge delivered separate judgments and made separate decrees in the three suits.

In Suit No. 27 of 1904, the District Judge held that the Raipur zemindars in exercising police and Excise functions were not acting as of right, but were so acting either by sufferance, or by delegation, and that the resumption of those functions by the Government was a thing done by the Government in exercise of its sovereign powers, and consequently that the suit was not maintainable.

On appeal the Judicial Commissioner held that powers of administration in respect of police and Excise must be deemed to have been granted to the Plaintiff, and that the Plaintiff was entitled to maintain his own Police and administer Excise in his zemindari.

On this question their Lordships agree with the view of the District Judge.

The District Judge dismissed Suit No.

31 of 1905. The Judicial Commissioner reversed his judgment and made a decree in favour of the Plaintiff.

In suit No. 6 of 1904, which relates to the Wajib-ul-arz of the 6th of August 1903, the following are the clauses objected to :—

In Part I. :—

"3. Removal of zamindar and forfeiture of privileges.

"6. Resumption and management of ferries and pounds.

"7. Provision that forest mahals shall be managed in accordance with rules framed by the Chief Commissioner under sec. 124A, Land Revenue Act.

"10 Declaration that all minerals are the property of Government.

In Part II. :—

"2. Discontinuance of *nazarana* on grant or renewal of leases

"7. Appointment, suspension, and removal of kotwars (village watchmen) to be governed by rules framed under sec 147A, Land Revenue Act

"11.—(1.) Forest lands not included in forest mahals to be managed in accordance with any rules made by the Chief Commissioner.

"15 Hides and carcases of dead cattle to be the property of the owners of the cattle."

The District Judge was in favour of the Government on all these questions except Part I, No. 3 and No. 7, and Part II., No. 2.

On appeal to the Judicial Commissioner the decree was varied by adding a direction that the words "and pounds" be deleted from Cl. 6, Part I., and by substituting the words and figures "Cl. 3 of Part I." for the words and figures "Cls. 3 and 7 of Part I."

On appeal to this Board the objection to Part II., No. 15 was not pressed.

The case was very fully and ably argued; but after carefully considering the arguments adduced the Wajib-ul-arz of 1892 and the Acts of the Legislature to which attention was called, their Lordships are of opinion that there is no ground for disturbing the judgment of the Judicial Commissioner in Suit No. 6 of 1904 except as regards cattle-pounds.

Their Lordships are disposed to think that the maintenance of private cattle-pounds is incompatible with the provisions of the Cattle Trespass Act, and they are of opinion that under the circumstances the establishment and maintenance of cattle-pounds under the superintendence and control of Government officials empowered to obtain the assistance of the police when required may be considered essential for the maintenance of law and order, and the peace and good Government of the country, and therefore an act of the Executive Government with which it is not competent for the Civil Court to interfere.

Their Lordships will humbly advise His Majesty that in Suits 27 of 1904 and 31 of 1905 the decrees of the Judicial Commissioner should be discharged, and the decrees of the District Judge restored, but without costs. That in Suit No. 6 of 1904 the decree of the Judicial Commissioner should be varied by omitting the words "and pounds."

Their Lordships do not think fit to make any order as to costs.

Solicitors : *Messrs. T. L. Wilson and Co.* for the Appellants.

Solicitor : *The Solicitor, India office*, for the Respondent.

B. D.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDERS

NOS. 167 AND 279 OF 1908.

COXE, J.
N. R. CHATTERJEA, J.
1911,
14, December.

RAMDEO PRASHAD SINGH, Judgment-debtor, Appellant,
v.
MUSSTT. GOPI KOERI and another, Decree-holders, Respondents.

Hindu Law—Mitakshara—Grandson if liable for interest on grandfather's debts—Son's liability, if may be thrown primarily on the share obtained by survivorship from father and grandfather.

A decree for mesne profits with interest was passed against A and D grandfather and father respectively of R after R was born. Subsequently on the death of A and D the decree-holder sought to execute the decree against the entire ancestral property in the hands of R. R claimed that inasmuch as the debt was his grandfather's he was not liable for the interest,

Held—*That the wrong being the joint act of the father and grandfather and the liability arising therefrom being that of the father as well as of the grandfather the son was liable for interest.*

That after the entire property vested in R on the death of A and D, there was no distinction between what was obtained by R by survivorship from them and his own share so as to enable R to compel the decree-holder to proceed first against the share of the father and grandfather to the exclusion of his own share.

Quære—*Whether the rule in* KISHUN PERSHAD *v.* TIPAN PERSHAD (1) *throwing the burden primarily on the share of the father applies to the case of a simple money debt as distinguished from a mortgage.*

(1) I. L. R. 34 Cal. 735: S. C. 11 C. W. N. 618 (1907).

This was an appeal preferred on the 27th of April 1908, against an order of Babu L. K. Basu, Subordinate Judge of Zillah Monghyr in Bhagulpur, dated the 11th of April 1908.

The facts of the case will appear from the judgment.

Babus Umakali Mukherjee and *Ganesh Dut Singh* for the Appellant.

Babu Kulwant Sahay for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

In this case the Respondent obtained a decree against Ajodhya and Damodar, the grandfather and father respectively of the Appellant, for recovery of possession of land, with mesne profits, costs and interest. The mesne profits were subsequently ascertained and decreed in 1912 against Damodar and Ajodhya. At that time all three members of the family were in existence. The Respondent took out execution of the decree; and the case ultimately came up to this Court in appeal. The Court below had excluded certain evidence: and the case was remanded in order that an opportunity might be given to the Appellant to show that the debt with respect to which execution was sought was not one for which he was liable. On remand the Court below has come to the decision that the Appellant is liable; and this finding has been returned to this Court.

Two points have been taken on behalf of the Appellant. The first is that, in any case, the decree-holder is not entitled to interest; and reference has been made to a passage at page 232 of Babu Golap Chandra Sarkar Shastri's book on Hindu Law, in which it is said that the grandson is not liable to pay interest on the grandfather's debts. It is argued that the dispossession which created the liability to

account for mesne profits was effected by Ajodhya, the grandfather; that, therefore, it was he that was liable for the interest; and that that liability does not descend to the present Appellant, who is his grandson. But it is clear that the decree for mesne profits was passed against both Damodar and Ajodhya; and there is nothing to show that the dispossession which formed the cause of action was not effected by Damodar just as much as by Ajodhya. In any case, it is clear that Damodar was liable for the whole of the interest and mesne profits decreed; and that being so, the passage we have quoted does not relieve the present Appellant from a similar liability.

The second point taken is based to a great extent, on the decision in *Kishun Pershad* v. *Tipan Pershad* (1). That was a suit by a mortgagee against a father and son, to enforce a mortgage; and the order was that the Plaintiff should have the usual mortgage decree against the share of the father and, if that was not sufficient, should be entitled to realise the balance by the sale of the share of the son in the ancestral property. It is argued that following the principle of this decision, the decree-holder ought to proceed first against what was the share of Damodar and Ajodhya in the ancestral property at the time of the decree, and only in the event of that being insufficient should be allowed relief against the interest that then belonged to the present Appellant. The case, however, which has been cited was a suit upon a mortgage; and it seems open to considerable doubt whether if it had been a case of a simple money decree, the Court would have made any distinction between the interest of the father and that of the son. But whether that be so or not, we are certainly not prepared to hold that after the death of Damodar and Ajodhya there remained any such distinction between the interest which was vested in the Appellant at his birth and the interest that he acquired by survivorship from Damodar and Ajodhya as would justify the application of the case cited. The case, therefore, does not appear to us to sustain the contention of the learned pleader for the Appellant: and there is certainly no direct authority in favour of that contention. No attachment of the property had been effected during the life-time of Damodar and Ajodhya.

It has been argued that the Appellant is not entitled to take these pleas at the present time. But, as we have decreed that they are not well-founded, it is not necessary to give any opinion on that point.

The appeal will be dismissed with costs.

This decision will also govern appeal No. 279 of 1908.

The hearing-fee for both the appeals is assessed at five gold mohurs.

Appeal dismissed.

(1) I. L. R. 34 Cal. 735: S. C. 11 C. W. N. 613 (1907).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 826 OF 1911.

HOLMWOOD, J. SHARFUDDIN, J, 1912, 18, January.

BAISNAB CHARAN MANJHI and others, 1st Party, Petitioners,

v.

GATINATH MUNSHI and others, 2nd Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 107, 146—Attachment of disputed property if may be made after one party is bound down.

It cannot be laid down as a general rule that simply because members of one party

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Contents.

NOTES.

THE DECISION OF THE JUDICIAL COMMITTEE IN the case of *Taylor*, reported in this issue at p. 386, will be found of considerable interest and importance to the legal profession. In the Colonies the Supreme Courts seem to entertain strange notions of judicial dignity and professional misconduct. In the special leave appeal in *McLeod's* case (3 C. W. N. cccxlvi), from the Supreme Court of St. Vincent, the Judicial Committee intervened and awarded costs against the Acting Chief Justice for improperly having recourse to proceedings in contempt against McLeod who practised before him as a barrister and solicitor. In the present case the facts were no doubt very different and undoubtedly the offending lawyer had acted irregularly in respect of some proceedings taken by him before the law Courts on behalf of his client. But an irregularity does not necessarily signify contempt of Court or professional misconduct.

TAYLOR, A BARRISTER OF GRAY'S INN, PRACTISING at Sierra Leone also as a solicitor, acting for his client gave notice to one Wright that unless he compensated his client for some alleged assault, he would bring an action against him, which he did, on Wright not replying to his letter. As Wright was about to leave the Colony, Taylor applied to the Supreme Court under the Debtor's Ordinance for a warrant which the Acting Chief Justice rejected, observing that the warrant applied for was intended to be used as a 'lever' for getting the money which he had demanded from Wright. Thereupon Taylor went before the Magistrate, applied for and obtained a warrant for the alleged assault and got Wright arrested. For lodging a complaint for an offence committed, as in this case, within the Protectorate a *fiat* of Governor was necessary. Taylor had not obtained this *fiat* and it did not transpire whether he had brought this fact to the notice of the Magistrate. The Supreme Court thereupon took proceedings against Taylor for contempt of Court and professional misconduct.

THE JUDICIAL COMMITTEE WAS OF OPINION THAT the warrant being on the face of it in respect of an offence committed in the Protectorate it might have been issued without a *fiat* from the Governor owing to inadvertence on the part of the Magistrate, and in the absence of proof of concealment or deceit on the part of Taylor he could not be charged with unprofessional conduct. In the next place their Lordships observe that when there are more remedies than one in a matter, it is open to a party to pursue one or the other or both, at his discretion. It is strange therefore that the Supreme Court of Sierra Leone should have thought that after Taylor had been refused a warrant by the Acting Chief Justice, though it be in connection with a civil action, it amounted to a contempt on his part to go before a Magistrate and to apply for a criminal process in respect of the same transaction. The effect of the decision of the Judicial Committee will surely be to remove such absurd notions of judicial dignity. The decision is also of importance as it draws a line between irregularities which may be otherwise punishable but yet may not amount to professional misconduct.

IT IS VERY MUCH TO BE REGRETTED THAT THE Hon'ble Mr. Bhupendra Nath Basu's Bill to amend the Civil Marriage Act should have been thrown out by the Supreme Legislative Council. In the discussion that took place on the Bill it was all unreasoned social prejudice and vague alarm on one side and claim for individual liberty and the dictates of individual conscience on the other. We can well understand the opposition from the class of people who see in every progressive social movement the spectre of rack and ruin to the existing order of things. We can also appreciate the apprehension felt by some orthodox members of the Indian community that the passing of the Bill will somehow bring about a serious breach in the fabric of Hindu or Mahomedan society. Alarmists as a rule are blind to the facts and believe that by only shutting their eyes to them they can stop the world from moving. We are prepared to make every allowance for such honest prejudice or vague misapprehension on this question. But what we fail to comprehend is the attitude taken up by some Indian members of the Viceroy's Council who pose at times as social reformers and of official members who are supposed to keep an open mind with regard to such questions.

IN SOCIAL LEGISLATIONS OF THIS TYPE THE Government may very well stand aloof without committing itself to any particular opinion and leave the representatives of the people to fight out and decide the question amongst themselves. If it were a measure which sought to place the society or any community under any disqualification and deprive it of any important privileges, the Government would no doubt have been justified in casting its votes against the Bill. But the Bill was a merely permissive measure allowing to some people a small measure of liberty and freedom from the rigour of the latter day customs and prejudices. It did not pretend to restrict the rights and liberties of any class or community nor did it seek to impose upon Hindu or Mahomedan society the obligation to receive back amongst them any person who had chosen to marry outside the community. If such persons were ardent believers in the Vedas, Vedanta, Quoran, Avesta, or the Scriptures, why should the Government object to their professing faith in any of these gospels of truth and compel them against their conscience to make a false declaration for the purpose of contracting a valid marriage. Even if individuals or any small section of the community wanted the Bill for safeguarding their own and their children's civil rights there can be no moral justification why the Government should actively oppose what after all was but an enabling measure.

FROM OTHER POINTS OF VIEW AS WELL IT WAS the duty of Government to support the Bill. The law of marriage is intimately connected with the public policy of the State and is the foundation of important civil rights of the subject. In India the diversity of religious faith, social ceremonies and practices make it all the more necessary for Government in this country to require a law for the registration of marriages, no matter in what form they may be celebrated. So from considerations of public policy as also from the point of view that it is a matter of duty on the part of every civilized Government to secure the publicity and certainty of marriage, the official members of the Government of India should have lent their support to the Bill. In any case they should have offered to be guided by the votes of the representatives of the people on the subject. The attitude taken up by them was, however, wholly inexplicable. It was surely not justified by any serious apprehensions on the score of public antipathy; for the opposition against the Bill was assuredly not very great and the feeling against it was not of very remarkable intensity. At any rate there was nothing to compare with the amount and intensity of feeling roused by the Widow Re-marriage Act or the Civil Marriage Act. In opposing this measure the Government has surely gone against its traditions of a century during which it has always associated itself with any forward move in social legislation whenever any section of the people have wanted it.

IT IS UNFORTUNATE THAT THE SUBJECT OF THE reform of criminals, a part of which the Hon'ble Mr. Dadabhoy touched by his resolution in the Supreme Council on Wednesday last, received a very inadequate consideration at the hands of the Hon'ble members. Mr. Dadabhoy's proposal was to credit a portion of the profits of jail products to individual prisoners so that, on leaving, the prisoners may have some capital to start an honest living with. The Hon'ble gentleman referred to similar measures taken in England, America and other foreign countries.

TAKEN BY ITSELF THE PROPOSAL INVOLVED serious difficulties and we certainly feel the justice of the remark of Sir Reginald Craddock that "although it might be desirable to provide the 'habitual' with some money when he was released from jail he could not help feeling that in the great majority of cases such generosity would be misplaced. In fact in England and America, we cannot speak with equal assurance of other countries, providing released prisoners with some capital is a part of an elaborate system, and it could not be isolated from the whole without considerable risks of abuse. What is wanted in India is not that

such measures should be introduced piecemeal ut that the whole penal system should be overhauled. The Hon'ble the Home Member gave some illustrations of what the Government had done towards such improvement. But the improvements effected touch only children, and even in their case, the very necessary provision of a separate Court for them is wanting. So far as adult persons other than 'habituals' are concerned nothing seems to have been done yet.

ANY SCHEME WHICH SEEKS TO DEAL ADEQUATELY with released offenders must presuppose the existence of probation officers and other voluntary aid societies whose duty it would be to take the released prisoner under their care and to help them with advice and assistance. Without these, merely money help of the kind suggested by Mr. Dadabhoy is likely to lead to abuse. With probation officers and other suitable organisations for the benevolent supervision and assistance to released prisoners such generosity would surely be the means of reclaiming many an offender from a life of crime. Merely to provide such a person with some money is not enough. The greatest difficulty lies in finding work for him. Proper arrangements for assistance in finding work and generally helping such a man forward in life are really the things that are first wanted. When proper aid and assistance of the released prisoners is thus provided for, the steps suggested by Mr. Dadabhoy may well be taken. We think that it is time that the Government should make a determined endeavour in this direction. We have a Prisoner's Aid Society in Calcutta which cannot do all that it would like to do for want of funds. A larger measure of support than has hitherto been accorded to it should, we think, be given to this noble institution and serious attempts made to establish similar organisations elsewhere. Children's Courts should be established at least in the big cities and a comprehensive system of probation of offenders gradually introduced. We hope that the Government will now make a decided attempt to move forward in this direction.

IN HIS REPLY SIR REGINALD CRADDOCK OBSERVED that the measures taken in England and other countries were in an experimental stage and that it would not, in the circumstances of the country, be advisable to diminish the deterrent effects of prisons. We are not prepared to say that no experiment should ever be tried in India till it has been successfully tried elsewhere. On the other hand where the principle on which an experiment is started elsewhere is sound we think it should be tried here as well. The effects of these measures in Europe and America cannot furnish an adequate index of what would necessarily follow here. In these matters India has an initial advantage to start with as compared with Europe or America and that is that the common people of this country are more moral and much more religious than people of the same class anywhere else in the world. It would be difficult to find in India any parallel to the utter absence of moral instincts which characterises the hardened criminals of Europe. Besides, a large majority of the crimes in India would seem to issue from momentary impulses or from a chronic want of the bare necessities of life. In conditions like these the experiments may be tried here under more favourable conditions than in Europe or America.

THE DETERRENT INFLUENCE OF PRISON LIFE IS one of the problems which has been engaging the attention of criminologists of the West. The general conclusion seems to be that the deterrent influence on habitual criminals of prison life is, to say the least, very questionable. And, we think, those who have had to deal much with criminals in this country will admit that here too prisoners on their release from jail are found to come out with a strong inclination to commit crimes of, perhaps, more serious character. It is also well known that hardened criminals are not in the least affected by the terrors of the prison. Cases are not uncommon where such people contemplate prison life with the utmost indifference. If that is so, it is time to consider whether, without impairing what value prison discipline may have for common offenders, a larger share of the attention of the Government may not be more profitably directed to the work of reclamation both inside and outside the prisons.

DELIVERY OF "SYMBOLIC" POSSESSION.

The question when legal possession is transferred from one individual to another is often sought to be determined upon purely logical considerations. In point of fact, however, usage or convention approved by law courts plays an even more important part in such matters than observation and induction. The possession of a warehouse is transferred with the delivery of the keys because it is according to established convention the approved mode of transfer of warehouses. The possession of a tract of land is sufficiently delivered for the same reason by the transferee formally crossing its boundary at one point or even by viewing it from a distance. With the increase of civilization these conventional modes of transferring possession tend to multiply in number and complexity. The element of convention has in fact entered so largely into current

notions of possession that it is only where the artificial element is very glaring that writers of text-books and judges find it necessary to characterise the delivery of possession as only "formal" or "symbolical." The difference between what is generally described as "formal" or "symbolical" and other modes of delivery of possession will however be found on analysis to be really one of degree, the "formal" or "artificial" element in the latter being in fact only less pronounced than in the former. Therefore the distinction often drawn between delivery of "formal" or "symbolical" possession and what by way of distinction is described as "actual" possession is thus in most cases more imaginary than real. The question in every case is, what is the conventional mode of transfer of possession approved by the law in respect of the particular object under consideration—and it is to be remembered that the convention or usage varies with the nature of the object and also with regard to the same object with variations in its situation.

It may often be very difficult to determine what is the generally approved mode of delivery of possession in respect of any object in a given situation, and differences of opinion may very well arise from this circumstance. Where however the mode or modes are prescribed by Statute no difficulties should arise. Instances of this are to be found in sec. 263 (see also sec. 318) and sec. 264 (see also sec. 319) of the Civil Procedure Code of 1882. Different modes are prescribed for delivery of possession of immoveable property in the direct possession of the judgment debtor and of similar property in the possession of a tenant. Where the special mode prescribed is not followed there is no effective delivery of possession. Thus where the formalities prescribed for delivery of property in the occupation of tenants are gone through in a case requiring transfer of direct possession, the transfer of possession should be wholly ineffective, and to describe such delivery of possession as "formal" and then to proceed to attach some legal consequences to it is surely the result of a confusion of ideas. This seems to be the *rationale* of the decision of the Full Bench of the Bombay High Court in *Mahadev Sakharam Parkar* v. *Jann Framji Hally*, reported at p. 115 of 14 Bom. Law Reporter, which overrules *Gopal* v. *Krishnarao*, I. L. R. 25 Bom. 275 and *Mahadeo* v. *Purashram*, I. L. R. 25 Bom. 358, where it was laid down broadly that the delivery of formal possession (*e.g.*, in the mode prescribed in sec. 264, C. P. C.) was effective at least as between the judgment-debtor and the judgment-creditor when the case really called for delivery of direct possession (as contemplated in sec. 263, C. P. C.). The judgment unfortunately is not sufficiently explicit even when read in the light of the order of reference.

Correspondence.

[TO THE EDITOR OF THE "CALCUTTA WEEKLY NOTES."]

In the Law Quarterly Review of October 1911, p. 489, I find a review of Mr. Sripati Roy's Tagore law lecture on "Customs and Customary Law in British India." The author of that review has evidently misunderstood the scope of the work. The reviewer thinks that Mr. Roy's plan of work is faulty, that he should have confined himself "to cases of custom which are opposed to the general law, that is to rules which in particular families or in a particular district have from long usage obtained the force of law but are in their essence contrary to the general law." Now to have done so would have rendered the treatise useless alike to the student, the practitioner and the jurist. Mr. Roy has classified the various customs and usages prevailing in British India. No language could have been more clear, concise and accurate. I would refer the reader to the pages of the author (see p 40).

The reviewer concludes that Mr. Roy is of opinion that an only or the eldest son cannot be adopted. He merely states what the shastras declare, and refers to the Madras and Allahabad cases to illustrate the interpretation put on the shastric passages by those two Courts with reference to the adoption of an only son. As to the adoption of the eldest son Mr. Roy referred to the Calcutta case of *Seetaram and others* v. *Dhunnook Dharee Sahye and others*, 1 Hay 260 (1862), and quoted the words of the report "that there was no evidence to show that Nursing Narain was the eldest son at the time of the adoption, and that precedents showed that the adoption of an elder son though improper, was not illegal." Up to the date of the ruling by the Privy Council in 1899 in the appeals from Madras and Allahabad, reported in 26 I. A. 113: S. C 3 C. W. N. 415, the interpretation of the law on this point was that the adoption of an only son was invalid. This the author has clearly stated. The case in the 24 Bombay Series, p. 367 (*Vyas Chuman* v. *Vyas Ramchundra*), was a reference to the Full Bench and the question there was simply this: whether or not in Gujarat where the Mayukha is the paramount authority, the adoption of an only son is legal and valid. This decision would not apply to the whole of India, but the Privy Council's decision is certainly contrary to the law laid down in the Courts of Calcutta and Bombay. I might here say that although the Privy Council has interpreted the Hindu law as not invalidating an adoption of an only son, there are eminent jurists, both Indian and European, who hold that such an adoption is contrary to the letter and spirit of the Hindu law. I cannot but think that all this contention and uncertainty have arisen because of the Indian interpreters of law, whether Manu, Vasistha, Yajnavalkya, Saunaka, or the authors of the Dattaka Mimansa not being real legislators enacting Statutes or Acts in clear concise language, or Judges declaring the law in solemn form, but rather only teachers expressing themselves to their pupils in loose language and adding reasons, to their mind no doubt very cogent but in the light of modern legal learning often very puerile. However this may be the Privy Council's decision is binding on our Courts for the present. This decision has not been referred to by the author, evidently by an oversight, and I am sure, he is much obliged to the reviewer and thankful to him for bringing it forward. The readers of the author's valuable work will no doubt excuse the omission.

As to the reviewer's remark on the author's treatment of the Mahomedan customs that "Mr. Roy in several places lays down the law in questionable shape and many of his propositions have no bearing on custom and customary law," I feel bound to say, it is more captious than just. The reviewer gives as an instance that Mr. Roy says that divorce may be made in either of two forms—*talak* or *khola*, but he ignores divorce by *mubàràt*. Surely the reviewer must know that divorce by *mubàràt* is not commonly known even to the Shiah masses, not to speak of the Sunnis, but only to jurists more antiquarian than modern.

I think a reviewer's task is to point out the merits of a work and incidentally refer to glaring mistakes in order that they may be corrected, but in this review faults are searched for and merits overlooked. The reviewer seems to be of opinion that there are three forms of divorce—*talak, khola* and *mubàràt*, whereas in fact divorce strictly speaking, that is, the putting away of a wife, is effected in only *one* way. The Moslem husband has absolute power to divorce his wife. This power he can exercise arbitrarily He is morally blamable if he does so capriciously. The words used by Arabians to signify the putting away of a wife is *taulauk*. He says to his wife *taulauk to ka unta taulakun*. It may be revocable, *ruja*, or, irrevocable, *bain*. As to *taulauk-us-sunnat* and *taulauk-ul-badai*, and the opinions of contentious jurists I need not refer to them. But I may be permitted to make the following observations. In the Mahomedan Law marriage is based strictly on the principles of contract, that is an offer, and acceptance, and a consideration Now bearing this in mind *khola* is not really a divorce, but rather the *rescinding* of the marriage contract at the instance of a wife for consideration issuing from the wife to the husband, who accepts and releases the wife from the contract. As to *mubàràt* it also follows the principles of the contract law and as such is grounded on mutual consent. I am of opinion, therefore, that the correct and the logical view of the question of divorce and the rescinding of the marital contract is as I have stated.

Let me cite another instance of the reviewer catching at supposed flaws. Mr Roy, he says, is not accurate in stating that *talak* is not complete and irrevocable by a single declaration of the husband Mr. Roy is quite right; for, when he wrote this passage he must have had the traditionary judgment of the Prophet in his mind. What does the reviewer say? He says *talak* called *ahsan* is so by virtue of a single declaration. But is it? No; for the reviewer adds that to be so, it must be followed by abstinence from sexual intercourse for the period of *iddat*. Therefore a single declaration surely does not even in the *ahsan taulauk* make it irrevocable. I think the reviewer will agree with Quintilian and Pope when they say "for not to know some trifles is a praise."

I need not take notice of the padding to his review of all that he has said about the Aga Khan, as the whole of it, forming a large portion, is irrelevant and pedantic. But as to the typographical mistakes of the printers devil I may just mention that works printed in India are not exceptionally full of misprints. When I look at the very p. 499 of the *Law Quarterly Review* I find several mistakes and I should be very uncharitable to attribute the mis-spelling to the want of a knowledge of modern orthography on the part of the author of that review, as I should by attributing ignorance to the reviewer when I see in his review LEVESTER instead of Sevester.

In ev'ry work regard the writer's end,
Since none need compass more than they intend;
And, if the means be just, the conduct true,
Applause, in spite of trivial faults, is due.

BAR LIBRARY,
Calcutta, 19th February, 1912. R. BRAUNFIELD.

Reviews.

A SUMMARY OF THE LAW OF TORTS. *By Arthur Underhill, M. A., LL. D., and J. G. Pease, B. A., Bar-at-Law. Butterworth & Co., London and Calcutta, 8-2, Hastings Street. Ninth Edition. 10s. 6d.*

We notice several changes of importance in this new edition. Notably amongst them is that a chapter has been devoted to the principle of liability on account of breach of duty as laid down in *Fletcher* v. *Rylands* and other allied cases. The extension of the principle to cases of damage by animals and fire has been well-indicated and explained. We find a paragraph devoted to *Lowey* v. *Walker*, [1910 (1 K. B. 173) reversed 1911, A. C. 10], and the authors declare themselves in favour of the view of the appeal Court which was reversed by the House of Lords. Whilst much may be said in favour of either view we do not approve of the authors disposing of the view of the House of Lords in a single sentence and declaring themselves in favour of the lower Appellate Court especially in a book of this kind which is meant for students. For learners it is always preferable to present before them, when necessary, the *ratio* of the decisions of the Court below and the final Court of Appeal and indicate the principle on which they are respectively based rather than to fasten on them the opinion of the author. All the same we have nothing but praise for the accuracy with which the leading principles of the Law of Torts have been summarised by the authors and illustrated and explained briefly by reference to the leading cases. Practising lawyers may also refer to the work at times with profit.

THE COURT OF CRIMINAL APPEAL. *By R. E. Ross, LL. B., Bar-at-Law. Butterworth & Co., London, and 8-2, Hastings Street, Calcutta.*

Appeal in criminal cases is quite a new institution in England. The English Statute does not provide in detail the procedure to be followed by judges in respect of the revision of the judgments of the Court of first instance or the hearing of appeals from them as in India. When the English statute was passed some three years ago, it had its prophets of evil, who in England, as they do often in India, made many predictions of evils that would result from the innovation. We are

glad to find that their prophecies, like those of their class who are always ready to oppose every reform here, have been wholly falsified. The criminal appellate work has not taxed the time and resources of either the State or of the judges to any abnormal extent. The procedure provided by the English statute is much simpler than it is in India and much is left to the discretion of the judges. The object of this work is to evolve rules from the practice followed by the English judges as embodied in their decisions. It is interesting to find that although in theory in England, as here, questions of fact cannot be gone into by the Court of Appeal, yet in considering question of law the judges have often to consider incidentally questions of fact with which the law is intertwined. The rules evolved by the author from the English Appellate Court decisions regarding the standardisation of sentences will be found of special interest and the author is to be congratulated on the care bestowed on this portion of the work. For instance the English Judges have laid it down that it does not follow that because a man has been convicted a second time of a similar offence a heavier sentence should be passed on him. The comparative gravity of the offence, the circumstances under which it was committed and the interval after the commission of the first offence should all be taken into consideration. The principle followed by English Judges that "wherever it is possible all the charges upon which it is intended to prosecute an accused person should be disposed of at the earliest time which is reasonably possible and should not be allowed to remain till the punishment for one or more of the offences has been nearly or entirely completed" should also be observed in this country.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important ones to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. REVISION No. 96 OF 1911. RAM DEO PANDE, Petitioner *v.* THE EMPEROR, Opposite Party. 15th February 1912.

Criminal Procedure Code, sec. 110—Successive proceedings—Locus penitentiæ.

The Petitioner was once before bound down under sec. 110, Cr. P. C., to be of good behaviour for 2 years ending with the 22nd December 1910. The police again submitted a report against him, dated the 20th October 1911, and the Sub-divisional Magistrate drew up proceedings against him under sec. 110, Cr. P. C. The Petitioner then moved the High Court for quashing the said proceeding.

Their Lordships observed :—

We think that this Rule must be made absolute on the first ground on which it was issued, namely, that the proceedings are premature. The police report upon which they are based mentions 17 cases, in which the accused has been suspected to have taken part, and 8 of these cases or nearly half, we are surprised to find, took place during the period when he was previously furnishing security. Then there are four cases in which the police reported that he has been known to have taken part. All four of these cases took place during the previous terms of security and it is upon these 12 cases, with 9 other cases which occurred in April, May and June and August 1911, that he is now being arraigned. * * * * *

But these proceedings must be confined to facts and circumstances alleged against him after his release from his last security, and to import anything before as evidence of habit would be to lay down that having once been called upon to furnish security he could always on the same evidence be made to continue that security from one term to another. That certainly is not the law. The principle on which these cases should be tried is laid down in *Jonab Ali* v. *The Emperor*, I. L. R. 31 Cal. 783. We do not mean to lay down in any particular case or in this case that 15 months is or is not a sufficient period to give a man a *locus penitentiæ*. * * * *

Mr. Huq with *Babu Monmatha Nath Mukherjee* for the Petitioner.

Babu Srish Chandra Chaudhury for the Crown.

B. C. *Rule made absolute.*

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. REV. No. 94 OF 1911. BALAI BHADRA AND ANR., Petitioners *v.* THE EMPEROR, Opposite Party. 15th February 1912.

Criminal Procedure Code, sec. 133—Magistrate must adjudicate upon the claim of private right.

This Rule was obtained on the ground *inter alia* that the Magistrate had no jurisdiction to appoint a jury in a proceeding under sec. 133 when one of the Petitioners had shown cause and stated that the disputed path-way was not a public pathway and the Magistrate had not made a preliminary enquiry into the *bonâ fides* or otherwise of the claim set up by the Petitioner before appointing the jury.

Their Lordships observed :—

As regards the first ground on which this Rule

was issued it is no answer for the Magistrate to say that he overlooked the fact that the Petitioner Balai had at the inception of the proceedings put in a claim that the place was not a public pathway. Such a claim having been made must necessarily be adjudicated upon by the Magistrate.

Babu Monmatha Nath Mukherjee for the Petitioners.

B. C.

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. REV. No. 68 OF 1912. BEKU SARDAR, Complainant, Petitioner *v.* BASHI AKADA AND ANR., Accused, Opposite Party. 15th February 1912.

Compensation—Appellate Court's power to order compensation under sec. 250, Cr. P. C.

On the complaint of the Petitioner the Opposite Party were convicted; on appeal the District Magistrate set aside the conviction and ordered the Petitioner to pay compensation to the accused. This Rule was obtained on the ground that the District Magistrate had no jurisdiction to make the order in appeal.

Their Lordships observed :—

This Rule must be made absolute on the ground on which it was issued. The Full Bench case, *Mehi Singh* v. *Mangal Khanda*, 16 C. W. N. 10, has now decided that the Appellate Court has no jurisdiction to order compensation. The money paid must be refunded.

Babu Puran Chandra Roy for the Petitioner.

B. C.

CIVIL APPELLATE JURISDICTION. Before CHATTERJEE, J. APPEALS FROM APPELLATE DECREES NOS. 1465 AND 1627 OF 1909. DULA MEAH, Plaintiff, Appellant *v.* JOLEKHA BIBI AND OTHERS, Defendants, Repondents. 20th February 1912.

Presumption—Bengal Tenancy Act (VIII of 1885), sec. 103—Entry in favour of two persons—Chitta, entry in, correctness of.

In the record-of-rights recently prepared in the locality, a certain tank was recorded, half in the name of the Plaintiff and half in the name of the Defendant.

Two suits were filed, one by the Plaintiff and one by the Defendant, each claiming the entire 16 annas of the tank. The Settlement Officer allowed the entry to remain as made in the record-of-rights.

The Special Judge on appeal declared Dhanghavo, the Plaintiff in one of these cases, as entitled to the whole 16 annas and ordered an alteration in the entry accordingly.

On appeal to the High Court by Dula Meah, who was Plaintiff in one case and Defendant in the other, it was contended that the learned Judge in arriving at his decision overlooked the presumption arising in favour of the correctness of the record-of rights until rebutted and further that he erroneously held that a certain Government chitta of 1826 raised a presumption as to the correctness of the entry made therein.

Held—That when the entry was made in favour of each of the parties to the extent of 8 annas, to that extent each party was entitled to rely upon the record-of-rights as furnishing presumptive evidence of his title to the extent of that share.

As regards the chitta of 1826, it was prepared by a certain Government Amin in respect of a Government khas mehal. The genuineness of the chitta was admitted by the parties. It was also admitted that a certain tank in that *chitta* was identical with the tank in dispute. But it was not admitted that it represented a correct state of things

Held—That there is no law which creates in favour of the chitta a presumption as to the correctness of the entry contained therein. An investigation based upon the existence of the presumption in favour of the *chitta* was a defective investigation, because the presumption assumed a certain state of things to be proved, unless the contrary was shown.

Babu Dhirendra Lal Khastgir for the Appellant.

Babu Jyotis Chandra Sarkar (for *Moulvi Serajul Islam*) for the Respondent.

A. T. M. *Case remanded.*

CIVIL APPELLATE JURISDICTION. Before CHATTERJEE, J. APPEAL FROM APPELLATE DECREE No. 2068 OF 1909. ADIRAM GAONBURA Defendant, Appellant *v.* DOMA HALWAI Plaintiff, Respondent. Heard, 20th and 21st February. Judgment, 21st February 1912.

Assam Land and Revenue Regulation (I of 1886), sec. 154—Suit for declaration of title, maintainability—Settlement, if can be cancelled when still subsisting.

The Defendant was an annual settlement-holders of a large plot of land, about 10 bighas, for some time. After some years of Settlement in this way the land was not settled with anybody and became 'Sarbasi.' In fact it remained waste at the disposal of the Government and was used for grazing purposes. For some years this state of things continued and then the Government settled the disputed land which was a portion of the said bigger plot of land with the Plaintiff's predecessor in title for 2 years, under annual leases. Thereafter there was a re-settlement and the disputed lands were settled with the Plaintiff's pre-

decessor in title. During the pendency of that settlement the Defendant made an application to the revenue authorities that those lands should have been settled with him as they formed a part of his old holding. The revenue officer made some enquires behind the back of the Plaintiff and cancelled the settlement of the Plaintiff and made a settlement in favour of the Defendant for 18 years. The Plaintiff then sued for a declaration of his title to those lands, evidently such title as was given to him under two annual settlements and the re-settlement thereafter.

Held, that as the prayer was for a declaration of title, sec. 154 of the Assam Land and Revenue Regulation was not applicable.

Held, *also*, that the settlement in favour of the Plaintiff could not be cancelled during its subsistence.

Babus Surendra Nath Roy and *Satyendra Nath Roy* for the Appellant.

Babu Monmatha Nath Mukherjee for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before CHATTERJEE, J. APPEALS FROM APPELLATE DECREES NOS. 175 AND 228 OF 1910. DASRATH PANDA, Appellant *v.* SATYABADI GAONTIA AND OTHERS, Respondents. 21st February 1912.

Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 14, 120—Suit for cancellation or amendment of entry—Central Provinces Land Revenue Act (1881), sec. 83.

The only question that arose in the appeal was whether the suit of the Plaintiff was barred by Art. 14 of the second schedule of the Limitation Act (XV of 1877). The suit was for the cancellation or amendment of certain entries made in the record-of-rights under sec. 83 of the Central Provinces Land Revenue Act of 1881. Sec. 83 provides for suits for the setting aside of certain decisions or for the cancellation or amendment of certain entries.

Held, that the suit was not for setting aside any order of a Government officer.

A revenue officer is a Government officer who can be said to act when he makes an entry in the Register; such an act cannot, however, be set aside by a Civil Court except under any statutory power.

Held, that the suit as brought did not come within the strict wording of Art. 14, but came under Art. 120.

Babu Sarat Kumar Mitra for the Appellant.

Babu Luchmi Narayan Singh for the Respondent.

Cases remanded.

A. T. M.

BAISNAB CHARAN MANJHI *v.* GATINATH MUNSHI.

to a dispute relating to possession of land have been bound down under sec. 107 no order of attachment under sec. 146 of the Criminal Procedure Code can be made in respect of the disputed property.

This was a Rule granted on the 10th July 1911, against the order of Babu A. L. Gupta, Deputy Magistrate of Magura, dated the 4th of May 1911, directing under sec. 146, Cr. P. C., the attachment of the disputed *jalkar* until the rights of the parties thereto are determined by a competent Court.

The material facts will appear from the judgment.

Babu Narendra Kumar Bose for the Petitioners.

Babus Monmatha Nath Mukherjee and *Kumar Sankar Ray* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This was a Rule calling upon the District Magistrate and the Opposite Party to show cause why the order attaching a certain *jalkar* should not be set aside on the ground that the Magistrate had no jurisdiction to proceed after all the members of the second party had been bound down under sec. 107, Cr. P. C., on the 19th December 1910 in a prior proceeding.

The proceedings under sec. 145 were taken on the 23rd February 1911 and the order complained of was passed on the 4th May 1911, and the Magistrate finding it impossible to determine who was in possession of the *jalkar* attached the property under sec. 146. Now it would be impossible for us to say that in no case can the fact that one party had been bound down to keep the peace under sec. 107 leave the Magistrate any jurisdiction to act under sec. 145 when the circumstances so require; and we cannot see our way to making this rule absolute without laying down such a general proposition. Certainly on the facts of this case it was quite open to the Magistrate to hold that there was a probability of a breach of the peace in respect of the possession of this *jalkar*, even although the members of the second party had been bound down. There were many persons who are said to be interested in the *jalkar* who absconded at the time of the 107 proceeding. The second party say that they have a reasonable apprehension that these persons may by claiming rights in this *jalkar* cause a breach of the peace with the first party, who are admittedly fishermen; or the first party being fishermen may very naturally seek to enforce their rights against the second party who have been bound down; in which case the order binding down the second party will have the effect of ousting them from any possession which they may have.

It would seem that in this state of fac's the right course for the Magistrate to take would be the course he has taken, namely, to try and discover who is in actual possession of this *jalkar*. He finds himself unable to do so and he therefore properly exercises his jurisdiction under sec. 146. The fact that the order under sec. 107, Cr. P. C., expired in December 1911, does not of course in any way affect the legal aspect of the case, but it certainly renders us less disposed in the exercise of our discretion to interfere with any measure that the Magistrate has thought it necessary to take for the preservation of the peace in his district.

The Rule is discharged.

Rule discharged.

[PRIVY COUNCIL.]

[APPEAL FROM THE SUPREME COURT OF THE COLONY OF SIERRA LEONE.]

LORD MACNAGHTEN.
LORD MERSEY.
LORD ROBSON.

1911, Heard, 1 and 15, December. 1912, Judgment, 26, January.

In the matter of MOSES AMADO TAYLOR.

Professional misconduct—Proceeding to strike off from Rolls—Contempt of Court, pursuing remedy in Criminal Court when Supreme Court refused civil remedy, having disbelieved information, if amounts to—Forgery, striking out names of witnesses from subpœnas and putting other witnesses' names by solicitor after informing responsible officer—Intent to defraud, if any—Bad faith—Right to be heard on matters relating to professional misconduct.

Where a Plaintiff who has been refused a warrant for the detention of the Defendant by a Civil Court straightway starts a criminal process on the same subject-matter and by means of allegations to which the Civil Court attached no credit obtains his warrant from a different Court, almost as a matter of course, he undoubtedly runs several risks of a serious character. He is not, however, restricted by law to a single form of remedy. He may pursue all the legal remedies appropriate to his grievance, and his conduct does not necessarily involve any punishable contempt of the Civil Court whatever may be its other consequences.

Where in such a case the arrest by warrant of the Criminal Court was obtained without getting the necessary fiat of Government, and it was executed but the prisoner was then discharged on the ground that the warrant was in excess of the Magistrate's jurisdiction, and it appeared that the Magistrate was not misled into issuing the warrant by any concealment or deceit on the part of the applicant but that it might have been due to the Magistrate's own inadvertence and there was no evidence to show that the applicant did not believe in the justice of his claim and did not so instruct the solicitor who acted for him in the matter:

Held—*That the conduct of the solicitor, though it might, from other points of view, be shown to be open to strong animadversion, could not, in the absence of proof that the proceedings were tainted by his fraud, be held to constitute contempt of Court, nor did it show bad faith on the part of the solicitor.*

Where two persons on being served with subpœnas taken out by the solicitor on behalf of certain accused persons stated that they knew nothing of the case, and thereupon the solicitor took back the subpœnas and mentioned to a responsible Court officer that he wanted the names of witnesses to be substituted, and on his making no objection struck out their names and substituted those of two other persons in their place:

Held—*That there being nothing to show that the intent of the solicitor in so doing was to defraud, the facts did not establish the charge of forgery brought against him, who at most had committed an irregularity and for which a pecuniary penalty of £20 imposed on him was an adequate punishment.*

That an order striking the solicitor's name from off the Rolls on account of the said two alleged offences of contempt and forgery could not in the circumstances be maintained.

References in the order to the solicitor's "conduct in other professional matters," when no such matters were specified in the information before the Court and upon which the solicitor had not been heard could not be relied on against him.

IN THE MATTER OF MOSES AMADO TAYLOR.

This was an appeal by special leave from three Orders of the Supreme Court of the Colony of Sierra Leone, dated respectively the 3rd day of September 1908 and the 7th and 10th days of May 1909.

Mr. Moses Amado Taylor, a native of Freetown in the Colony of Sierra Leone, a Barrister of the Honourable Society of Gray's Inn where he was called to the Bar in June 1907, was subsequently enrolled as a Barrister and Solicitor of the Supreme Court of the said Colony of Sierra Leone.

Early in April 1908 the Appellant, Mr. Taylor, was instructed by one Michael Huggins, a railway pointsman in the service of the Sierra Leone Government, to bring an action against one George Wright, a foreman platelayer in the employ of the said Government, for damages for an alleged assault by shooting on or about the 30th of January 1908. On the 10th of April 1908, the Appellant sent the usual letter before action to the said George Wright, demanding from him an apology and costs. There being no answer to the said letter, an action (*Michael Huggins* v. *George Wright*) was commenced on the 6th day of May 1908 in the Circuit Court of the Protectorate of the Colony of Sierra Leone.

The Appellant acted professionally for the Plaintiff in the said action of *Huggins* v. *Wright*, and during the absence on leave of the Judge of the said Circuit Court, the Appellant on the 22nd day of August 1908, applied to the Acting Chief Justice of the Supreme Court of the Colony of, Sierra Leone, to issue under the provisions of secs. 2 and 3 of the Ordinance for the Abolition of Imprisonment for Debt, and for the Punishment of Fraudulent Debtors, Ordinance No. 7 of 1883, for the arrest of the said Defendant Wright, on the ground that the Defendant was about to leave the Colony but the said Acting Chief Justice rejected the said application.

The Appellant then advised Huggins that in his opinion he might proceed criminally against Wright for the alleged assault, and Huggins on the 24th day of August 1908 swore to an information before the Acting Police Magistrate of Freetown, who issued a warrant for the arrest of Wright for a felony alleged to have been committed by him, on or about the 30th day of January 1908. The warrant was duly executed, and the Appellant on the instructions of Huggins, appeared to prosecute Wright when he was brought before the Magistrate, who however discharged Wright, for want of jurisdiction.

On the 27th day of August 1908, Wright presented a petition to the Acting Chief Justice, alleging *inter alia*, that he had been prejudiced in the action of *Huggins* v. *Wright* by reason of the fact that Huggins, the Plaintiff, and his Solicitor, the Appellant, caused him, the said Wright, to be illegally arrested and falsely imprisoned under the circumstances stated in the last paragraph, and praying that he might be afforded such relief as might seem fit to the learned Judge, in order that his cause might not be prejudiced at the hearing of the said action.

The Acting Chief Justice, thereupon, issued under the seal of the said Circuit Court, a summons, dated the 27th day of August 1908, calling upon the Appellant, and Huggins "to show cause why an attachment should not issue against you for a contempt of this Court, in causing to be illegally arrested, on a warrant of arrest, dated the 24th day of August 1908, under the hand and seal of the Police Magistrate of the Freetown Police District, the above-named Defendant for a felony

alleged to have been committed by the said Defendant in the protectorate aforesaid on the 30th day of January last, in gross contempt and defiance of the refusal of the Judge, of the said Court on Saturday the 22nd day of August 1908, to issue a warrant for the arrest of the said Defendant, on an application made by you in the above-mentioned action under the provisions of secs. 2 and 3 of an Ordinance intituled 'An Ordinance for the abolition of Imprisonment for Debt, and for the Punishment of Fraudulent Debtors' whereby, in so illegally causing the said Defendant to be arrested as aforesaid, you have acted contrary to good faith, and the true interests of justice, and in a manner calculated to bring the process of the Court and the administration of justice into contempt."

The Appellant answered the said summons and pleaded in defence, *inter alia*, that the procedure adopted was irregular, that the Acting Chief Justice had no jurisdiction in the matter of a contempt, if any, of the said Circuit Court, and that the action of the Appellant was not a contempt of Court.

After recording oral and documentary evidence, the said Acting Chief Justice delivered his judgment and made an order, on the 3rd day of September 1908, whereby the Appellant was ordered, "to pay a fine of one hundred pounds, and costs of these proceedings, and to be imprisoned, till the fine is paid within twenty-four hours, in which to pay the fine." He held that there was no irregularity in the procedure adopted, that he had jurisdiction to deal with the matter, and that the Appellant was guilty of a grave contempt of Court. The Appellant complied with the said order and paid the amount of the fine and costs.

In or about the month of February 1909 the Appellant was retained to defend, in the said Supreme Court, three of the accused in the case of *Rex* v. *Ganson and others*, and with a view to secure the attendance of certain witnesses, he applied to the Master of the said Supreme Court, to issue certain subpœnas, which were duly issued upon the Appellant, paying only the necessary conduct money (there being no fees chargeable). The said subpœnas were duly issued, and served by the bailiff. When the Appellant called upon two of the witnesses, who were prison warders, so served respectively, named Charles Ashley and Robert Gittens, to take their proofs, he learnt from them, that they knew nothing about the case. The Appellant, thereupon, requested the said Charles Ashley and Robert Gittens to return the subpœnas served upon them, and the said witnesses handed over the same to the Appellant. The Appellant then struck out the names, addresses, and occupations of the said Ashley and Gittens, and also the date on which the said two persons were summoned to attend the said Supreme Court, and substituted therefor the names, addresses, and occupations of two other witnesses, respectively named Lamina and Sorie, and another date, namely, 1st March. The said subpœnas, so altered, were served on the said Lamina and Sorie by the Appellant. The said Sorie did not give evidence, but the said Lamina did, and at the close of his evidence the subpœna served upon him was impounded.

The Appellant was subsequently brought before the Police Magistrate of Freetown, on a charge "that he the said Moses Amado Taylor, did on the 28th day of February 1909, at Freetown, in the Police District of Freetown, unlawfully deliver

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or serve or cause to be delivered or served upon one Sorie and one Lamina, labourers, residing at Big Wharf, Freetown, in the Colony aforesaid, certain forged processes on orders of the Court, or copies thereof, to wit, subpœnas, well knowing the said processes, or orders to be forged, contrary to sec. 59 of Ordinance No. 14 of 1904."

The Magistrate, after recording the oral and documentary evidence adduced in support of the said charge of alleged forgery, committed the Appellant, who reserved his defence, to the Supreme Court for trial. One of the witnesses examined before the Magistrate, was the Master of the Supreme Court, Mr. Samuel A. Metzger whose evidence went to show that only the Master of the Supreme Court could make an alteration in a subpœna, and that a "criminal subpœna" could not be served, except by a bailiff of the Court. According to his view, the Appellant forged the said two subpœnas by making the alterations that he did, and served the alleged forged processes of the Court, by serving them on the said witnesses himself. Mr. Metzger, however, admitted in cross-examination that the practice alluded to by him was unwritten.

The Appellant was thereafter indicted by the Acting Attorney-General, and when the case (*Rex* v. *Taylor*) came on for hearing, the learned Chief Justice made an order, dated the 7th day of May 1909, to the effect that if the Appellant paid a fine of £20 by the following 10th day of May, he would not be called upon to plead to the said indictment. The Appellant paid the said fine, on the same date.

On the 10th day of May 1909, the case (*Rex* v. *Taylor*) was again taken up by the learned Chief Justice who made an order removing the Appellant's name from the Roll of Barristers and Solicitors of the said Supreme Court, as a consequence of the matters which resulted in the orders, dated the 3rd day of September 1908 and the 7th day of May 1909, respectively.

On the 11th day of May 1909, the learned Chief Justice, in recording his reasons for his refusal to suspend the Appellant, expressed himself in the following terms :—

"I refused to suspend Mr. Taylor for a definite period, as I have not struck off the Rolls of the Court as a punishment for his offence in the above case (*i.e.*, *Rex* v. *Taylor*), but because I consider his present conduct and also previous conduct, in other professional matters render him unfit to be on the Rolls of the Court, and that I have had reasonable grounds for removing his name under the provisions of sec. 56 of the Ordinance No. 14 of 1904 . . . ."

The Appellant was subsequently required, by the Benchers of the Honourable Society of Gray's Inn, on the application of the Acting Attorney-General of Sierra Leone, to make answer to the following charges :—

"That while practising as a barrister and solicitor of the Supreme Court of Sierra Leone, you were guilty of professional misconduct and conduct unworthy of a member of the Bar, in respect of (1) the matter for which you were find £100 on the 3rd September 1908, by the Acting Chief Justice of Sierra Leone; (2) the matters for which you were struck off the Roll of the Supreme Court of Sierra Leone by the Chief Justice of the Court on the 10th day of May 1909."

The Appellant sent a written answer to the said charges, and on the 3rd day of

November 1909 the said Bench made the following Order :—

"That the Bench, having considered the communication of the Acting Attorney-General of Sierra Leone, with regard to the conduct of Mr. Amado Taylor, and the documents which accompanied the said communication, and having also considered Mr. Taylor's written answer thereto, does not think fit to take any action in the matter."

By an order in Council made on the 28th day of November 1910, on the petition of the Appellant, it was ordered that he should have special leave to appeal, from the said three orders of the said Supreme Court.

Sir R. Finlay, *K. C.* (with him *Messrs. Daniel Warde* and *Parikh*) for the Appellant submitted that the Appellant's action was not a contempt of Court. There was nothing wrong in the Appellant advising his client to prosecute Wright in the Criminal Court if his client chose to do so. Even if it was, Wright could bring an action for damages in a Civil Court. But it was not contempt of Court nor could the arrest in any way prejudice the trial of the civil action. As regards the subpœnas, they were often taken out in blank and the names of witnesses were inserted afterwards. The Appellant's alterations were unintentional breaches of the unwritten practice of the Master's office. The alterations were made openly and without any attempt at concealment. There was no wrong motive. The payment of the fine of £20 was not admission of guilt. It was paid only to put an end to the matter. The Chief Justice's judgment ordering the Appellant's name to be removed from the Rolls of the Court was a most extraordinary one. The Appellant knew nothing whatever about the "other professional matters" referred to by the Chief Justice. He had no opportunity of defending himself. The Appellant had been hardly and unjustly treated.

The Attorney-General and *Mr. S. A. T. Rowlatt* for the Respondents.

Mr. Rowlatt submitted that the Appellant was guilty of contempt of Court in bringing to bear the process and the pressure of the Court by arresting Wright on an alleged assault. The process must have been irregular to the Appellant's knowledge as he had not received the *fiat* of the Attorney-General. It was an abuse of process to coerce the Defendant. Referring to the subpœnas it was submitted that the offences charged against the Appellant involved intent to defraud. In a Colony such as Sierra Leone the way of dealing with a barrister or solicitor was by contempt of Court for there were no Bar Council, no Law Society and no professional opinion.

Sir R. Finlay in reply.—It was no doubt true that it desirable that the law should be observed and applied with all strictness and regularity in a Colony where there was a large native population but it was no less important that His Majesty's Judges in such a community should not bring to bear such a weapon as they exercised in this case under the guise of their jurisdiction for contempt of Court, against a barrister whose proceedings had brought him under their displeasure.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ROBSON.—The Appellant Moses Amado Taylor is a native of Freetown in the Colony of Sierra Leone and a barrister of the Honourable Society of Gray's Inn, where he was called to the Bar in June 1907. He was afterwards

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enrolled as a barrister and solicitor of the Supreme Court of the said Colony, and he now appeals from three orders of that Court.

By the first of those orders, dated the 3rd September 1908, he was fined 100*l.* and costs for an alleged contempt of Court; by the second, dated the 7th May 1909, he was fined 20*l.* in respect of an alleged forgery in the case of *Rex* v. *Ganson* and by the third, dated the 10th May 1909, his name was removed from the Roll of barristers and solicitors of the said Supreme Court.

On the 6th May 1908 the Appellant, acting professionally for one Michael Huggins, commenced an action in the Circuit Court of the Protectorate wherein the Plaintiff Huggins, who was a native railway pointsman in the service of the Sierra Leone Government, sued one George Wright, who was a foreman platelayer in the same employ, for damages for an alleged assault by shooting on the 30th January 1908 at Kangahun, in the Protectorate. When the action was begun Huggins had been dismissed from his employment, and on the 20th June the Appellant wrote to Wright saying that if his client had not been peremptorily dismissed from work he would have advised him to drop the matter, and offering at the same time to settle it if Wright would agree to pay his client's wages for the six months' employment he had lost (amounting to about 10*l.*) and costs. He further stated that if these terms were refused he would apply for the Governor's fiat to have the action tried in Freetown before he (Wright) left the Colony.

No notice was taken of this letter.

On the 22nd August 1908, the Appellant applied to the Acting Chief Justice under sec. 2 of the Debtor's Ordinance, 1883, for a warrant for the arrest of Wright on the ground, which was true, that he was about to leave the Settlement. The Appellant at the same time stated that if Wright would settle on the terms before suggested, his client would be satisfied. The Acting Chief Justice refused this application because, as he states in his judgment delivered on the 3rd September 1908, he "saw that all he (Appellant) wanted was to get some money out of Wright and to use the warrant as a lever."

On the 24th August 1908, an application was made on the information of Huggins to one of the police Magistrates, Mr. Vergette, at Freetown, for a warrant for the arrest of Wright upon a criminal charge of assault, with intent to murder, on the 30th January 1908, and a warrant was issued accordingly. As the Magistrate who granted it had no jurisdiction over matters arising in the protectorate, except under the authority of the fiat of the Governor, which was wanting in this case, this warrant was in excess of his jurisdiction. Afterwards, in the proceedings for the contempt, the Magistrate stated that—

> "In granting the warrant, I was misled by the information, which did not go to show that the offence was committed in the protectorate; it was brought to me while I was on the Bench."

The information was silent as to the place where the alleged assault was committed, but it so happens, however, that the warrant itself explicitly states that the offence took place at Kangahun in the protectorate, a circumstance which must have been communicated by the Appellant or Huggins. There does not appear, therefore, to have been any concealment or deceit on the part of the applicant, though there may have been inadvertence

IN THE MATTER OF MOSES AMADO TAYLOR.

on the part of the Magistrate. The warrant was duly executed, and on the 25th August 1908 Wright was brought before the Magistrate. The Appellant appeared for Huggins, the prosecutor, and at once asked the Court to remand Wright so that he (the Appellant) might apply to His Excellency the Governor to obtain a fiat to give the Magistrate jurisdiction. The Magistrate had, under the circumstances, no jurisdiction at all, and very properly refused, that application, whereupon Wright was discharged.

On the 27th August 1908, a summons was issued by the acting Chief Justice and served on the Appellant, calling on him to appear and show cause why an attachment should not issue against him for contempt of the Circuit Court of the protectorate in causing Wright to be illegally arrested—

"in gross contempt and defiance of the refusal of the Judge of the said Court on the 22nd August 1908, to issue a warrant for the arrest"

of Wright.

The summons was heard on the 29th and 31st August 1908 by the Acting Chief Justice, who called and examined Wright, and the Magistrate, Mr. Vergette. The sole question then to be determined was whether or not the prosecution and arrest of Wright was a contempt of Court. The Acting Chief Justice came to the conclusion that it was. He was of opinion that the Appellant and Huggins resorted to the criminal proceedings and procured the illegal arrest as a mere lever to get the money they were demanding from Wright.

"The whole proceeding"

said the learned Judge

"was simply an abuse of a process of Justice,"

and he adds,

"I am satisfied that the contemnors, in initiating their criminal proceedings, were influenced by the intention of defying me for having refused them the civil warrant of arrest they applied for, and Taylor in particular had this object in view, for when I refused him the warrant, he became impudent and threatened to complain to the Secretary of State."

. . . .

"Even if the warrant had been valid, a contempt would have been committed, and the illegality of the warrant only intensifies the contempt."

It was the recourse which this solicitor had, on behalf of his client, to another tribunal and a different process, in order to get what the learned Judge had decided he was not entitled to have, which constituted, in the learned Judge's view, the essence of the contempt.

It is true that the learned Judge found as a fact that the Appellant was not acting in good faith, but the sense in which that charge is put forward needs some explanation. It is not suggested, or certainly there is no evidence to support such a suggestion, that Huggins did not believe in the justice of his claim and did not so instruct his lawyer. It was, indeed, pointed out by the learned Judge that the alleged assault was seven months old, and that if the contemnors had been acting in the interests of justice they would have taken their proceedings earlier, but mere delay in such circumstances can scarcely be advanced as a proof that the proceedings were fraudulent. It may be that the alleged contemnors have made themselves liable to proceedings at the instance of Wright; that is a question on which their Lordships express no opinion whatever, and have no adequate means of forming one; it may be that the conduct of the Appellant may turn out to be open to strong animadversion from other points of view than that of contempt of Court, but for the purposes of the present proceeding it has not been proved, and

cannot be assumed, that the proceedings before the Magistrate were tainted by any fraud on the part of the Appellant.

The question is therefore narrowed down to the bare ground stated in the summons, namely whether under the circumstances, procurement of the warrant and the arrest consequent thereon constituted in law a contempt of the Supreme Court. Their Lordships think they did not. Where a Plaintiff who has been refused a warrant for the detention of the Defendant by a Civil Court straightway starts a criminal process on the same subject-matter, and, by means of allegations to which the Civil Court attached no credit, obtains his warrant from a different Court, almost as a matter of course, he undoubtedly runs several risks of a serious character. He is not, however, restricted by law to a single form of remedy. He may pursue all the legal remedies appropriate to his grievance, and his conduct does not necessarily involve any punishable contempt of the Civil Court, whatever may be its other consequences.

The next order complained of, that of the 7th May 1909, arose out of the case of *Rex* v. *Ganson and others* in the Supreme Court, in which the Appellant was retained to defend three of the accused. He was desirous of securing the attendance of two witnesses, Ashley and Gittens, who were prison warders, and applied to the Master of the Supreme Court for subpœnas for them. The subpœnas were accordingly issued on the deposit by the Appellant of the conduct money, or allowance usual for witnesses of that class, (there being no fees payable), and were duly served by the bailiff. It turned out that the witnesses named said they knew nothing about the case, so the Appellant asked them to return the subpœnas to him, which they did. He then struck out the names of Ashley and Gittens, and substituted for them the names of two labourers, Lamina and Sorie. The subpœnas, so altered, were served by the Appellant on Lamina and Sorie, and one of them, Lamina, was called and gave evidence. On these facts being disclosed at the trial the learned Chief Justice ordered Lamina's subpœna to be impounded.

Proceedings were subsequently taken against the Appellant in the Police Court at Freetown on the charge that he had forged the subpœnas delivered to Lamina and Sorie.

The facts above stated, which were never in dispute, and which constituted the whole case against the Appellant on this head, were then duly proved, with one additional circumstance worthy of note. It appeared on cross-examination of the Deputy Master and Registrar of the Supreme Court, who is also Under-Sheriff, that the Appellant called on him on 27th February 1909 for a subpœna for one Anderson. At that time the other subpœnas, including those for Ashley and Gittens, had been issued, and the Deputy Master admitted that the Appellant told him that he wanted some other witnesses substituted. He clearly referred to a proposed substituiton of names in the existing subpœnas. The Deputy Master never told him that new subpœnas would have to be taken out. He made no protest or objection. It did not seem to strike him as being in any way a serious matter, though, possibly enough, if any one had paused to think about it, it would have been recognised as an irregularity.

The Appellant was committed for trial, and on the 1st May 1909 the Attorney-General preferred an information against the Appellant charging him with (1) alter-

ing two copies of a subpœna with intent to defraud, (2) serving the copies, so altered, with intent to defraud, and (3) uttering forged subpœnas, with intent to defraud, knowing that they were forged.

The case came on for trial before the Chief Justice on the 3rd and 7th May 1909. Some of Appellant's colleagues at the Bar made a representation to His Honour, pointing out that the effect of his pleading to the information would be a conviction for an indictable offence, the consequence of which would be the removal of his name from the Roll of the Inns of Court in London. His Honour, therefore, on the application of the Appellant's counsel, consented that a plea should not be taken, the prisoner admitting his guilt and submitting to a fine of 20*l.*, which was paid.

Their Lordships are of opinion that the facts alleged against the Appellant did not suffice to establish the very serious offence with which he was charged. The evidence does not show or suggest any intent to defraud on the part of the Appellant, and, indeed, there seems to have been no motive so far as he was concerned which could give rise to any such intent. At the most he committed an irregularity for which some pecuniary penalty on his part was an adequate punishment.

A fresh proceeding was then immediately instituted against the Appellant to have him struck off the Roll of barristers and solicitors of the Supreme Court of the Colony, and on the 10th May 1909 the Chief Justice made an order to that effect. This is the third order complained of. It is founded entirely on the two alleged offences already dealt with, and must stand or fall with them. It is true that the Chief Justice in giving his reasons for this order refers to the Appellant's "conduct in other professional matters" as rendering him unfit to be on the Rolls of the Court, but no such matters are specified for the information of their Lordships, nor has the Appellant been heard upon them. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed; that the Order of the 3rd September 1908, should be discharged, and the sum of 100*l.* and the costs paid thereunder by the Appellant be returned to him; that the Order of the 7th May 1909, be discharged, except in so far as the same accepts the offer of the Appellant to pay the sum of 20*l.*; and that the Order of the 10th May 1909, be discharged, and the name of the Appellant restored to the Roll of the Supreme Court of the Colony of Sierra Leone.

No order is made as to the costs of this appeal.

Solicitor: *Mr. T. D. Metcalfe* for the Appellant.

Solicitors: *Messrs. S. Ommanney and Rendall* for the Respondents.

B. D.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

Suit No. 450 of 1900.

Fletcher, J.
1910,
4, April.

Golam Hossein Cassim Ariff
v.
Fatima Begum.

Sale by the Court and sale by Receiver under direction of Court, distinction between—Sale by Receiver, if requires confirmation or sale certificate by Court—Civil Procedure Code (Act V of 1908), Or. 21, rr. 92 and 94.

A sale by a Receiver under direction of Court is not a sale by Court and in such a sale the Court does not grant a sale certificate nor does it confirm the sale.

GOLAM HOSSEIN CASSIM ARIFF *v.* FATIMA BEGUM.

MINATOONNISSA BIBEE *v.* KHATOONNISSA BIBEE (1) *explained.*

This was an application by the purchaser for the issue of a sale certificate in respect of property purchased by him at a sale held by the Receiver.

Mr. B. L. Mitter for the Petitioner.—The High Court has always recognised the rights of a purchaser at a Receiver's sale to invoke the assistance of the Court in obtaining possession under the provisions of the Code of Civil Procedure which relate to sales in a suit.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This is an application by a purchaser at a sale held by a Receiver under an order of Court for a sale certificate and for confirmation of the sale. The purchaser relies upon a decision of Sale, J., in the case of *Minatoonnessa Bibee* v. *Khatoonnessa Bibee* (1). The short point is whether a sale by a Receiver under the direction of the Court is a sale by the Court so as to enable or require the purchaser to obtain a sale certificate. With the utmost respect for the learned Judge I think he has made a confusion between a sale by the Court and a sale under the Court. There are two classes of sales in suit, first sales by the Court and second sale under the Court. Sales by the Court are cases in which the Court makes a title to the purchaser and the Court confirms the sale and issues a sale certificate. The second class is where the Court authorises a trustee, receiver or other person holding property to sell the property and the sale is made out of Court, the Court while authorising or directing the sale does not make any title to the purchaser and in such a sale the Court does not grant a sale certificate nor does it confirm the sale. I am of opinion that the purchaser can rest content upon his purchase without having the sale confirmed by the Court or having a sale certificate issued to him.

(1) I. L. R. 21 Cal. 479 (1894).

I certify this case for counsel.

Solicitors: *Messrs. B. N. Basu & Co* for the Petitioner.

A. K. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO. 256 OF 1911
AND
RULE NO. 3037 OF 1911.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1911,
Heard,
29, November.
Judgment,
1, December.

RASH MOHINI DASI, Judgment-debtor, Appellant,
v.
DEBENDRA NATH SINHA, Decree-holder, Respondent.

Rent decree, one decree for two different tenures if is—Consolidation of tenures.

Where there were two different darputni *tenures in respect of 13 as. and 3 as. respectively of a* putni, *with different assessments of rent held by the same tenant though it is competent to a landlord to bring one suit for both the tenures, the mere fact that the total rent of the two tenures is claimed in the same suit cannot have the effect of consolidating the two tenures into one.*

A decree obtained for arrears of rent in respect of two or more separate tenures cannot be executed as a rent decree under the Bengal Tenancy Act but must be executed as a money decree under the Civil Procedure Code.

This was an appeal preferred on the 31st of May 1911, against an order of Babu N. N. Dhar, Subordinate Judge of Zillah Nadia, dated the 27th of May 1911.

RASH MOHINI DASI *v.* DEBENDRA NATH SINHA.

The material facts will appear from the judgment.

Babus Mohendra Nath Roy and *Surendra Nath Guha* for tht Appellant.

Babu Hara Prasad Chatterjee for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The question raised in this appeal is whether a decree for arrears of rent obtained by the Respondent against the Appellants can be executed under the special procedure prescribed in the Bengal Tenancy Act. The record of the rent suit was sent for and is before this Court. It appears from the plaint that there are two *darputni* tenures one in respect of the 13 annas share of the *putni* and the other in respect of the 3 annas share. Separate rents and instalments are fixed in respect of each *darputni* which moreover are not proportionate to each other, and the tenures are referred to in the plaint itself as both the *jamas*. The mere fact that the total rent of the two tenures are claimed in one suit cannot have the effect of consolidating the two tenures into one.

It is true the decree refers to a *darputni* but the question, whether there were two separate tenures or there was only one becomes material only when the decree is sought to be executed under the special provisions of the Bengal Tenancy Act. It is competent to a landlord to bring one suit for the total rents of several tenures held by the same tenant and no objection can be taken to the decree passed in this case.

It is clear upon the authorities that when one decree is obtained in respect of two or more separate tenures the special procedure prescribed in the Bengal Tenancy Act cannot be adopted in executing such a decree. Such a decree must be executed as an ordinary decree under the Civil Procedure Code.

The order of the Court below is accordingly set aside. The decree-holder of course will be at liberty to execute the decree as a decree for money under the provisions of the Civil Procedure Code.

We make no order as to costs. The Rule is discharged.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO. 76 OF 1911.

CASPERSZ, J. CHATTERJEE, J. 1911, Heard, 22, December. 1912, Judgment, 4, January.	KUTABULLAH SARKAR, Petitioner, Appellant, *v.* DURGA CHARAN RUDRA, Opposite Party, Respondent.

Civil Procedure Code (Act V of 1908), Or. XXI, r. 2—Payment not certified if may be taken to extend limitation.

Under Or. XXI, r. 2 of the Civil Procedure Code, an adjustment or payment of a decree which is not duly certified cannot be recognised by the Court for any purpose whatever, e.g., *for extending the time of limitation.*

This was an appeal preferred on the 9th of February 1911, against an order of Mr. A. Majid, District Judge of Zillah Rajshahye, dated the 15th of November 1910, confirming an order of Babu Bepin Chandra Chatterjee, Munsif of Nattore, dated the 8th of March 1910.

The facts of the case will appear from the judgment.

Mr. Wahed Hussain for the Appellant.

Babu Krishna Kumar Moitra for the Respondent.

KUTABULLAH SARKAR *v.* DURGA CHARAN RUDRA.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the judgment-debtor, from an order of the District Judge permitting the decree-holder to execute the decree of the 4th August 1901. The first execution proceeding began on the 5th September 1904; the second on the 4th January 1908; while the third and present application was made by the decree-holder on the 11th August 1909. On these facts, it is urged for the judgment-debtor that the first and second applications to execute the decree were clearly barred. This contention, however, cannot be considered in the absence of findings of fact, and the omission is due to the attitude of the judgment-debtor who refrained from pressing any such objection in the lower Courts. There must have been various proceedings on the successive applications, and certain action taken on the second application has been mentioned at the bar. If that application was in time, the case with which we are now concerned was properly instituted and can continue.

The next contention is that there was an adjustment of the decree some time in the year 1901; that the decree-holder fraudulently omitted to certify the same to the Court; and that the question is one that should have been decided under sec. 47 of the Code of Civil Procedure, 1908.

Or. XXI, r. 2 of the Code, as now amended, provides that a payment or adjustment, which has not been certified or recorded in the manner provided by the foregoing part of the section, shall not be recognised by any Court executing the decree. The omission of the words "as payment or adjustment of the decree" makes it clear that the Court cannot recognise a payment or adjustment, which has not been certified, for any purpose whatsoever, as, for example, to prolong the period of limitation for applying for execution. The judgment-debtor has his remedy under the second clause of r. 2; he is at liberty to inform the Court, and so to protect himself from any fraud of the decree-holder. The Appellant however seeks to obtain another remedy, and to have his objection to execution tried out under sec. 47 of the Code. But he cannot be permitted to evade the provisions of Art. 173A of the Limitation Act, and to obtain a decision in a matter which does not strictly come within the scope of sec. 47 because it is a matter which has been specifically provided for in Or. XXI, r. 2. If the contrary view were adopted, it would be open to the judgment-debtor in any similar case to allege fraud on the part of the decree-holder and to have an enquiry made under the general section, for every omission to certify payment may involve either negligence or fraud which in such a case would be an aggravated form of negligence. In the same Or. (XXI) the Legislature has exacted that applications to set aside sales on the ground of fraud came within the scope of r. 90, and so the operation of sec. 47 is excluded by necessary implication.

The view we take in this matter receives support from the decision of Mookerjee and Carnduff, JJ., in *Monmohan Karmokar* v. *Dwarka Nath Karmokar* (1). The judgment-debtor may have his remedy by suit on a plaint properly framed.

The appeal is dismissed with costs. We assess the hearing-fee at 2 gold mohurs.

Appeal dismissed.

(1) 12 C. L. J. 312, (317) (1910).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 1819 OF 1906.

MOOKERJEE, J.
CASPERSZ, J.
1911,
Heard,
20, April.
Judgment,
3, May.

TARA NATH CHAKRAVERTY, Appellant,
v.
ISWAR CHANDRA DAS SARKAR, Respondent.

Limitation Act (IX of 1908), Sch. I, Art. 142—Bengal Tenancy Act (VIII of 1882), Sch. III, Art. 3, secs. 184, 5 (5), 20 (7)—Suit by tenant against landlord for recovery of land—Rules of limitation, general and special, onus of proof as to—Character of tenancy, presumption as to—Area less than 100 bighas.

In a suit by a tenant for the recovery of land of which he had been dispossessed by the landlord, the tenant claimed the land as tenure-holder and the Defendants contended that it was an occupancy holding. Neither the character of a tenure-holder nor that of an occupancy raiyat was established by positive evidence. The question being what period of limitation was applicable to the case,

Held, *that in the circumstances of the case there was no statutory presumption either way.*

That the general rule of limitation in suits for recovery of possession of property was twelve years and that it is upon the party claiming the benefit of a shorter period of limitation to establish that the case fell within the special rule limiting the period to a shorter time.

The Defendants having failed to establish the occupancy character of the holding so as to bring it within the special rule of limitation under the Bengal Tenancy Act and the Plaintiff's suit being within time by the general rule, the suit was not barred by limitation.

A suit by a tenant to recover lands from the landlord, of which he alleges he has been dispossessed, is not a proceeaing under the Bengal Tenancy Act within the meaning of cl. (7) of sec. 20 of the Bengal Tenancy Act.

There is no provision in cl. (5) of sec. (5) of the Bengal Tenancy Act that when the area held by a tenant is less than 100 bighas, the tenant is to be presumed a raiyat until the country is shown.

This was an appeal preferred on the 21st August 1906 from a decision of Babu Pran Krishna Biswas, Subordinate Judge, Faridpur, dated the 25th of June 1906, modifying that of Babu Syama Kanta Nag, Munsif, Faridpur, dated the 31st of March 1905.

The facts of the case will appear from the judgment.

Mr. A. Chaudhuri and *Babu Baikuntha Nath Dass* for the Appellant.

Babu Monmotho Nath Roy for *Babu Prokash Chandra Majumdar* for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

This is an appeal on behalf of the Defendants in an action in ejectment. The Plaintiffs Respondents commenced this action for recovery of 14 parcels of land, of which they claimed to be the tenants under the Defendants-Appellants as zemindars. The Defendants conceded that the Plaintiffs were their tenants, but denied their tenancy in respect of the lands in dispute. The Court of first instance dismissed the suit. Upon appeal, the Subordinate Judge decreed the suit in part in respect of the plots to which the tenancy right of the Plaintiffs had been established. The Defendants have now appealed to this Court, and on their behalf the only substantial question of law which has been argued is that the

claim is barred by limitation inasmuch as the Plaintiffs were occupancy raiyats, and, according to their own case, had been dispossessed more than two years before the commencement of the suit. The Plaintiffs, on the other hand, have contended that they were tenure-holders, and no question of limitation arose as they had brought the suit within twelve years from the date of dispossession.

The learned Subordinate Judge in the Court below has found that the Defendants had failed to prove that the Plaintiffs were occupancy raiyats, and that consequently the special rule of two years limitation could not be applied to the claim. The present appeal was heard by a Division Bench on the 26th April 1909, and on that occasion an order was made under Or. XLI, r. 25 of the Civil Procedure Code, 1908, to enable the lower Court to determine the true character of the tenancy. The Subordinate Judge has now returned the finding that the Plaintiffs had failed to prove that they were tenure-holders as asserted by them. The position, therefore, in substance is that the origin of the tenancy is unknown, and neither the Plaintiffs nor the Defendants have been able to establish their allegation as to the true character of the tenancy.

It is worthy of remark that the provision in cl. (7) of sec. 20 of the Bengal Tenancy Act is of no assistance to the parties. That clause provides that if in any proceeding under the Act, it is proved or admitted that a person holds any land as a raiyat, it shall, as between him and the landlord under whom he holds the land, be presumed, until the contrary is proved or admitted, that he has for twelve years continuously held that land or some part of it as a raiyat. In the first place this suit for ejectment cannot be properly deemed a proceeding under the Bengal Tenancy Act: in the second place it is neither proved nor admitted that the Plaintiffs hold as raiyats, and consequently no presumption can arise that they are occupancy raiyats. Nor is the presumption laid down in cl. (5) of sec. 5 of the Bengal Tenancy Act of any use in the solution of the question raised before us. That clause provides that where the area held by a tenant exceeds 100 standard bighas, the tenant shall be presumed to be a tenure-holder until the contrary is shown. Here the area held by the tenant does not exceed 100 bighas. Consequently, the statutory presumption is entirely inapplicable. It may be observed here that the clause to which reference has been made does not embody a presumption that where the area held by a tenant is less than 100 bighas, the tenant is to be presumed to be a raiyat until the contrary is shown. The presumption created by the Legislature is purely unilateral, and its scope and applicability cannot be extended beyond its legitimate limits.

The position, therefore, is that the Plaintiffs have been proved to be the tenants of the disputed lands under the Defendants as their landlords who have unlawfully dispossessed them. No information is available as to the origin of the tenancy, and nothing is known about the purposes for which the tenancy was created. The question arises, under these circumstances, whether the general rule of limitation embodied in Art. 142 of the second schedule of the Limitation Act is to be applied, or whether the special rule of limitation laid down in Art. 3 of Sch. III of the Bengal Tenancy Act is to be taken to govern the matter. The learned Coun-

TARA NATH CHAKRAVERTY *v.* ISWAR CHANDRA DAS SARKAR.

sel for the Defendants-Appellants has contended that as cl. (1) of sec. 184 of the Bengal Tenancy Act, quite as much as sec. 4 of the Limitation Act, makes it obligatory upon the Court to dismiss a suit instituted after the time prescribed for the purpose, and as sec. 50 of the Civil Procedure Code, 1882, casts the duty upon the Plaintiffs to specify the point of time when the cause of action arose, the burden of proof is upon the Plaintiff to establish the true character of the tenancy and the applicability of the rule of limitation upon which they place reliance. In answer to this contention, it has been argued by the learned Vakil for the Plaintiffs-Respondents, that the onus is upon the Defendants to prove the special circumstances which would abridge the ordinary period of limitation applicable to cases of this description. In our opinion, the contention of the Respondent is well-founded and must prevail.

Art. 142 of the second schedule of the Limitation Act provides that a suit for possession of immoveable property, when the Plaintiff while in possession of the property has been dispossessed or has discontinued possession, must be instituted within twelve years from the date of the dispossession or discontinuance. There is no room for controversy that the present suit is one for possession of immoveable property within the meaning of the rule thus laid down. *Primâ facie*, therefore, this is the rule applicable to the matter now before us. The Defendants, however, contend that the period which would otherwise be available to the Plaintiffs has been abridged, because the Plaintiffs are occupancy raiyats, and that they are bound to sue within two years from their dispossession as laid down in Art. 3 of Sch. III of the Bengal Tenancy Act. That article provides that a suit to recover possession of land claimed by the Plaintiff as an occupancy raiyat must be instituted within two years from the date of dispossession. As the Defendants rely upon the special rule, the burden is obviously upon them to establish the circumstances requisite to make the rule applicable. The Plaintiffs do not claim to recover possession of the land as occupancy raiyats. It may be conceded that if it was established that the Plaintiffs were, as a matter of fact, occupancy raiyats, the mere circumstance that, in their plaint, they claimed the disputed land not as occupancy raiyats but as tenure-holders, would not exclude the operation of Art. 3 of Sch. III because it is a well-settled principle that parties cannot be allowed to evade the just application of statutory provisions on allegations untrue in fact: if the contrary view were taken, an unscrupulous litigant might evade the bar of limitation created by Art. 3 of Sch. III, by an unfounded assertion which would not stand scrutiny. We shall, therefore, assume that Art. 3 would be applicable if it was proved that the Plaintiffs were in reality occupancy raiyats. But they have not been proved to be such: neither the Plaintiffs nor the Defendants are able to prove the true character of the tenancy. Under such circumstances, as the special rule embodied in Art. 3 of Sch. III is not shown to be applicable, we must fall back upon the general rule embodied in Art. 142 of the Limitation Act, which, it cannot be disputed, is by its very terms, applicable to the case. The position that in circumstances like these the burden of proof is upon the party who asserts that the case has been taken out of the general rule and is governed by the special rule, is

supported by the principle which underlies the decisions in *Mohan Singh* v. *Conder* (1), *Danmull* v. *B. I. S. N. Co.* (2) and *Mangun Jha* v. *Dulhin* (3). The burden of proof is rightly thrown on the party who claims the protection of the shorter period, because he would fail in his contention if no evidence at all were given on this question on either side (secs. 102 and 103 of the Indian Evidence Act, 1872). The wider clause is, by the very generality of its terms, comprehensive enough to govern the matter, and if its operation is sought to be excluded on the ground that the case is covered by a special clause, the party who takes up this position must prove the existence of the special fact which operates as a bar to the suit, except perhaps when the facts are specially within the knowledge of the Plaintiff (sec. 106, Indian Evidence Act, 1872). To put the matter in another way, if there is a conflict between two periods of limitation, one of which, the longer, is applicable to all circumstances, and the other, the shorter, to special circumstances only, the longer term given by the statute to bring the suit ought to be applied, unless there is clear proof of the special circumstance which would make the shorter term applicable [*Crum* v. *Johnson* (4)].

The view we take is obviously just and may be defended on first principles if we remember for a moment the object of statute of limitation. We are not now concerned with the conflicting opinions as to the policy which underlies statutes of limitation, whether they are to be strictly interpreted because they encourage unconscientious defences [Lord Mansfield, C. J., in *Quantock* v. *England* (5)], or whether they are to be construed liberally because they are statutes of repose, Dallas, C. J., in *Tolson* v. *Kaye* (6), or statutes of peace [Baron Bramwell in *Hunter* v. *Gibbons* (7)]. It is sufficient for our present purpose to hold with Lord St. Leonards [*Trustees of Dundee Harbour* v. *Dougall* (8)], that "all statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost, and in all well-regulated countries, the quieting of possession is held an important point of policy" [*Luchmee Buxsh* v. *Runjeet Ram* (9), *White* v. *Paruthet* (10)]. The principle is lucidly explained by Sir Thomas Plumer M. R. in *Cholmondeley* v. *Clinton* (11):—"The public have a great interest in having a known limit fixed by law to litigation for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question." In the case before us, the possessor knew that after the expiry of twelve years from his entry, his right could not be called in question. If it was his case that his right ought not to be allowed to be called in question after the expiry of a shorter period, namely, after the lapse of two years from the commencement of his possession, it was for him to prove the special circumstances which alone would support a claim for such special protection. The burden, therefore, would be clearly upon him to

(1) I. L. R. 7 Bom. 478 (1883).
(2) I. L. R. 12 Cal. 477 (1886).
(3) I. L. R. 25 Cal. 692 (1898).
(4) [1902] 92 N. W. 1054.
(5) 5 Burr. 2628; 2 W. Bl. 702 (1770).
(6) 3 Br. and Bi. 223 (1822).
(7) 26 L. J. Ex. 5 (1856).
(8) 1 Macqueen H. L. 321 (1852).
(9) 20 W. R. 375 (1873).
(10) 1 Knapp. P. C. 179 at 227 (1829).
(11) 2 Jack and W. 140 (1820).

establish the facts which would justify a reliance on his part upon the special period of limitation. This he has failed to do. Consequently, in our opinion, the Subordinate Judge has rightly applied the general rule of limitation.

The result is that the decree made by the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 5010 OF 1910.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard,
23, May.
Judgment,
28, June.

BEGG, DUNLOP & CO. and another, Claimants, Petitioners,
v.
JAGANNATH MARWARI, Decree-holder, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 21, r. 48—Debt payable to judgment-debtor by non-resident outside jurisdiction, if may be attached—Execution.

It is not competent to a Court, in execution of a decree for money, to attach at the instance of the decree-holder a debt payable to the judgment-debtor by a non-resident outside the jurisdiction.

IN RE HOLLICK (6) *considered.*

This was a Rule granted on the 1st of December 1910, against the decision of Babu Bankim Chunder Mitra, Subordinate Judge of Zillah Burdwan, dated the 19th of September 1910.

The facts of the case will appear from the judgment.

Mr. B. C. Mitter and *Babus Monmatha Nath Mukherjee* and *Satis Chunder Sen* for the Petitioners.

Babu Surendra Nath Ghosal for the Opposite Party.

(6) 2 B. L. R. 108 : S. C. 10 W R. 447 (1868).

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—The Court is invited in this Rule to consider the legality of an order by which the Subordinate Judge has directed attachment of a debt payable outside its jurisdiction. The circumstances, under which the attachment has been made have not formed the subject of controversy before us. The decree-holder, Opposite party, one Jagannath Marwari, held a decree for money against one Rowland Hill, now deceased. Upon the death of the judgment-debtor, he sought to enforce the decree against his widow Annie Hill, as executrix to the estate of her husband. It appears that Rowland Hill was entitled to obtain a large sum of money from Messrs. Begg, Dunlop & Co. and Messrs. Williamson Magor & Co., two firms of merchants carrying on business in the town of Calcutta. The decree under execution had been made by the Court of the Subordinate Judge of Burdwan, and the application for execution had in the usual course been presented to that Court. The decree-holder next applied for an order of attachment of a sum of Rs. 6,750, out of the amount alleged to be due to the judgment-debtor from the two firms just mentioned. The Subordinate Judge thereupon issued a prohibitory order under r. 46 of Or. 21 of the Code of 1908 which was served upon the two firms on the 13th August 1910. The firms filed an objection against the prohibitory order, amongst others, on the ground that the Burdwan Court had no jurisdiction to attach the money in their hands, as they carried on business in Calcutta and the debt was also payable outside the jurisdiction of the Court. The Subordinate Judge, on the 19th September 1910, overruled this objection,

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and held that he had power to issue a prohibitory order, under r. 46, beyond the local limits of his jurisdiction. We are now invited to set aside this order on the ground that the prohibitory order was beyond the competency of the Court and that the Subordinate Judge had exercised a jurisdiction not vested in him by law. In support of the Rule, reliance has been placed upon the cases of *Abdul Gafur* v. *Albyn* (1), *Rango Jairam* v. *Balkrishna* (2) and *Sayadkhan* v. *Davies* (3). Reference has also been made to the cases of *Moonshee Hossein Ally* v. *Ashotosh Gangoolly* (4) and *Parbati Charan* v. *Panchanand* (5). In answer to the Rule, on the other hand, reliance has been placed upon the case of *In re Hollick* (6). It may be conceded that the observations of the learned Judges who decided the case last-mentioned do tend to support the contention of the decree-holder that it was competent to the Subordinate Judge to issue a prohibitory order upon a person, resident outside the jurisdiction of his Court, restraining him from paying a debt due to the judgment-debtor of the execution-creditor. This view, however, has not been accepted in the other cases upon which reliance is placed by the Petitioner, and in the case of *Abdul Gafur* v. *Albyn* (1) the Court declined to follow the decision in *In re Hollick* (6). Under these circumstances, and in view of the fact that the decisions mentioned turn upon the construction of the Codes of 1859 and 1882, it is incumbent upon the Court not merely to examine the provisions of the Code of 1908, which alone are applicable to the case before us, but also to consider the question as one of principle.

Sec. 38 of the Civil Procedure Code of 1908 provides, that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. Sec. 39 specifies the circumstances under which the Court which passed the decree may, on the application of the decree-holder, send it for execution to another Court. Cl. (*a*) of this section provides that a decree may be transferred if the person against whom the decree has been passed actually and voluntarily resides within the local limits of the jurisdiction of the Court to which the decree is sent for execution. Cl. (*b*) provides that a decree may be transferred if the judgment-debtor has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree, and has property within the local limits of the jurisdiction of the other Court. Cl. (*c*) deals with the case of a decree for the sale or delivery of immoveable property situated outside the local limits of the jurisdiction of the Court which passed it. These provisions of sec. 38, read along with those of sec. 39, plainly indicate the acceptance by the Legislature of the general principle that no Court can execute a decree in which the subject-matter of the suit or of the application for execution is property situated entirely outside the local limits of its jurisdiction. This elementary principle was recognised by a Full Bench of this Court in *Prem Chand* v. *Mokhoda* (7). It is needless for the purposes of the present case to formulate the exceptions to this rule: it is sufficient to indicate that in cases of decrees for

(1) I. L R. 30 Cal. 713 (1903).
(2) I. L. R. 12 Bom. 44 (1887).
(3) I. L. R. 28 Bom. 198 (1903).
(4) 3 C. L. R. 80 (1878).
(5) I. L. R. 6 All. 243 (1884).
(6) 2 B. L. R. 108: s. c. 10 W. R. 447 (1868).
(7) I. L. R. 17 Cal. 699 (703) (189).

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sale of mortgaged properties an exception has been recognised. *Maseyk* v. *Steel* (8), *Kartick Nath* v. *Tilukdhari* (9), *Gopi Nath* v. *Doybaki* (10), *Tincouri* v. *Shib Chandra* (11), *Latchman* v. *Maddan* (12) and *Jahar* v. *Kamini Debi* (13). An exception has also been recognised by the new Code in cases of attachment of salaries of public officers under r. 48, and of sale of entire estates situated within tho local limits of the jurisdiction of more than one Court under r. 3 of Or. 21. It is not necessary, however, as just stated, to attempt an exhaustive enumeration of all possible exceptions to the general principle. The sole question for consideration now is, whether the principle should be held inapplicable to the case of attachment of a debt payable outside the jurisdiction of the Court by a person who also resides beyond the local limits of such jurisdiction.

R. 43 of Or. 21 provides the mode of attachment of moveable property, other than agricultural produce, in possession of the judgment-debtor; such attachment must be effected by actual seizure, and it is reasonably plain that the attachment can be so effected only when the property is within the jurisdiction of the Court. R. 46 then provides for the attachment of moveable property not in possession of the Judgment-debtor, including a debt not secured by a negotiable instrument. The attachment is to be effected by a written order prohibiting the creditor from recovering the debt, and the debtor from making payment thereof until further orders of the Court. A copy of such order must be affixed on a conspicuous part of the Court-house, and another copy sent to the debtor. It is further provided that a debtor so prohibited may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same. The substance of the procedure, therefore, is that upon the application of the decree-holder the Court records an order which prohibits the judgment-debtor who is the creditor of the debtor from recovering the debt, and also prohibits the debtor from paying the debt to his creditor; a copy of the order is published in the Court house, and another copy is sent for communication to the debtor. I am unable to hold, on principle, that it is competent to a Court to issue such a prohibitory order upon a person resident outside the local limits of its jurisdiction in respect of property also beyond such local limits. If such a person disobeyed the order of the Court and in defiance thereof made the payment, the Court would be powerless to enforce its order by proceedings in contempt. On the other hand, there is no good reason why the decree-holder should not apply for transfer of the decree to the Court within the local limits of which the garnishee, that is, the debtor of the judgment-debtor, resides. Two objections, however, have been suggested to the adoption of such a course. It has been contended in the *first* place, that the delay which must necessarily take place before an order of transfer could be obtained might prove fatal to the decree-holder who might find that the judgment-debtor had in collusion with his debtor received payment of the debt sought to be attached. The obvious answer is that the procedure of attachment under pre-

(8) I. L. R. 14 Cal. 661 (1887).
(9) I. L. R. 16 Cal. 667 (1888).
(10) I. L. R. 19 Cal 18 (1891).
(11) I. L. R. 21 Cal. 689 (1894).
(12) I. L. R. 6 Cal. 513 (1880).
(13) I. L. R. 28 Cal 238 (1900).

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cepts provided in sec. 46 of the Code of 1908 furnishes a speedy and effective remedy. The object of a precept is to enable a decree-holder to obtain an *interim* attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. Sec. 46 expressly provides that upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept; and the Court to which a precept is so sent shall proceed to attach the property in the manner prescribed in regard to the a tachment of property in execution of a decree. This provision plainly indicates that the Legislature did not intend that a Court should directly attach property beyond the local limits of its jurisdiction. It has been argued in the *second* place that if the contention of the Petitioners prevails, two separate orders would be required in respect of the same matter; that is, an order by the Court which passed the decree upon the judgment-debtor prohibiting him from recovering the debt; and an order by the Court, to which the decree has been transferred for execution upon the debtor of the judgment-debtor prohibiting him from making payment thereof. This in substance was the argument which found favour with the learned Judges who decided the case of *In re Hollick* (6). I do not feel pressed by the weight of this contention. The course suggested does not lead to any serious inconvenience. On the other hand, if the prohibitory order is issued by the Court which made the decree to a person beyond the local limits of its jurisdiction, the order may prove infructuous, if it is disobeyed and the Court may find itself powerless to enforce it.

Under these circumstances, we are confirmed in the opinion that it is not competent to a Court, in execution of a decree for money, to attach at the instance of the decree-holder a debt payable to the judgment-debtor by a non-resident outside the jurisdiction. Rule 48 of Or. 21 also tends to support this view. It is well known that under the law as it stood before the Code of 1908 it had been ruled that the salary of a public officer or railway servant could not be attached unless the disbursing officer was within the local limits of the jurisdiction of the Court executing the decree. *Rango* v. *Balkrishna* (2), *Sayadkhan* v. *Davies* (3) and *Abdul Gafur* v. *Albyn* (1). This led to considerable inconvenience in the execution of decrees and put the decree-holder in many cases to needless expense. In view of the difficulty thus created, the Legislature has provided in r. 48 of Or. 21 a less expensive and, at the same time, a more effective machinery for the execution of decrees against this class of judgment-debtors. Under the law as it now stands, the salary of a public officer or a railway servant or a servant of a local authority may be attached, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the jurisdiction of the Court executing the decree. The inference may therefore be legitimately drawn that the Legislature has provided a special rule in the case of certain judgment-debtors because r. 46 does not entitle the

(6) 2 B. L. R. 108: s. c. 10 W. R. 447 (1868).

(1) I. L. R. 30 Cal. 713 (1903).
(2) I. L. R. 12 Bom. 44 (1887).
(3) I. L. R. 28 Bom. 198 (1903).

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execution Court to attach a debt payable to the judgment-debtor by a non-resident outside the jurisdiction of the Court. The view we take of the principle applicable to this class of cases is also supported by the decision in *Moonshee Hossein Ally* v. *Ashotosh Gangoolly* (4), which was accepted as good law by a Full Bench of the Allahabad High Court in *Purbati Charan* v. *Panchanand* (5). These cases support the view that a Court could not issue a prohibitory order, under sec 268 of the Code of 1877, out of its own jurisdiction. We may further add that, as pointed by Mr. Justice Banerjee in *Abdul Gafur* v. *Albyn* (1), the contrary opinion indicated in *In re Hollick* (6) is really an *obiter dictum*, because there the order was made by the Monghyr Court within whose jurisdiction the office of the disbursing officer was held at Jamalpur. With all respect, therefore, for the opinion of the learned Judges who decided that case, we are unable to accept it as well-founded on principle.

It is worthy of note that the view we have adopted is in harmony with the procedure followed both in England and America. In England it is expressly provided in r. 1 of Or. 45 of the Rules of the Supreme Court that an order for attachment of a debt may be made only when the person indebted to the judgment-debtor of the execution-creditor is within the jurisdiction of the Court. The same rule has been adopted in Ireland where also r. 1 of Or. 45 of the Rules of the Supreme Court, Ireland, 1905, provides that before a garnishee order can be obtained it must be shown that the debtor of the judgment-debtor is within the jurisdiction. A similar view had been taken in Ireland even before the Judicature Act, Ireland, 1877. Thus we find that in *Martyn* v. *Kelly* (14) it was accepted as settled law, that a debt could not be attached under the garnishee clauses of the Common Law Procedure Act, 1856, unless the garnishee was within the jurisdiction; and that consequently a registered company whose head office was in London was not within the jurisdiction within the meaning of sec. 63 of the Statute, although it had an agent residing in Ireland and transacting its business there. In the American Courts there has been considerable controversy and divergence of judicial opinion upon the question of the *situs* of a debt for purposes of garnishment proceedings; but it is well-settled that, in the absence of express statutory provision to the contrary, a non-resident of a State cannot be summoned in garnishment proceedings, whether the principal debtor be a resident or non-resident, at least unless he is in possession of property within the State belonging to the principal debtor, or is indebted to him, and such debt is by the terms of the contract to be liquidated within the State. The principle upon which this result is reached, is lucidly explained by Chief Justice Drake in his classical treatise on the Law of Attachment (7th Ed., sec. 474). It is there pointed out that under the custom of London one cannot be charged as garnishee unless he resides within the jurisdiction of the Court of the Lord Mayor. *Tamm* v. *Williams* (15), *Crosby* v. *Hetherington* (16) and *Day* v. *Paupierre* (17). This doctrine was accepted as well-founded on principle in *Tingley*

(1) I. L. R. 30 Cal. 713 (1903).
(4) 8 C. L. R. 30 (1878).
(5) I. L. R. 6 All. 243 (1884).
(6) 2 B. L. R. 108; s. c. 10 W R. 447 (1868).

(14) I. R. 5 C. L. 404 (1871).
(15) 3 Doug. 281; 2 Chitty 438 (1783)
(16) 4 Man. & Gr. 933 (1842).
(17) 13 Q. B. 802 (1849).

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v. *Bateman* (18) and *Nye* v. *Liscomb* (19), where the Court observed as follows: "The summoning of a trustee is like a process *in rem.* A chose in action is thereby arrested and made to answer the debt of the principal. The person entitled by the contract of the supposed trustee is thus summoned by the arrest of this species of effects. These are, however, to be considered for this purpose as local and as remaining at the residence of the debtor or person entrusted for the principal and his rights in this respect are not to be considered as following the debtor to any place where he may be transiently found, to be there taken at the will of a third person within a jurisdiction where neither the original creditor nor debtor resides." In two later cases, *Ray* v. *Underwood* (20) and *Hart* v. *Anthony* (21), the same doctrine was affirmed, although the Defendant was resident within the jurisdiction of the Court and the garnishee was non-resident. Similar expositions are adopted by Reno in his treatise on "Non-residents" (sec. 147), and by Waples in his monograph on "Situs of Debt" (sec. 161). The question is elaborately discussed in *National Fire Insurance Co.* v. *Chambers* (22), where it is explained that the test to be applied is, whether the judgment-debtor, as creditor, could have sued the garnishee as his debtor in the Court in which the execution proceedings have been commenced. In its essential elements, a garnishment proceeding is a proceeding by the Defendant in the suit against the garnishee, in the name and for the benefit of the Plaintiff. The Plaintiff is empowered by law to step into the shoes of the garnishee's creditor and acquire his rights, no more and no less. (See *In re General Horticultural Co.* (23), where a similar test was suggested by Mr. Justice Chitty). Whatever he could do, the Plaintiff decree-holder, under the statutory novation of garnishment, may do as his assignee and attorney in fact, by operation of law. Wherever the garnishee could be sued by the Defendant for the payment, he may be charged as garnishee on account of it: [*Mooney* v. *Buford* (24), *German Bank* v. *American Fire Insurance Co.* (25), *Burlington Ry. Co.* v. *Thompson* (26), *Wyeth* v. *Lang* (27), *Cross* v. *Brown* (28), *Mobile Ry. Co.* v. *Burnhill* (29) and *Neufelder* v. *German Insurance Co.* (30)]. If this be adopted as the true criterion to determine the *situs* of a debt in garnishment, no difficulty is presented in the solution of the problem (Rood on Garnishment, secs. 241-245). From this point of view, it becomes needless to consider, whether the principle upon which the *situs* of a debt is determined for purposes of garnishment is necessarily identical with what determines the rights of the parties. Nor is it necessary to examine the validity of the rule of law by which a debt like other personal property is deemed for many purposes (such as transmission and succession) to attach to the person of the owner, that is the creditor. The case before us, in which the garnishees are admittedly out of jurisdiction, and the debts due from them are also payable out of jurisdiction, does not present any real

(18) 10 Mass. 343.
(19) 21 Pickering 263.
(20) 3 Pickering 302.
(21) 15 Pickering 445.
(22) 32 Atl. 663; 53 N. J. Eq. 468 (1895).
(23) 32 Ch. D. 512 (516) (1886).
(24) 72 Fed. Rep. 32.
(25) 83 Iowa 491; 32 Am. St. Rep. 316.
(26) 31 Kan. 180; 47 Am. Rep. 497.
(27) 127 Missouri 242; 48 Am. St. Rep. 626.
(28) 19 R. I. 220.
(29) 91 Tenn. 399; 30 Am. St. Rep. 889.
(30) 6 Wash. 336; 36 Am. St. Rep. 166.

difficulty. The Court cannot, in a case of this description, issue a prohibitory order under r. 46 of Or. 21 of the Code of 1908. We may add that the principle which underlies the decisions of this Court in *Vulcan Iron Works* v. *Bishumbhur Prosad* (31) and *Jumna Dass* v. *Harcharan Dass* (32) and of the House of Lords in *Carron Iron Co.* v. *Maclaren* (33) also supports this view. The order of the Court below, therefore, must be taken to have been made without jurisdiction.

There are two other points which require a brief consideration. The Subordinate Judge has held that, as in the case of an attachment before judgment, the writ can be issued in respect of properties outside jurisdiction [*Noor Mahamed* v. *Ibrahim* (34), *Ram Pertap* v. *Madho Rao* (35), *Amara* v. *Annamala* (36)] the same doctrine ought to be applied to cases of attachment in execution proceedings. But apart from the fact that there is weighty authority against this view, *Balaram* v. *Solano* (37), *Kedar Nath* v. *Luchmun* (38), *Krishnasami* v. *Engel* (39), *Raja* v. *Jankibai* (40), *Dawood* v. *Moona* (41), *Pannu* v. *Sathappa* (42), *Siva Swami* v. *Soleman* (43), *Kin Kin* v. *Nga Kyaw* (44), there is no analogy between the two classes of cases. In the case of an attachment before judgment, the question turns upon the construction of Or. 38, rr. 5 and 6 read with sec. 136. Besides, in the case of an attachment before judgment, the garnishee cannot be required to pay the debt into Court for the benefit of the Plaintiff. Whether, after attachment has been so obtained before judgment, it can subsequently be made available for the benefit of the successful Plaintiff, is a question by no means free from difficulty, and does not require consideration in the present instance. It has also been argued by the learned Vakil for the decree-holder Opposite party, that as on a previous occasion the garnishees did not take any objection to the jurisdiction of the Court to issue a prohibitory order under r. 46, they are not entitled to urge the objection in the present proceedings. There is no substance in this contention. The previous proceeding proved infructuous under circumstances which we need not explain, and it is open to the garnishees to urge the objection they have taken when a fresh attachment is sought in respect of the debts payable by them to the original judgment-debtor.

The result, therefore, is that this Rule must be made absolute, and the order of the Court below discharged. The Petitioners are entitled to their costs both here and in the Court below. We assess the hearing-fee in this Court at five gold mohurs.

CARNDUFF, J.—I agree.

Rule made absolute.

(31) I. L. R. 36 Cal. 233 (1908).
(32) I. L. R. 38 Cal. 405 (1911).
(33) 5 H. L. C. 416 (1853).
(34) 8 Bom. H C. R. 29 (O. C. J.) (1871).
(35) 7 C. W. N. 216 (1902).
(36) I. L. R. 31 Mad. 502 (1908).
(37) 8 B. L. R. 335 (1872).
(38) 1 C. L. R. 336 (1878).
(39) I. L. R. 8 Mad. 20 (1884).
(40) 5 Bom. L. R 570 (1903).
(41) P. J. L. B. 56 (1894).
(42) 1 L. B. R. 310 (1902).
(43) 3 L. B. R. 255 (1907).
(44) U. B. R. 18 (1907).

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Contents.

NOTES.

THERE IS ADMITTEDLY NO MORE HARD WORKING or deserving body of public servants than the Munsifs of Bengal and Eastern Bengal. And yet it would be impossible to say at this moment that the conditions under which they serve, both as to pay and as to prospects, have ever been at all commensurate with the quality of the work obtained from them. We have repeatedly drawn attention in these columns to the just grievances of this branch of the Provincial Service and we have from time to time also suggested certain remedies, which we believed would go a great way towards ameliorating their condition. The representations made to Government on behalf of Munsifs, whether in Council or through other channels have, however, so far borne no fruit beyond drawing the assurance (the value of which can only be judged by the result) that the matter is under its consideration.

THE JUDICIAL SERVICE OF THE TWO PROVINCES is under the direct supervision and control of the High Court. We can hardly believe that the Government and the High Court have been led to form different estimates of the value of the services rendered to the State by Munsifs and Subordinate Judges, and we may very well assume that no such difference exists. How is it then that the just grievances of the Munsifs and Subordinate Judges in both Provinces have received such slow recognition from Government? It may be that the very fact that the control of the Governments concerned over this branch of the service is indirect is also the reason why such inadequate attention is paid by them to the conditions of this service.

WE DO NOT INDEED FOR ONE MOMENT SUGGEST that the control of the High Court over the service should in any degree be weakened or that of the Government increased. On the contrary we may reasonably expect that if the new Home Member of the Government of India would but give effect to his ideas concerning the legitimate spheres of work of the executive and the judiciary, a more liberal policy would be followed by the Government of India in this respect. Is it, therefore, too much to ask that larger powers should be given to the High Court for re-organising the service? The High Court should not be merely regarded as a consultative body but should be asked to frame definite schemes for the re-organisation of the service and make such suggestions for the improvement of their pay and prospects as would remove a long-standing grievance amongst this most deserving class of public servants.

ADDITIONAL REASONS IN SUPPORT OF OUR PLEA are furnished by the new factor introduced into this problem by the impending separation of Behar, Chota Nagpur and Orissa from Bengal.

The number of Munsifs and Subordinate Judges who are now posted within this area is respectively 68 and 20. The number in Bengal and Eastern Bengal on the other hand is 245 and 42 respectively. If a division of cadre in the service should follow upon this re-adjustment of the Provincial units, the prospect of promotion amongst the bulk of the Munsifs who will work in the Presidency of Bengal will be very seriously affected whilst that of the few fortunate members who will happen to be posted in Behar will be unexpectedly improved. This state of things would certainly cause considerable heart-burning amongst the bulk of the members of the same service.

THIS ANOMALY WILL, HOWEVER, SURELY BE avoided if the judicial services of the two Provinces are kept, for purposes of promotion and transfer, under the High Court as it was before the partition of the Eastern Provinces. So far as the administration of justice is concerned they have even after the partition continued to be subject to the judicial superintendence of the High Court. There can therefore be no serious objection to the High Court continuing to exercise the administrative control which it had been exercising before the partition in regard to transfers and other matters in the two sister Provinces.

THE FINANCIAL POSITION OF THE TWO GOVERNments with regard to the service would admit of easy adjustment. As to the claims of the people of Behar, Orissa and Chota Nagpur to appointments in the Provincial Service, such appointments are, we believe, made even now by the High Court with due regard to such considerations and there are hardly any grounds for supposing that they will be overlooked after Behar will have been separated. A complete separation of cadre in the judicial service is therefore quite unnecessary. Such a separation will not only cause stagnation and discontent in the Bengal branch of the service but may ultimately go to affect conditions of recruitment and result in the deterioration of the service as a whole which would be highly prejudicial to public interests. There may be other possible means of adjusting the prospects of the branches of the service in the two Provinces, but judging from the experiment recently tried in Eastern Bengal and Assam, which was not very successful, we hope no fresh experiments on the same lines would be attempted. It would be far more preferable to revert to the old state of things and to treat the whole of the Provincial Judicial Service as one service and to give equal opportunities to all its members.

AS BOTH BEHAR AND BENGAL WILL NOW HAVE A new constitution this will require no surrender of powers on the part of the Governments that are yet to come into existence. The principle of the separation of the executive and judicial functions are now well-recognised and decentralization is to be the future policy of the Government of India. It would therefore satisfy public opinion, relieve the executive of an unnecessary burden and meet with the unqualified appreciation of the members of the Provincial Judicial Service if they were placed under the High Court for purposes of transfer and promotion. The Rs. 500 grade which was created for the Munsifs in Eastern Bengal and Assam should be retained, only the number in this grade should be increased so as to give a fair chance to Munsifs to get promoted to this grade at some part of their career. We would further suggest that the Government should also consistently with its proposed policy of decentralization leave the task of re-organising the service and improving its condition and prospects to the High Court. The Hon'ble Judges are naturally more familiar with all questions of judicial administration and the requirements of the judicial service than the Executive Departments of Government. We are sure the High Court may be trusted to perform this duty with due care and circumspection.

ALTHOUGH THE HON'BLE MR. BHUPENDRA NATH Basu's resolution asking for the appointment of a Committee for enquiring into the Police administration had to be withdrawn, the pronouncement that it drew from Sir Reginald Craddock would be read with considerable interest by all who are interested in the proper administration of criminal justice in the country. It is reassuring to find that the Government realises the responsibility of looking over the doings of the Police and admits, what it has at times been reluctant to do, that there are defects in its administration. Sir Reginald Craddock undoubtedly shows a true appreciation of the situation when he points out that one of the chief reasons of the defects in the Police administration lies in the vast amount of temptation that they are exposed to. The Police had the power, says he, "to interfere with the liberty of people not only in their own society but in a much higher society, not only with the liberty of the poor but also with the liberty of the rich." The Hon'ble the Home Member was not quite as ready to acknowledge that these temptations did have their undesirable effect in very many cases. He quoted figures to show that cases of torture and abuse of powers by the Police were not too many. But the number of cases decided is surely not a safe index to go by. So long as the Police continue to exercise the vast powers vested in them and enjoy the opportunities of abusing them, it is not too much to presume that

by far the greater number of such cases never see the light.

UPON THESE FACTS PARTLY ADMITTED BY THE Hon'ble Member himself the case for a committee of enquiry would seem to be well-established. For if there are these extensive chances of abuse of power by the Police it could do no harm to have the matter enquired into by a committee for suggestions as to the best method of providing against risks. No doubt we have had a Police commission not very long ago and it may be claimed that the recommendations of the commission have not yet been given a fair trial. Sir R. Craddock also claimed that there has since then been a steady improvement in the Police and that in view of these facts it would be advisable to wait and watch further developments. But there is one important element in the question which seems to have been overlooked in the whole discussion, *viz.*, that since the Police Commission sat the circumstances have very remarkably changed. The change is not to be measured by the number of years but by the vast difference in the mutual attitude of the people and the Police to one another. The Criminal Investigation Department which has grown since the Commission's report by rapid strides has introduced into the consideration of the problem questions of vast magnitude and complexity. They have now to be dealt with and while we are willing to accept the assurances of the Home Member that the Government will attend to the matter we cannot but feel that before dealing with the matters now raised it would have been well to start with a thorough enquiry by a committee like that suggested by Mr. Basu.

MR. BASU'S RESOLUTION FURTHER RAISED THE question of the amendment of the present law relating to confessions. The matter is of vast importance, and while we are glad to be assured that the matter is engaging the attention of the Government, we certainly would have liked to see the matter discussed with more seriousness than the Hon'ble the Law Member thought fit to bestow on it. The law of confessions is one of the most potent instruments of oppression in the hands of the police and the possibilities of an easy solution of difficulties by securing a confession make the police generally very unwilling to take the more arduous course of detecting crimes and proving facts by evidence. While on the one hand the present law leads to abuse and thus works hardship sometimes on innocent people, it tends to demoralise the police and is a bar to the development of genuine detective abilities in them. From every point of view the law of confession at present would seem to be capable of considerable improvement.

CONFESSIONS IN THEMSELVES CAN VERY SELDOM BE voluntary. The cases in which confession is born of remorse must be very rare indeed. In the case of *Queen* v. *Thomson*, L. R. (1893) 2 Q. B. 12 at p. 18, Cave, J., threw a great deal of doubt on confessions generally in words which will bear reproduction. "I would add" says his Lordship "that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession—a desire which vanishes as soon as he appears in a Court of justice." If this could be said of confessions in England, though in respect of extra-judicial confessions, with how much greater force would the same observations apply to the case of confessions in cases in India where the supposed penitent has passed through the hands of the police.

CONFESSIONS THEREFORE OUGHT TO BE LOOKED upon with the greatest suspicion, and the greatest care should be taken to ascertain that they are voluntary before a judgment of guilt is based on it. It cannot be denied that this is surely not the attitude with which confessions are looked upon in the majority of the cases. Having regard to the fact that cases of true remorse leading to a confession must be very rare indeed and that in a majority of cases confessions must largely be a matter of inducement or coercion though such inducement or coercion may be practically incapable of proof it may be safely said that administration of justice will not be any way affected for the worse by the scope of confessions being considerably restricted. In what way that restriction may be made so as to effectively take away from the police all reasonable temptation to secure a confession by improper means is a matter for anxious consideration. While conceding that the Government is anxious to amend the law along right lines we are disposed to think that they should rather have invited than opposed the proposal of Mr. Basu to assist them in their work by the recommendations of the committee.

WE ARE NOT PARTICULARLY STRUCK BY THE justice or the substance of the Hon'ble Mr. Ali Imam's objections to such a committee. The Hon'ble gentleman seems to be under the impression that to appoint a committee for the purpose

would be to abdicate the functions of the Council. On that principle every committee of the Council may be dispensed with. The committee was not to have had any legislative function; its sole work would be to help the Legislature with suggestions. We fail to see how such a reasonable suggestion should have raised up before the mind of the Law Member the spectre of abdication.

HIS HONOUR JUDGE EDGE, IN GIVING HIS DECISION in a case tried before him at the Clerkenwell County Court on 15th December last, said:—

> The increase of perjury in the County Court is so alarming that public attention ought to be directed to it. It is a pressing demand. I am saying it as a retiring Judge, after being on the Bench for 23 years, that it is almost impossible to do justice between parties owing to the prevalence of false swearing. It really is shocking. It has been a matter which has placed a very great anxiety upon Judges who have to try cases, and endeavour to do what is right and just between parties. False swearing is increasing in a way that I think the Legislature ought to pay attention to at once. I do not think any one would oppose that greater powers should be placed in the hands of Judges for checking perjury.

AMONGST THE NOTES OF ENGLISH DECISIONS published in this issue will be found some interesting instances of what might constitute contempt of Court. The parties to any proceedings are not at liberty to publish or circulate even amongst friends and relations any note of the proceedings of matters heard *in camera*. They may communicate to them the result of the hearing but if they circulate any account of the proceedings they are liable to be punished for contempt. This view of the law if enforced except when absolutely necessary for safeguarding public morals may go hard with people who have to clear their character before friends and relations.

THE OTHER CASE OF CONTEMPT, *Barnett* v. *Shaw*, (*post*, p. 98) though equally unusual, will certainly be found re-assuring by the profession. It is not every day that one finds one's opponent in a forensic fight actually taking to the *argumentum ad baculum* on turning one's back on the Court. But now that we find women up in arms against mankind, it is nothing unusual to find men cultivating feminine forms of chastisement. But the English Courts of justice are apparently alarmed at this prospective inversion of the more amiable qualities of men and women. So where a solicitor threatened to scratch his brother's eyes when the Court had risen, the Court held that any such mode of settlement of their differences out of Court would constitute a grave contempt of His Majesty's Court.

Review.

BANKING AND CURRENCY. *By Ernest Sykes, B. A. (Oxon), Lecturer on Banking and Currency to the London Chamber of Commerce. Third edition. By Butterworth & Co.; Bell Yard, Temple Bar, London and 8/2, Hastings Street, Calcutta. Price Rs. 1-14 nett.*

We welcome a new edition of this work. Although this book is intended for students offering themselves for the examinations held by the London Institute of Banking and the London Chamber of Commerce yet it would amply repay legal practitioners the trouble of glancing through this book, especially, the chapters dealing with "The Functions of a Banker," "The Relations of Banker to Customer," "Endorsements," "Revocation of the Customer's Authority" "Bankers and Borrowers." These chapters contain much useful information which solicitors and other lawyers cannot afford to ignore in their daily business dealings either on their own account or that of their clients. For instance we find it stated at p. 147 that "if a cheque is drawn payable to trustees the paying banker requires all trustees to join in endorsing and refuses to accept a *per pro* endorsement or the endorsement of a single trustee on behalf of the co-trustees." "In the case of executors, however, * * * * an endorsement by a single executor on behalf of the body of the executors is regular and valid." In this edition we find a chapter added on the "Central Gold Reserve." The author has very clearly explained in this chapter the object of the Reserve and also how without the co-operation of the other banks it is impossible for the Bank of England either to regulate the rate of interest or to meet any crisis in the money market brought about either by economic or political crisis of any great magnitude.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Weldon* v. *The Times Book Company*, "*Ld.*" Before the MASTER OF THE ROLLS AND LORDS JUSTICES MOULTON AND FARWELL. 15th December 1911.

Bookseller or librarian—Is it their duty to read books to see if they contain libellous matter before circulation—Liability considered.

This was an appeal in an action in which the Appellant sued the Respondents for damages for alleged libel. The Plaintiff's case was that the Respondents had in their circulating library a copy of a book on Gounod and six copies of another biography which contained libellous statements concerning her. The Court below found

that the Defendants were not liable. The Plaintiff's appeal was dismissed. In the course of his judgment the MASTER OF THE ROLLS remarked—

Both books were published in the French language in Paris, and they contained statements which he would assume were clearly libellous against Mrs. Weldon. Each of these books belonged to a series of books on celebrated musicians, and the gentlemen whose names appeared as authors of the books were French scholars of the highest literary distinction, while the publishers in Paris were in the first rank and not likely to publish and distribute doubtful works.

It was said boldly that the Respondents, who were not publishers in the ordinary sense but distributers only, were liable in damages because they had distributed and sold these books, and this although it was admitted that they did not know of anything libellous contained in the books, and although the jury had found that it was not through their own negligence that they did not know, and that the books were not of such a character as to put them on inquiry. The matter had been put to the jury by Mr. Justice Ridley with perfect propriety, but as there had been some argument on the point he would state what he understood the law to be.

It was quite impossible that distributing agents such as the Respondents should be expected to read every book they had. There were some books as to which there might be a duty on the Respondents or other distributing agents to examine them carefully because of their titles or the recognized propensity of their authors to scatter libels abroad. Beyond that the matter could not go. It was impossible to say there was a liability to examine the contents of books like the two in question, which were by authors of high character and related to a distinguished musician who had been dead for over a quarter of a century. There was a book with which the Court was very familiar called "Farwell on Powers." He thought the author was a respectable man, and he had no reason to suspect that he would commit a libel on any one. In his opinion there was no liability on persons selling that book to read it from cover to cover in order to see whether it contained a libel on Lord Justice Fletcher Moulton or himself. That was not an unfair analogy to the present case.

He repudiated the suggestion that there was any liability upon the Respondents to do so in the case of these two books. The principles governing the question had been laid down in *Emmens* v. *Pottle* (1885, 16 Q. B. D. 354). There Lord Esher said :—

"The question does not depend on any statute, but on the common law, and, in my opinion, any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust cannot be part of the common law of England." And Lord Justice Bowen said :—"The jury have found as a fact that the Defendants were innocent carriers of that which they did not know contained libellous matter, and which they had no reason to suppose was likely to contain libellous matter. A newspaper is not like a fire ; a man may carry it about without being bound to suppose that it is likely to do an injury. It seems to me that the Defendants are no more liable than any other innocent carrier of an article which he has no reason to suppose likely to be dangerous. But I by no means intend to say that the vendor of a newspaper will not be responsible for a libel contained in it if he knows, or ought to know, that the paper is one which is likely to contain a libel."

Messrs. Bankes, K. C., and Diggle for the Appellant.

Messrs. Smith, K. C., and Hills for the Respondents.

B. D. *Appeal dismissed.*

COURT OF APPEAL.—*Carl Rosa Opera Company, "Ld."* v. *Britt.* Before LORDS JUSTICES VAUGHAN WILLIAMS, BUCKLEY AND KENNEDY. 8th December 1911.

Injunction—Negative restrictive covenant determined with the contract of service.

This was Plaintiff's appeal from an order refusing interlocutory injunction. The Defendant agreed to serve the Plaintiff as principal second violin for a season (with right to renew) and not to perform elsewhere without the Plaintiff's permission. The Plaintiffs gave notice to renew for another season but Defendant gave notice to leave and it was alleged that the Defendant had already entered into an agreement with another Company. The Plaintiffs filled up his place.

THE COURT dismissed the appeal. In the Course of his judgment LORD JUSTICE VAUGHAN WILLIAMS said :—

When two parties had once entered into a contract, it required both parties to bring the contract to an end. If one party expressed the intention to repudiate the contract, the other party might, if he chose, agree that it should be determined, but the contract did not come to an end in consequence of the repudiation by one party unless the other party agreed to its termination.

He did not think this agreement to determine need be expressed in words ; it might be expressed by act, and on the evidence before the Court it seemed to him to be clear that the repudiation of this contract of service by the Defendant was accepted by the Plaintiffs, who had engaged another principal second violin. When the Defendant's actual service came to an end, his membership of the Company come to an end, and

at the same time the Plaintiffs' right to prevent his playing elsewhere came to an end.

Mr. Dodd for the Plaintiffs.

Mr. Mathews for the Respondent.

B. D.

KING'S BENCH DIVISION.—*Taylor* v. *Wilson.* Before THE LORD CHIEF JUSTICE OF ENGLAND AND JUSTICES HAMILTON AND BANKES. 30th November 1911.

Betting Act, 1853—Order convicting a visitor to an Inn for betting, if admissible against Innkeeper to show that his premises used for betting—Estoppel.

The Appellant who was an innkeeper was charged with allowing his premises to be used for betting in contravention of the Betting Act, 1853. At the trial the prosecutor tendered in evidence against the accused an order convicting another a third person of unlawfully using the said premises for betting. The Appellant objected to the admissibility of the conviction of a third person as evidence, but the Magistrates overruled the objection. The Appellant sought to show that the said premises were not used for betting, and that the conviction of the third person was wrong. The Magistrates however found the Appellant guilty and stated a case for the opinion of the High Court. The learned Judges allowed the appeal and quashed the conviction. In the course of his judgment

The LORD CHIEF JUSTICE said :—

It was quite plain that Whalley's conviction was not evidence against this Appellant. The Justices frankly said that they held that Whalley's conviction was evidence of betting having taken place, and that the Appellant could not in view of that seek to show that no betting had taken place on the premises on April 29. That amounted to this, that the Appellant was estopped by the Whalley conviction from denying that there had been betting on the premises. The suggestion that because Justices in another case upon what might be other evidence had come to the conclusion that betting had taken place, the same fact ought to be considered to be thereby proved against the present Appellant, was absolutely untenable.

Mr. G. Lord for the Appellant.

Mr. Riby for the Respondent.

B. D.

KING'S BENCH DIVISION.—*Barnett* v. *Shaw.* Before MR. JUSTICE DARLING.

Contempt of Court—Plaintiff's assault upon the Defendant's Solicitor after adjournment.

In the course of the trial of the above suit an incident occurred which was brought to the notice of the Court. After the Court had risen for the adjournment the Plaintiff met the Defendant's solicitor and taking him by the arm abused him and said—"I will scratch your eyes out. I will strike you."

The learned JUDGE held that what took place amounted to a contempt of Court. He observed :—

Mr. Barnett was himself a solicitor, and the conduct complained of affected another solicitor, who was attending Court in pursuance of his duty to his client. As Lord Bowen said in *In re Johnson* (20 Q. B. D., at p. 74), "The principle is that those who have duties to discharge in a Court of Justice are protected by the law and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom, in order that such persons may safely have resort to Courts of Justice." The reasoning of that case applied to a case where a solicitor, who was an officer of the Court, was concerned. There was no doubt therefore, that Mr. Barnett had been guilty of a grave contempt, not of his Lordship personally but of the Court of King's Bench.

B. D.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.—*Scott* v. *Scott.* Before MR. JUSTICE BARGRAVE DEANE. 4th December 1911.

Contempt of Court—Private publication of proceedings in cases tried in camera.

This was a motion to commit the opposite party and her solicitors for contempt of Court. There was a petition for nullity that was tried *in camera.* The Petitioner and the Opposite Party were parties to it. After the decision of the case the Opposite Party secured transcripts of the official shorthand writer's notes of evidence through her solicitors, and communicated them to some of her friends. The Petitioner submitted that it was contempt of Court. It was urged on behalf of the Opposite Party that she was entitled to tell her friends and relations what had passed—what the evidence was—what the truth was—and that it was not publication which alone was forbidden. Reliance was placed on "The Laws of England, Vol. 16, pp. 464-5.

The learned Judge held that it was contempt. He said that the object of trying cases *in camera* was to protect both parties ; necessarily the details in such cases were of a very private character and all that the nearest relations had a right to know was what was the result of the trial. In certain cases there was no fault on either side. In such circumstances it was a gross contempt of Court to publish an account of anything done in Chambers. What had been done in the present case had been done in ignorance.

It must be clearly understood in future that

ie object of trying these unhappy cases *in camera* that they should be kept private.

Mr. Bayford for the Petitioner.

Messrs. Barnard, K. C., and Willis for the Opposite Party.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

RIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. REV. NOS. 1521 AND 1522 OF 1911. HEM CHANDRA ROY CHOWDHURY AND OTHERS, 2nd Party, Petitioners *v.* RAM CHANDRA PAL, 1st Party, Opposite Party. 9th February 1912.

Criminal Procedure Code, sec. 145—Jurisdiction, ciding without hearing a party.

There were two proceedings under sec. 145, Cr. C., between the parties, one of them out of hich Rule No. 1521 arose the case had been ompleted and order was made by the Magistrate though no one appeared on behalf of the cond party and in the other proceeding out which Rule No. 1522 arose, before the Magisa'e had delivered his final order, the second arty had put in certain petitions in the nature written statements and his pleader wanted to heard by the Court with regard to his case, the Magistrate did not entertain the peti-s nor heard the pleader but passed his final cision then and there.

Their Lordships observed :—

. . . "The first case had been completed and ie order delivered before any one appeared on half of the second party. The second party ere entirely unrepresented at that hearing and must be taken that they were alone to blame r that and that the Magistrate had full jurisdicon to decide that case upon the documents and idence produced by the first party. . . . . ut in the second case it was obviously possible r the Magistrate to take into consideration these ritten statements and whatever the learned pleader ight have to urge. There was no occasion for m to grant any adjournment and he had jurisction to decide the matter summarily at that aring. But when before he had decided it it beme possible to hear the second party, he acted thout jurisdiction in declining to hear them."

Babu Sarat Chandra Ray Chowdhury for the etitioners.

Babu Narendra Kumar Bose for the Opposite arty.

B. C. *Rule No. 1522 made absolute.*

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. REV. No. 1061 OF 1911. KALIM MIA AND ANOTHER, Petitioners *v.* KADER ALI, Opposite Party. 15th February 1912.

Criminal Procedure Code, secs. 419 and 421—Dismissing the appeal without hearing the Appellant.

This Rule was issued for the re-hearing of an appeal on the ground that the provisions of sec. 421, Cr. P. C., that no appeal presented under sec. 419 should be dismissed unless the Appellant or his pleader has had reasonable opportunity of being heard in support of the same, were not complied with.

Their Lordships in making the Rule absolute observed :—

"No one appears to show cause and no explanation is offered upon this Rule. It must be made absolute on the ground on which it was issued. The appeal must be re-heard and the Appellants given an opportunity of having their pleader brought in to argue the case."

Babu Gunada Charan Sen for the Petitioners.

B. C.

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. REVISION NO. 69 OF 1912. ABINASH CHANDRA SINGH, 1st Party, Petitioner *v.* MADAN GOPAL SEIT, 2nd Party, Opposite Party. 16th February 1912.

Criminal Procedure Code, sec. 147—Omission to state the source of information in the proceeding—Easement, right of, to be proved.

This Rule was issued on the grounds (1) that the source of information was not disclosed in the proceedings, (2) that it was not found in what way the right of easement had been acquired. (3) That there was no finding that the right, if any, had been exercised within 3 months of the date of the proceeding.

On the first ground, their Lordships held on the authority of Rulings in I. L. R. 32 Cal. 771 and 15 C. W. N. 271, that the proceeding must show the ground of the Magistrate being satisfied that there is a likelihood of a breach of the peace. If a police report or other written information is relied upon, that report or information must be referred to in the proceeding. If the Magistrate acts on oral information, he must himself set out the substance of that information in writing in the proceeding. This matter goes directly to the jurisdiction and cannot be cured by any reference to any information subsequently had. On the second ground their Lordships observed that the Magistrate had to decide not merely the question of user and but the question of right and to find that such right existed. As the Magistrate confined his attention to the question of user, he

omitted to exercise jurisdiction as to the existence of the right.

Mr. B. C. Mitter, *Babus Dasarathi Sanyal*, *Monmatha Nath Mukherjee* and *Devendra Narain Bhuttacherjee* for the Petitioners.

Messrs. Pugh, *K. N. Chaudhuri*, *Babus D. N. Bagchi* and *Sushil Madhub Mullick* for the Opposite Party.

B. C. *Rule made absolute.*

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. REV. No. 1536 OF 1911. GOPAL MANDOL AND OTHERS, 2nd Party, Petitioners *v.* HARI DAS GOSWAMI, 1st Party, Opposite Party. 16th February 1912.

Criminal Procedure Code, sec. 145—Whether the possession of a person as agent could be declared.

One of the questions for decision in the Rule was whether the Magistrate acted illegally in the exercise of his jurisdiction in declaring possession in favour of a person as agent.

Their Lordships observed :—

"The case of *Brown* v. *Prithi Roy* (I. L. R. 25 Cal. 423) is clear authority for the proposition that a person who is in possession of land merely as manager for the actual proprietor could not be made a party to a proceeding under sec. 145 in the presence of the actual proprietors. . . . . that he was in possession as agent of the first party would be beyond the jurisdiction of the Criminal Court." . . . .

Babus Monmatha Nath Mukherjee and *Tarakeshur Pal Choudhry* for the Petitioners.

Mr. K. B. Dutt and *Babu Jyotish Chandra Hazra* for the Opposite Party.

B. C.

CIVIL APPELLATE JURISDICTION. Before COXE and TEUNON, JJ. APPEAL FROM APPELLATE DECREE No. 1530 OF 1909. GOJRAJ DAS AND ANOTHER, Appellants *v.* KRIPA SINDHU DAS AND OTHERS, Respondents. Heard, 14th February. Judgment, 1st March 1912.

Appeal—Commissioner's order—Central Provinces Land Revenue Act (1881), sec. 136 G. H.

The appeal was from an order of the Commissioner of Orissa passed in appeal from an order of a Sub-Divisional Officer, exercising the power of a Deputy Commissioner made under sec. 136G. of the Central Provinces Land Revenue Act, 1881.

Held—That no appeal lay to the Commissioner and that therefore no appeal lay from the Commissioner to the High Court.

Mr. G. Sarkar for the Appellant.

Babu Sarat Chandra Roy Chowdhury for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before BRETT and CARNDUFF, JJ. APPEAL FROM APPELLATE ORDER No. 520 OF 1909. RAJMOHON PAL AND ANOTHER, Appellants *v.* RABINDRA CHUNDER PAL AND OTHERS, Respondents. Heard, 21st February. Judgment, 22nd February 1912.

Appeal—Civil Procedure Code (Act V of 1908), Or. 21, r. 92—Auction-sale, setting aside of—Application under old Code.

The appeal was against an appellate order confirming an order of refusal to set aside a sale in execution on the ground of material irregularity and fraud.

The auction-sale was held on the 14th November 1908, and the application to set it aside was made on the 12th December following, both under the old Code.

Held—That no second appeal was maintainable; that under Or. 21, r. 92 read with sec. 104 (2) of the Code of Civil Procedure only one appeal lay.

Babus Mohendra Nath Roy and *Upendra Lal Roy* for the Appellants.

Babus Dwarka Nath Chuckerbutty, *Rajendra Chunder Guha* and *Dr. Sarat Chunder Basack* for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before CHATTERJEE, J. APPEAL FROM APPELLATE DECREE No. 1868 OF 1910. BENGAL PROVINCIAL RAILWAY Co., Appellant *v.* GOPI MOHAN SINGH, Respondent. Heard, 20th February. Judgment, 27 h February 1912.

Damages—Contributory negligence.

It was conceded that the Railway Company was guilty of negligence in leaving the gates of the level crossing open when the accident took place. The lower Appellate Court found that the accident was not brought about solely by Plaintiff's want of caution. It also found that the proximate cause of the accident was the running of the train against the carriage of the Plaintiff and not the running of the carriage across the line, there being obstruction at the time it was passing; and that the last opportunity of avoiding the accident was with the Defendant Company.

Held—That the findings were sufficient to negative such contributory negligence on the part of the Plaintiff as would disentitle him to damages.

Babus Provas Chunder Mitter and *Jotindra Nath Sen* for the Appellant.

Babu Monindra Nath Bhuttacharjee for Respondent.

A. T. M. *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1911,
Heard, 10 and
14, November.
1912,
Judgment,
2, February.

DEBI MANGAL PROSAD SINGH, Plaintiff, Appellant,
v.
MAHADEO PRASAD SINGH and others, Defendants, Respondents.

Hindu Law—Mitakshara—Mother's share upon partition, if stridhan*—Succession—*Stridhan, *two senses of.*

The share obtained by a Hindu mother upon partition of ancestral property amongst her sons, under the Mitakshara law, does not become her* stridhan *property descendible to her* stridhan *heirs. Such share stands on the same footing as property obtained by a woman by inheritance.

CHHIDDU *v.* NAUBAT (6) *overruled.*

DEBI MANGAL *v.* MAHADEO PRASAD (20) *reversed.*

This was an appeal from a judgment and decree of the High Court at Allahabad, dated the 20th December 1909, which affirmed the judgment and decree dated the 14th December 1907, of the Subordinate Judge of Gorakhpur. Both Courts dismissed the Plaintiff's suit.

The main question for determination on the present appeal was whether immoveable property obtained by a Hindu widow on partition of the joint family property among her sons and grandson is her stridhan property and descends as such to her own heirs.

One Gaya Parshad and his three sons formed a Hindu joint family governed by the Mitakshara law. He died leaving a widow, Dulhan Sahibzad Kunwari, and three sons of whom Sheo Pratap Singh died in 1889, leaving a widow and his son, the Plaintiff-Appellant.

In 1894 this Plaintiff, under the guardianship of his mother, instituted a suit for partition of the joint family property. He claimed a one-third share. The said Dulhan Sahibzad Kunwari (who was one of the Defendants to the suit) pleaded that the Plaintiff's share was only one-fourth, inasmuch as she too was entitled to a share equally with her sons and grandson. The Court allowed her claim and she accordingly remained in possession of a one-fourth share of the family property during her life.

The said Dulhan Sahibzad Kunwari died on the 19th November, 1900. On her death her surviving sons, the Defendants-Respondents, took possession of the entire property, without recognizing the Appellant's title to any portion of it.

The Plaintiff therefore instituted the present suit on the 1st June, 1907, in the Court of the Subordinate Judge of Gorakhpur. He stated the facts set forth above, and claimed possession of a one-third share of the said property with mesne profits and costs. The Defendants filed their written statements and their main plea was that the property in suit constituted the *stridhan* of the deceased lady, and in consequence Defendants Nos. 1 and 2 succeeded to it to the exclusion of the Plaintiff.

The learned Subordinate Judge fixed the following issues :—

(1) Whether the property Dulhan Sahibzad Kunwari got under the partition decree was her own *stridhan* or she had only a life-interest in it ?

(2) Is the Plaintiff the legal heir of Dulhan Sahibzad Kunwari, and has he any interest in the property left by her as against the Defendants Nos. 1 and 2 ?

(6) I. L. R. 24 All. 67 (1901).
(20) I. L. R. 32 All. 253 (1909).

After considering the evidence produced by the parties, the Subordinate Judge delivered his judgment on the 14th December, 1907. He decided both issues in favour of the Defendants. He held that the said property was *stridhan*, and that the sons of the said Dulhan Sahibzad Kunwari (deceased) succeeded to it as *her* heirs to the exclusion of the Plaintiff. He accordingly passed a decree dismissing the suit with costs.

The Plaintiff thereupon appealed against the said decree to the High Court at Allahabad, which delivered its judgment* on the 20th December, 1909. The learned Judges of the said High Court (Sir John Stanley, C. J., and Banerji, J.) agreed with the view of the Court below, and accordingly made a decree dismissing the appeal with costs.

They held that the appeal was concluded by the decision in the case of *Chiddu* v. *Naubat* (6). In the course of their judgment, they said—

"The contention of the learned advocate for the Plaintiff-Appellant in that under a recent ruling of the Privy Council we must hold that the decision in the case of *Chhiddu* v. *Naubat* (6), to which we have referred must be treated as overruled. This was a decision of a Bench of this Court to which one of us was a party. It was to the effect that according to the Mitakshara the share which the mother in a joint Hindu family obtains after the death of the father on partition of the joint family property between the mother and the sons, becomes the mother's *stridhan* which devolves on her death upon her own heirs and not upon the heirs of her husband. The question in the case appears to have been carefully considered and the ruling has been followed in several later cases including the case of *Gambhir Singh* v. *Makraddhuj* (7). In this last-mentioned case it was contended that having regard to the ruling of the Privy Council in *Sheo Shhankar Lal* v. *Debi Sahai* (1), the rulings of this Court must be deemed to be of no authority. The ruling in question is not a ruling upon the point which is now before the Court.

"What their Lordships in that case held was that under the Hindu Law of the Benares School property which a woman has obtained by inheritance from a female is not her *stridhan* in such a sense, that on her death it passes to her *stridhan* heirs in the female line to the exclusion of males. This is not the question which is before us. Some of the considerations which arose in that case may have a bearing upon the point before us. The question is by no means free from difficulty as has been pointed out in the case of *Chhiddu* v. *Naubat* (6). We think that we ought to abide by that decision unless and until it is reversed by their Lordships of the Privy Council."

Hence this appeal.

Sir E. Richards, K. C. (with him *Mr. Bhugwandin Dubé*) for the Appellant.—I submit that immoveable property received by a Hindu widow on partition of a joint family governed by the Mitakshara is not her *stridhan* property so called. Instead of the property passing on her death to her own heirs it reverts to her husband's heirs. *Stridhan* is defined in Mitakshara, Chap. 2, sec. 11, para. 1. The commentator, Vijnanesvara, there gives the

(1) L. R. 30 I. A. 202: s. c. 7 C. W. N. 831; I. L. R. 25 All. 468 (1903).
(6) I. L. R. 24 All. 67 (1901).
(7) 4 All. L. J. 673 (1907).

* Reported in I. L. R 32 All. 253 (1909).

definition of Yajnawalcya. The words "as also any other" are translation of the original आदि (adi). Strictly speaking आदि (adi) means "and the like"—*ejusdem generis*. It only refers to the property of the same nature as the foregoing, that is, to special gifts made to a woman in the six-fold ways laid down by Manu, Narada and Yajnawalcya. Mayne's Hindu Law (7th Edn.), pp. 822, 823 and 824. The extended meaning which Vijnanesvara gives to *stridhan* in Mitakshara, Chap. 2, sec. 11, para. 2 is an innovation, and is not borne out by Manu and other text-writers. In any case he does not use the word in a technical sense as woman's peculium. *Vide*, para. 3. This view is supported by judicial decisions. So far as property acquired by a woman by inheritance is concerned it is now finally settled by this Board that it is not her *stridhan*. These sections of the Mitakshara were considered and *stridhan* was construed in its limited and technical sense. *Bhugwandeen* v. *Myna Baee* (3), *Thakur Deyhee* v. *Rai Baluk Ram* (2), *Chotay Lall* v. *Chunno Lall* (4), *Mutta Vaduganadha* v. *Dorasinga Tevar* (8), *Sheo Shhankar Lal* v. *Debi Sahai* (1), *Lal Sheo Pertab* v. *Allahabad Bank* (5). Same considerations would equally apply to property acquired by partition. In a joint family a woman has no right to a specific share of the family property. On the death of her husband she inherits his separate property for her life only. If she has a son she does not succeed at all. In all these cases she gets a limited estate. It is unreasonable to hold that she would get an absolute estate if the family property were divided by the sons. The widow of a sonless man takes a limited estate, why should she take an absolute estate if she has a son. Mayne's Hindu Law, p. 837. In reality the share allotted to the mother on partition is by way of provision for her maintenance only. Mayne's Hindu Law, p. 703. *Beni Parshad* v. *Puran Chand* (9). Mitra's Tagore Law Lectures, 1879, p. 467, Sir G. D. Banerjee's Tagore Law Lectures, 1878 (1896), pp. 305, 330, 331. *Sorolah Dossee* v. *Bhoobun Mohini* (10). Reference was also made to Vyavastha Chandrika, Vol. 2, p. 493 and Vyavahara Mayukha, pp. 93 and 97. The High Court rely on their previous decision in *Chhiddu* v. *Naubat* (6) which was based on Mitakshara, Chap. 1, sec. 6, para. 2. That section only deals with division of property on the birth of a posthumous son. It ought to be read with Mitakshara, Chap. 1, sec. 3, para. 8. *Stridhan* in these sections must mean her *peculium*.

Mr. Bhugwandin Dubé on the same side.—The Mitakshara as we find it apparently treats the woman owner of property in the same way as man. "An owner is by inheritance, purchase, partition, seizure or finding," Chap. 1, sec. 1, para. 12. Vijnanesvara draws the same conclusion in Chap. 2, sec. 1. For the present case property acquired by "seizure or finding" need not be considered for it relates to such moveable things as water, grass, wood and hidden treasure and the like. But the British Courts have not administered the law contained in the existing texts of the Mitakshara. In *Thakur Deyhee* v. *Rai Baluk Ram* (2),

(1) L. R. 30 I. A. 202, 205, 208 : s. c. 7 C. W. N 881 ; I. L. R. 25 All. 468 (1903).
(2) 11 Moo. I. A. 139, 173 (1866).
(3) 11 Moo. I. A. 487, 509, 514 (1867).
(4) L. R. 6 I. A. 15 (1878).
(5) L. R 30 I. A. 209, 217, 219 : s. c. 7 C. W. N. 840 (1903).
(8) L. R. 8 I. A. 99, 108 (1881).

(2) 11 Moo. I. A. 139, 173 (1866).
(6) I. L. R. 24 All. 67 (1901).
(9) I. L. R. 23 Cal. 262 (1895).
(10) I. L. R. 15 Cal. 292 (1888).

DEBI MANGAL PROSAD SINGH *v.* MAHADEO PRASAD SINGH.

it was said at p. 173 "we have not the whole Mitakshara. . . . . The widow's disabilities, which depend in a great measure upon the notions which the Hindu legislators entertained of the infirmity and necessary dependence of the sex may be dealt with in other parts of the work. It is certain that upon other subjects the Mitakshara cites with approbation Manu, Katyayana, Narada and others upon whose *dicta* the limitation of the widow's enjoyment of her husband's estate, and of her power over it, chiefly depends." That decision was based mainly on the fundamental principles of the Hindu Law, and not on the existing texts of the Mitakshara. In fact it was opposed to the letter of the texts. It decided that immoveable property acquired by a widow (1) by inheritance, and (2) by purchase did not become her *stridhan*. It is settled law now that all immoveable property purchased by a woman is not necessarily her *stridhan*. It was too late now to go back to the existing texts of the Mitakshara and to hold, as the High Court have done, that property acquired by partition is *stridhan* simply because the Mitakshara says so. The existing texts of the Mitakshara are consistent with one another. The decisions of the British Courts ought also to be consistent in principle. The share allotted on partition is by way of a temporary provision for maintenance only and reverts on her death to the husband's heirs. He cited *Buldeo Singh* v. *Mahabeer Singh* (11), *Sheo Dyal Tewaree* v. *Jadoo Nath Tewaree* (12), *Lalljeet Singh* v. *Raj Coomar* (13), *Hemangini* v. *Kedar Nath* (14).

(11) 1 Agra H. C. Rep. 155, 157 (1866).
(12) 9 Suth. W. R. 61, 63 (1868).
(13) 20 Suth. W. R. 336, 340 (1873).
(14) L. R. 16 I. A. 115, 123 (1889).

Mr. L. DeGruyther, K. C., *Mr. Ross* and *Mr. A. P. Sen* for the Respondents.

Mr. L. DeGruyther.—The law to be administered in the present case is the law of the Mitakshara. The Smritis of Manu and Yajnawalcya were written before 200, A. D.; Mitakshara in 1200, A. D., and the Smriti Chandrika, Vyvahara Mayukha and the Dayabhaga long after the Mitakshara, Mayne's Hindu Law, p. 40. We have nothing to do with the other systems of Hindu Law or with the texts of Manu and Yajnawalcya. It has been laid down by this Board that the Courts have to administer the law as contained in the Mitakshara and not to deduce new propositions of law from doctrines and other *a prori* reasoning. We must confine ourselves to what we find in the Mitakshara. The definition of *stridhan* in Mitakshara is unmistakably clear. The Mitakshara expressly negatives the theory that the share given on partition is given for maintenance only. Chap. 2, sec. 1, paras. 32 and 33. The Mitakshara recognizes no distinction between a partition made in father's life-time and that made after his death. In both cases a mother takes "an equal share." Further, the Mitakshara provides in express terms "he obtains after his parents both their portions: his mother's portion however only if there be no daughter." Chap. 1, sec. 6, para. 2. The authority of the Mitakshara has not been cut down by the decision in *Thakur Deyhee* v. *Rai Baluk Ram* (2). It was based on practice and judicial decisions. The case of *Lal Sheo Pertab* v. *Allahabad Bank* (5) upheld only "the doctrine of reverter." There was no reason for extending the principles

(2) 11 Moo. I. A. 139, 173 (1866).
(5) L. R. 30 I. A. 209, 216: s. c. 7 C. W. N. 840 (1903).

applicable to cases of inheritance to a case of partition. *Subramanian Chetti* v. *Arunachelum Chetti* (15). Property acquired by purchase or by seizure or by finding was a woman's own property. A Hindu widow can obtain absolute title to property by her adverse possession. Some commentators agree with our view. Jolly: Tagore Law Lecture, pp. 242, 247, Sir G. D. Banerjee, Tagore Law Lecture, 1878 (1896), pp. 314, 320. Chap. 1, sec. 7, paras. 1 and 2 show that if no separate property were given to her she would get an equal share. In other words the share given on partition takes the place of separate property. In any case even if she receives the share in lieu of her right of maintenance she gets an absolute estate. It is for the other side to show that the Court decreed a limited estate only in her favour. Maintenance might be the ground of her absolute right. *Musammat Doorga* v. *Musammat Tejoo* (16), *Nellaikumaru* v. *Marakathammal* (17), *Bhagirthibai* v. *Kathnujirav* (18). The cases decided under the Dayabhaga law do not help the Appellant. The passages relied upon in *Sheo Dyal* v. *Jadoo Nath* (12), *Lalljeet Singh* v. *Raj Coomar Singh* (13) were *obiter dicta*. Phear, J., left the point undecided in *Mahabeer Parshad* v. *Ramyad Singh* (19), *Hemangini* v. *Kedar Nath* (14), the *dictum* of Sir R. Couch was *obiter*. The point decided was quite different. The text relied upon by the High Court seems to have been overlooked by Mr. Mayne.

(12) 9 Suth. W. R. 61, 63 (1868).
(13) 20 Suth. W. R. 336, 340 (1873).
(14) L. R. 16 I. A. 115 (1889).
(15) I. L. R. 28 Mad. 1, 6 (1904).
(16) 5 Suth. W. R. Misc. 53 (1866).
(17) I. L. R. 1 Mad. 166 (1876).
(18) I. L. R. 11 Bom. 285, 302 (1886).
(19) 20 Suth. W. R. 192, 195 (1873).

Mr. Ross followed on the same side.—He submitted that Sir S. Subrahmania Ayyar quoted *Chhiddu* v. *Naubat* (6) with approval in *Subramanian Chetti* v. *Arunachelam Chetti* (15), and pointed out that the decision of the High Court was based upon a specific text of the Mitakshara.

Sir E. Richards, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ROBSON.—The question to be determined in this case is whether immoveable property, obtained by a Hindu widow on partition of the joint family property under the Mitakshara law, is part of her *stridhan* in the narrow sense of that word, indicating her separate property or *peculium* which passes on her death to her own heirs; or is merely part of her *stridhan* in the wider sense in which the word is sometimes used, as indicating any property in which she may have some right of proprietorship.

The property in question originally belonged to one Gaya Parshad who with his three sons formed a Hindu joint family governed by the Mitakshara law. He died leaving three sons and a widow, Dulhan Sahibzad Kunwari. One of his sons, Sheo Partap Singh, died in 1889, leaving a widow and his son, the Plaintiff-Appellant. In 1894, a partition of the joint family property took place at the suit of the Plaintiff under the guardianship of his mother, and in that suit the Court apportioned one-fourth share of the family property to Dulhan Sahibzad Kunwari who remained in possession thereof until her death on the 19th November 1900.

The Plaintiff claims possession of one-third of the property thus held by her,

(6) I. L. R. 24 All. 67 (1901).
(15) I. L. R. 28 Mad. 1, 8 (1904).

on the ground that it passed, under the Mitakshara law, to the heirs of her husband, of whom he is one.

The first two Defendants-Respondents are the two surviving sons of Dulhan Sahibzad Kunwari, and their contention is that the property acquired by their mother on the said partition was her *stridhan* or *peculium* so as to descend to her heirs.

This raised the further question as to whether the Plaintiff, whose father had predeceased Dulhan Sahibzad Kunwari, was one of her heirs or was excluded from her inheritance by her surviving sons. The Subordinate Judge decided both these issues in favour of the Defendants, and that judgment was affirmed by the High Court at Allahabad.

The sections of the Mitakshara dealing with the property of a woman have given rise to much controversy and some conflict of decisions. In Chap. 2, sec. 11, para. 1, of that treatise, Vijnanesvara sets forth Yajnyawalcya's classification or description of woman's property as follows:—

"What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other [separate acquisition] is denominated a woman's property."

In para. 2 of the same section, Vijnanesvara repeats in substance the six-fold classification given in para. 1, and then in place of the general words "as also any other" he substitutes a further enumeration as follows:—

"And also property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by Menu and the rest, 'woman's property.'"

This reference to Menu is not borne out by the quotation from that authority given in para. 4 (sec. 11). Menu is there cited as making the same classification of the different kinds of "woman's property" as that above given by Yajnyawalcya, and saying that they "are denominated the six-fold property of a woman."

This six-fold enumeration of the sources of a "woman's property," as given by Yajnyawalcya and Menu, corresponds with the technical or narrow signification of *stridhan* indicating property which is under her absolute control during life and on her death is descendible to her heirs. Do the same characteristics attach to a woman's property derived from the additional sources specified hy Vijnanesvara, *viz.*, inheritance, partition, &c.? The words "any other" with which Yajnyawalcya concluded his enumeration are a translation of the word "adi" or "adya," which, according to Mr. Mayne (Hindu Law, 7th Ed. p. 823) means "and the like." In that view, Yajnyawalcya meant to limit his description of "woman's property," or *stridhan*, to property acquired in any of the six modes he had just specified, or in any other manner *ejusdem generis* with those modes. Vijnanesvara's additional enumeration goes beyond that. When read with Yajnyawalcya's description, it constitutes a practically complete statement of the means by which a woman can acquire property rights. Dealing with this extended signification of the term "woman's property" Vijnanesvara says in para. 3 of the same section that it "conforms in its import with its etymology and is not technical." In paras. 2, 3 and 4, therefore, he is speaking of *stridhan* in the wider sense. In paras. 5, 6 and 7, Vijnanesvara cites the description of "woman's property" given by Katyayana, which does not expressly profess to be exhaustive, but which closely approximates in character to that given by Yajnyawalcya and Menu, and does not include any of the heads (inheritance,

partition, &c.) added to the list by Vijnanesvara in para. 2. Then comes para. 8, which gives rise to the difficulty. It runs thus:—"A woman's property has been thus described. The author next propounds the distribution of it. 'Her kinsmen take it if she die without issue.'"

The rule of devolution prescribed by the author (Yajnyawalcya), to whom Vijnanesvara refers, was, so far as that author himself was concerned, no doubt intended to apply only to *stridhan* in the narrow signification defined in para. 1, and not to the enumeration as expanded by the commentator in the concluding words of para. 2. It is, indeed, possible to read para. 8 as applying only to the more limited enumeration of Yajnyawalcya. When Vijnanesvara says "a woman's property has been thus described," he may have been referring to the description given by his author and by Katyayana, and have intended to confine Yajnyawalcya's rule of devolution to Yajnyawalcya's classification. His language, however, in para. 8, when read with what he says in paras. 2, 3 and 4, is open to the meaning that a woman's property, of whatsoever kind, descends always to her own heirs. It is difficult to adopt the latter construction in view of the undoubted fact that, as Sir Arthur Wilson said in delivering the judgment of their Lordships' Board in *Sheo Shhankar Lal* v. *Debi Sahai* (1), "most of the old commentators recognise, with regard to the property of a woman, whether called *stridhan* or by any other name, that there may be room for differences in its line of descent according to the mode of its acquisition."

So far as a woman's acquisition of property by inheritance is concerned the matter is now clearly concluded by authority, and a considerarion of the cases decided with regard to that item in Vijnanesvara's additional enumeration will facilitate the task of dealing with the item of "partition" in the same enumeration.

In the case of *Thakur Deyhee* v. *Rai Baluk Ram* (2), it was contended that, in the provinces governed by the Mitakshara, the widow's estate in her husband's property was absolute, and that she had full power to dispose of it. In support of that argument reliance was placed on the concluding words of the second paragraph of sec. 11, Chap. 2 of the Mitakshara above dealt with, *viz.*, "also property which she may have acquired by inheritance." Their Lordships, however, rejected the view that those words included such property as part of a woman's *stridhan* so as to make it descendible to her heirs. They quoted, with approval, the proposition laid down by Sir William Macnaghten in his "Principles and Precedents of Hindu Law," Vol. 1, p. 38, where he says:—

"In the Mitakshara, whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her *peculium*."

It was therefore held that a widow has no power of alienating any immoveable property which she has inherited from her husband, and that, on her death, such property will pass to the next heirs of her deceased husband. Similarly, in *Bhugwandeen Doobey* v. *Myna Baee* (3), it was held that, by the Hindu law prevailing in Benares (the Western School), no part of the husband's estate, moveable or immoveable, forms portion of his widow's

(1) L. R. 30 I. A. 206: S. C. 7 C. W. N. 881; I. L. R. 25 All. 468 (1903).

(2) 11 Moo. I. A. 139 (1866).

(3) 11 Moo. I. A. 487 (1867).

stridhan, and she has no power to alienate the estate inherited from her husband, to the prejudice of his heirs, which, at her death, devolves on them. Sir James Colville, in delivering the judgment of their Lordships' Board, says: "Both the Vivada Chintamani and the Mayukha confine *stridhan* within the definitions of Menu and Katyayana. They exclude property inherited, and the other acquisitions which are comprehended in the last clause of the paragraph in the Mitakshara, but are excluded by Sir William Macnaghten."

This observation puts partition on the same footing as inheritance, so far as the rights of a widow are concerned.

In *Chotay Lall* v. *Chunno Lall* (4), it was held that, under the law of the Mitakshara, a daughter's estate inherited from the father is a limited and restricted estate only and not *stridhan*, so that upon her death the next heirs of the father succeed thereto.

The cases on the question of a woman's inherited property came under review by their Lordships' Board in *Sheo Shhankar Lal* v. *Debi Sahai* (1) before referred to and *Lal Sheo Pertab Bahadur Singh* v. *Allahabad Bank* (5). The construction of the Mitakshara was again considered, and it was held that, under the Hindu law of the Benares school, property which a woman has taken by inheritance from a female is not her *stridhan* in such sense that on her death it passes to her *stridhan* heirs in the female line to the exclusion of males.

Each of these authorities is inconsistent with the wide scope which the Respondents, on their construction of the Mitakshara, seek to give to the definition of *stridhan*.

The question now arises whether there is any substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition. It is a question attended with some difficulties, especially in the construction of the Mitakshara, whatever view of it may be taken. While a family remains joint a woman has no right under the Mitakshara to a specific share of the family estate. She is only entitled to maintenance, or in due course to her customary inheritance, and if a partition takes place a mother gets a share equal to that of a son. If the share given to a widow on partition is given to her as a substitute for that to which she would be entitled upon inheritance, then, according to the foregoing authorities, it would seem reasonable that it should follow the same rule of descent and revert on her death to her husband's heirs. If, on the other hand, it is given to her by way of provision for her maintenance, it seems equally reasonable that when the necessity for her maintenance has ceased the property should revert to the estate from which it was taken. Of course, the members of a joint family effecting a partition may agree that a portion of the property shall be transferred to the widow by way of absolute gift, as part of her *stridhan*, so as to constitute a provision for her *stridhan* heirs; but, in the absence of any such intention, their Lordships do not feel justified in putting property acquired by a widow, on a partition of the joint estate, upon a footing different from that on which property coming to her by way of inheritance has been placed. The contrary view was taken by the High Court

(1) L. R. 30 I. A. 206: s. c. 7 C. W. N. 881; I. L. R. 25 All. 468 (1903).

(4) L. R. 6 I. A. 15 (1878).

(5) L. R. 30 I. A. 209: s. c. 7 C. W. N. 840 (1903).

at Allahabad in *Chhiddu* v. *Naubat* (6). The learned Judges in that case laid great stress upon Chap. I, Sec. VI., para. 2, of the Mitakshara. Vijnanesvara there deals with the rights of a son born after the partition, and says that on the demise of his parents he obtains both their portions,—

"His mother's portion, however, only if there be no daughter, for it is declared that 'Daughters share the residue of their mother's property after payment of her debts.'"

Again Chap. I., sec. III., para. 8, runs as follows.—

"It has been declared that sons may part the effects after the death of their father and mother. The author states an exception in regard to the mother's separate property: 'The daughters share the residue of their mother's property, after payment of her debts.'"

This paragraph refers only to the mother's separate property or *peculium* whatever that may be. But it is by no means certain that either in that paragraph or in sec. VI., para. 2, the property coming to her by way of partition is necessarily included in that *peculium*.

That there is a distinction in the rules of descent between different kinds of a woman's property, according to the mode in which it has been acquired, is beyond question, but the Mitakshara does not always discriminate between these different kinds of property, and in the doubt that arises as to its precise intent and construction in reference to this point, the principle upon which the cases relating to inheritance have been decided appears to be a safe guide in dealing also with cases of partition.

In this view, it is unnecessary to discuss the second question as to whether the Plaintiff was entitled to share in his grandmother's estate as one of her heirs equally with his uncles.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed; the decrees of the Courts below set aside with costs; and in lieu thereof a decree made in favour of the Appellant for the one-third of the share with mesne profits which came to Dulhan Sahibzad Kunwari on partition and was held by her.

The Respondents will pay the costs of the appeal.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

B. D. *Appeal allowed.*

(6) I. L. R 24 All. 67 (1901).

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

CHITTY, J.
1912,
15, January.

In the matter of HAROLD TUCKER.

Indian Christian Marriage Act (XV of 1872), secs. 41 and 46—Marriage between a Christian and a Jewess divorced according to Jewish Law—Registrar refusing to take any steps—Direction from Court to solemnize marriage.

Where a Jewess was divorced according to Jewish law, a Christian desiring to marry her gave notice to the Registrar under the provisions of Act XV of 1872. The Registrar having refused to solemnize the marriage, the Court, on application, ordered the Registrar to receive and publish the notice and, upon compliance with the provisions of sec. 41 of the Act, take all such steps as are necessary for the solemnization of the marriage.

This was an application in the matter of Act XV of 1872, The Indian Christian Marriage Act, and in the matter of an intended marriage between Harold Tucker,

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a Christian, and Isabella Landeman, a Jewess.

The application was made by Harold Tucker, under sec. 46 of the Christian Marriages Act, on notice to the Senior Marriage Registrar, and the petition on which the application was made set out the nationality, age, religion of the parties to the intended marriage, the fact that the said Isabella Landeman had been married and divorced according to the Jewish Law and that there was no valid impediment to the applicant's marriage with the said Isabella. After setting out the refusal of the Marriage Registrar to issue the certificate, the petition prayed for a direction to the Marriage Registrar for the issue of the certificate. The reason why the Registrar had refused the certificate did not appear.

The petition was supported by the affidavit of the priest, Solomon Tweuna. After stating the length of the time he has been acting as priest, he set out the manner in which a divorce takes place according to Jewish rites. He stated that he knew Isabella Landeman and had duly divorced her, in the manner described by him. He finally stated that she was according to the Jewish Law free to marry again and that no marriage between a Jew and a Gentile could be solemnised according to Jewish Law.

The Marriage Registrar did not appear, and no oral examination took place in Court.

Mr. J. E. Bagram, for the Applicant, cited a previous application,* made in July 1902 to Mr. Justice Henderson, on a petition and affidavit in almost the same language as the language of the present petition and affidavit.

His Lordship, after perusing the minutes of that application, made the order asked for.

Messrs. Gregory and Jones, Attorneys for the Applicant.

H. G. *Application granted.*

* In the matter of Act XV of 1872 and in the matter of an intended marriage between William Lennox Harwood of No. 173, Lower Circular Road and Florence Ezra of the same place.

HENDERSON, J

3rd July 1905.

Application being made by Mr. L. P E Pugh for Mr. Harwood for the solemnisation of his marriage with Florence Ezra, (The senior Marriage Registrar of Calcutta not appearing in person or by Counsel) and upon reading a notice, dated 1st July 1905, from Gregory and Jones, Attorneys for Mr. Harwood, and an affidavit of Nibaran Chandra Banerji of the due service thereof affirmed this day, both filed this day, and a petition of Mr Harwood and his affidavit in verification thereof sworn on the 20th June last and upon hearing counsel for applicant, the Judge being of opinion that there was a valid divorce between the said Florence Ezra and her former husband Moses Cohen: It is ordered that the Senior Marriage Registrar of Calcutta do under the provisions of the said Act XV of 1872 receive and publish the notice of the intended marriage given to him in writing in the form prescribed in and by the said Act and upon compliance with the provisions of sec. 41 of the Act take all such steps as may be necessary for the solemnisation of the marriage intended to be had between the said Harwood and Ezra in the said petition named.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE No. 915 OF 1909.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
Heard, 22, January.
Judgment, 29, January.

SATYA SRI GHOSHAL and ors, Plaintiffs, Appellants,
v.
KARTIK CHANDRA DAS and another, Defendants, Respondents.

Presumption, conditions of—If may be made in favour of an illegal transaction—Debutter lands,

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intention to create permanent tenancy of, if may be presumed.

A presumption in favour of a transaction assumes its regularity : it cannot be made in favour of that which offends legal principle.

Where lands are debutter, *to create a permanent tenancy at a fixed rent under it would be a breach of duty in the shebait and an intention in the shebait to create such tenancy is not therefore presumable.*

This was an appeal preferred on the 10th of May 1909, against a decree of Babu Mohim Chandra Sarkar, Subordinate Judge of 24-Pergunnahs, dated the 28th of November 1908, reversing a decree of Babu Mohon Lal Ray, Munsif of Alipur, dated the 31st of July 1908.

The facts of the case briefly were as follows :—

The suit was brought by the Plaintiffs to eject the Defendants from a plot of land appertaining to the Plaintiffs' *debutter* after notice to quit on the allegation that the Defendants were monthly tenants at will. This contention was based on a registered *kabuliyat* alleged to have been executed by the tenant in which he was described as a "*bharatia* paying rent monthly." The Defendants denied the genuineness of the *kabuliyat* and contended that they held the land as permanent tenants the permanent right of occupancy having been acquired under the rent law and by long possession. The first Court decreed the suit on the basis of the *kabuliyat.*

On appeal the Subordinate Judge found that the *kabuliyat* was a collusive document executed by one Kasem who held a power-of-attorney from the Defendants. He further found that the Defendants and their predecessors had been holding the land for nearly 70 years at an uniform rate of rent, that they had erected *pucca* building on the land and that there had been transfers by sale and mortgage which had been recognised by the landlord. After stating these circumstances the lower Appellate Court went on to observe as follows :

"All those facts taken together lead to the irresistible inference of the permanency of the Defendants' tenure. It also appears that the Defendants' tenure was originally an agricultural one and a right occupancy had been acquired in it by the holders of it . . . . . Upon a consideration of the oral and documentary evidence adduced in this case and also the acts and the conduct of the parties. I arrived at the conclusion that the Defendants' tenancy is a permanent one, that the Plaintiffs are estopped by their acts and conduct from questioning the permanent rights of the Defendants and the Plaintiffs are not entitled to eject the Defendants from the disputed land."

In this view the Subordinate Judge dismissed the Plaintiffs' suit with costs.

Against this decision the Plaintiffs appealed to the High Court.

Dr. Rash Behary Ghose and *Babu Mohini Mohun Chatterjee* for the Appellants.

Babus Nil Madhub Bose, Shib Chandra Palit and *Surendra Chandra Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This second appeal arises out of a suit to eject the Defendants from a piece of land in Kidderpur on the ground that they are monthly tenants to whom due notice to quit has been given. The lower Appellate Court, reversing the

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decree of the Court of first instance, has dismissed the Plaintiffs' suit with costs, holding that the Defendants have a permanent tenancy.

From this decree the Plaintiffs have appealed. It cannot be said in the light of the decided cases that there are no materials to justify the lower Appellate Court's view; but it has to be borne in mind that the conclusion rests not on direct proof but on presumption.

The presumption in favour of a permanent tenancy implies that there is ground for inferring that the tenure was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction assumes its regularity: it cannot be made in favour of that which offends legal principle. It is this that prevents our accepting the view of the lower Appellate Court as final, for it would seem that the property to which the presumption has been applied is *debutter*.

If it was *debutter* at the time the tenancy originated, then this would affect the applicability of the presumption, for to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in a *shebait*, and is not, therefore, presumable. *Moharanee Shibessoree Debia* v. *Mothoora Nath Acharyo* (1). It should therefore be seen whether at the origin of the tenancy the property had acquired its *debutter* character, and on this will depend the applicability of the presumption.

In the course of the argument before us the Appellants have relied on the use of the words *Bharatia*: We cannot pronounce an opinion as to the weight it should carry but it will be for the lower Appellate Court to consider its bearing as one of the factors in the case.

We reverse the decree of the lower Appellate Court and send back the appeal for re-hearing in the light of the foregoing remarks.

The costs in this Court and those incurred elsewhere up to this stage will abide the result.

Appeal allowed:
Case remanded.

(1) 13 M. I. A. 270 (1869).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 530 OF 1910.

CASPERSZ, J.
CHATTERJEE, J.
1911,
Heard,
28, November.
Judgment,
5, December

SHAKARUDDIN CHOUDRY, Judgment-debtor, Appellant,
v.
RANI HEMANGINI DASI and ors., Decree-holders, Respondents.

Occupancy holding—Sale in execution of decree—Consent of fractional landlord—Sale if legal.

Where a decree-holder's application for sale of an occupancy holding was granted to the extent of a 15½th annas share upon the finding that co-sharer landlords to that extent had consented to the sale,

Held—*That in the present state of authorities the order should be maintained, the purchaser purchasing at his peril.*

This was an appeal preferred on the 21st of November 1910, against an order of Babu Ashutosh Mitter, Officiating Subordinate Judge of Bogra, dated the 4th of July 1910, confirming an order of Babu Bejoy Gopal Chatterjee, Munsif of Bogra, dated the 29th of January 1910.

The facts of the case will appear from the judgment.

Babu Mohini Mohun Chuckerbutty for the Appellant.

SHAKARUDDIN CHOUDRY *v.* RANI HEMANGINI DESI.

Babu Priya Sankar Mojumdar for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The decree-holder applied for the sale of a non-transferable occupancy holding in execution of a money decree on the allegation that the landlords had given their consent. The raiyat judgment-debtor objected and the learned Munsif found that the consent was not by all the landlords but by co-sharers to the extent of 15½th annas only and made an order for the sale of that share of the holding. That order has been affirmed by the lower Appellate Court.

It has been held that an occupancy holding which is not transferable by custom can be sold with the consent of the landlord. See *Ananda Das* v. *Ratnakar* (1). That consent however must be by the whole body of landlords. It is contended that the result of the order of the lower Courts would be a sale of a part of a holding and a consequent sub-division of the holding without the consent of the whole body of landlords. As regards the sale of a part of a holding there is some divergence of opinion and the matter has been referred to a Full Bench in another case. As regards the sub division of the holding, that would not be a necessary consequence of the sale and the non-consenting landlords would not be bound to recognise the sub-division. It has also been held that the landlord may consent even after the sale, see *Dwarka Nath* v. *Tarini Sankar* (2). So that here the non-consenting landlords may give their consent after the sale. In any case the decree-holder takes the risk and in the present state of the law the purchaser will purchase at his peril. We do not think it necessary to interfere and we accordingly dismiss this appeal but without costs.

(1) 7 C. W. N. 572 (1903).
(2) 11 C. W. N. 513 (1907).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO. 609 OF 1910.
WITH RULE NO. 5346 OF 1910.

STEPHEN, J.
COXE, J.
1911,
Heard, 18 and 19, December.
1912,
Judgment, 22, January.

NALINI BEHARY RAY, Decree-holder, Appellant,
v.
FULMANI DASI and anr., Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 170 (3)—Transferee of occupancy holding, if may make deposit—Voidable interest.

A transferee of an occupancy holding not transferable by custom has no interest in his holding and is not entitled to make a deposit under sec. 170 (3) of the Bengal Tenancy Act, to avoid a sale of the holding in execution of the landlord's decree for rent.

To permit such a transferee to make the deposit and thus prevent execution is an irregular exercise of jurisdiction open to revision by the High Court.

NISSA BIBI *v.* RADHA KISHORE (1), PROSUNNO KUMAR *v.* BAMA CHURN (2) *followed.*

HARI DAS *v.* UDOY CHANDRA (4), OMAR ALI *v.* BASIRUDDEEN (5), THOMAS BARCLAY *v.* SYED HOSSAIN (6) *referred to.*

This was an appeal preferred on the 19th of December 1910, against an order

(1) 11 C. W. N. 312 (1906).
(2) 13 C. W. N. 652 (1909).
(4) 8 C. L. J. 261 (1908).
(5) 7 C. L. J. 282 (1908).
(6) 6 C. L. J. 601 (1907).

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of Mr. J. Cornes, District Judge of Zillah Midnapur, dated the 10th of September 1910, affirming that of Babu L. Patnaik, Munsif of that place, dated the 21st of May 1910.

The material facts will appear from the judgment.

Babu Tarakeshur Pal Choudhry for the Appellant and Petitioner.

Babus Sarat Chandra Ray Choudhury and *Gobinda Chandra Chuckerbutty* for the Respondents and Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

STEPHEN, J.—This matter comes before us on a Second Appeal and on a Rule. The Appellant, who is also the Petitioner in the Rule, is a landlord who is seeking to sell a tenant's holding in execution of a rent-decree. The Respondent purchased the holding from an occupancy raiyat and seeks to defeat the landlord's right by depositing the decretal money in Court under sec. 170 (3) of the Bengal Tenancy Act. The Appellant contests his right to do this on the ground that the holding is not transferable, as it has now been found it is not, and that the Respondent has not therefore any interest in the holding voidable on the sale. Both the lower Courts have found in the Respondent's favour, and have allowed the deposit to be made. The Appellant now appeals from the decision in the lower Appellate Court, and in case it should be held that no appeal lies has also obtained a Rule calling on the Respondent to show cause why the order accepting the deposit should not be set aside.

Leaving aside for the moment the question whether any appeal lies we have to consider whether the Respondent, that is the applicant, has any interest in the land, and if he has, whether that interest is voidable on the sale.

On the authorities before us I hold that the complainant has no interest in the land. This result, in my opinion, follows from the decisions of this Court in *Nissa Bibi* v. *Radha Kishore* (1) and *Prosunno Kumar* v. *Bama Churn* (2). The two cases together are certainly an authority for the statement that the transferee of a non-transferable holding is not a representative of the transferer under sec. 244 of the old Code or the owner of immoveable property under sec. 311, and in both cases the point is considered as depending on the question whether he had an interest in the property. It is possible of course that the phrase "having any interest" in sec. 170 (3) of the Bengal Tenancy Act, might be construed as having a wider application than the "representative" of a party to a suit under sec. 244, or the owner of immoveable property under sec. 311. But in *Ishan Chandra* v. *Beni Madhab* (3), the authority on which *Nissa Bibi* v. *Radha Kishore* (1) was decided it seems as if the classes of person described in the three sections were all the same, as indeed there is no reason why they should not be.

I should feel no difficulty in following these decisions were it not for the decision of this Court in *Hari Das* v. *Udoy Chandra* (4), where it was held that the sale of a non-transferable holding is not void but merely voidable by the landlord, a rule that has frequently been followed by this Court in holding that where the landlord is not a party to proceedings arising out of the transfer the question of transferability does not arise. I doubt,

(1) 11 C. W. N. 312 (1906).
(2) 13 C. W. N. 652 (1909).
(3) I. L. R. 24 Cal. 62 (1896).
(4) 8 C. L. J. 261 (1908).

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however, whether the distinction between void and voidable contracts has not been pushed too far in the case in question. The landlord's rights were not directly concerned in the case in question, and on the facts before it, in order to support the conclusion arrived at, the Court need not have decided more than that the contract was void only. If the landlord recognises a transfer of a non-transferable holding it is probably open to him to recognise it on the footing that it is or is not the subject of an occupancy right, or at least there does not appear to be any authority that it is not. If the "interest" in sec. 170 (3), Bengal Tenancy Act, is read as interest against the landlord, a sense which would bring the section into line with secs. 244 and 311 of the old Code, this would put an end to the distinctions between void and voidable contracts as far as the present case is concerned. That it should be so read I do not say but the possibility of the reading inclines us to follow the two decisions we have followed.

We have also been referred to the case of *Omar Ali* v. *Basiruddeen* (5), where it was held that the transferee of a portion of a holding had a right to pay the amount of a decree in a rent suit under sec. 310A of the old Code. I cannot say that this is consistent with the principles on which *Nissa Bibi* v. *Radha Kishore* (1) and *Prosunno Kumar* v. *Bama Churn* (2) were decided ; but the difference between the views expressed does not seem to me to justify a reference.

Under these circumstances, we need not consider the further question whether the applicant had an interest voidable on the sale.

(1) 11 C. W. N. 312 (1906).
(2) 13 C. W. N. 652 (1909).
(5) 7 C. L. J. 282 (1908).

If the applicant had no interest he had no right of appeal from the first decision, and consequently the present Appellant had no such right. But on our findings it appears that the Courts below have prevented the landlord from proceeding with the execution of his decree, at the instance of one who, on the Court's own finding, was a stranger and had no *locus standi* in the matter. It must be held, therefore, that there has been an irregular exercise of jurisdiction. The appeal is therefore dismissed, but the Rule is made absolute, the orders of both the lower Courts are set aside, and the money deposited by the applicant must be returned to him, and the execution case must proceed according to law.

The Petitioner is entitled to the costs of the Rule which we assess at two gold mohurs, and to his costs in the Courts below.

COXE, J.—Considering the importance of the point and the conflict of judicial opinion upon it I should have preferred to have the case referred to a Full Bench but as my learned colleague does not think that this course is rendered necessary by the decision in *Omar Ali* v. *Basiruddeen* (5) and as I agree with his view that the purchaser in this case is not entitled to deposit, I do not press for a reference.

To the cases cited by my learned colleague, I may add that of *Thomas Barclay* v. *Syed Hossain* (6). In that case it was held that if the landlord does not dispute the title of the depositor and withdraws the money, he cannot afterwards refuse to recognise the transfer. It is argued that that case has no bearing on the present case, because it does not lay down that the mere drawing of the money

(5) 7 C. L. J. 282 (1908).
(6) 6 C. L. J. 601 (1907)

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would debar the landlord from denying the title of the depositor and in this case the landlord has contested the depositor's right to make the deposit. This argument however is hardly in accordance with the explanation of the decision given in *Jugal* v. *Srinath* (7). Moreover both these decisions imply that the landlord can attack successfully the right of a purchaser to make the deposit. If a purchaser of a holding that is not transferable is entitled to deposit the money, what will be the use of the landlord's resisting him, and why should the landlord be estopped from contesting his title because he has refrained from taking action that is bound to be pointless. On the other hand if drawing the money estops the landlord in future, what is he to do, if he desires to exercise his undoubted right of refusing to recognise the transfer. If he draws the money he is bound to recognise the transfer. If he does not, the sale is stopped and he has to go without his rent. It appears to me to follow necessarily from these rulings that the landlord is entitled to resist the deposit and that if he resists it, the purchaser cannot be allowed to make it and save the holding from sale.

Appeal dismissed :
Rule made absolute.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 3101 OF 1911.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1911.
18, December.

RAMJAS AGARWALLA, Plaintiff, Petitioner,
v.
INDIA GENERAL NAVIGATION and RAILWAY COMPANY LD., Defendant, Opposite Party.

Civil Procedure Code (Act V of 1908), sec. 115, Or. XLI, r. 25—Failure by Appellate Court to frame material issue not raised and tried—Material irregularity—Revision by High Court.

A suit for damages against a Steamer Company for loss due to short delivery was decreed by the Munsif who did not frame and try the issue whether notice under sec. 10 of the Carriers Act had been served on the Company, that issue not having been presented to him by the parties. The Subordinate Judge on appeal reversed that decree and dismissed the suit on the ground that service of notice under the said section had not been made out :

Held—*That the failure of the Subordinate Judge to frame and try the requisite issue under r. 25, Or. XLI, C. P. C., was in the circumstances a material irregularity which might have led to a failure of justice.*

This was a Rule granted on the 5th of June 1911 against the judgment and decree of Babu S. C. Ganguli, Subordinate Judge of Faridpur, dated the 21st of April 1911, decreeing Money Appeal No. 296 of 1910 with costs, setting aside the decree of Babu Bunwari Lal Banerjee, Munsif of Goalundo, dated the 7th of September 1910, and dismissing the suit with costs.

The Plaintiff sued the Defendant Company to recover Rs. 329-14 as. for loss sustained owing it was alleged to Defendant's negligence.

The Plaintiff alleged that his agent made over to the Defendant Carrier Company at Mokameh 353 sacks of dried chillies weighing 344 maunds and 15 seers for delivery to Plaintiff at Goalundo, that the Plaintiff got delivery of 324 maunds only and that Defendant admitted short delivery but alleged that it was due to dryage, that the shortage was in fact due to gross negligence of the Company and that the Plaintiff was entitled to get

(7) 12 C. L. J. 609 (1910).

RAMJAS AGARWALLA *v.* INDIA GENERAL NAVIGATION & RAILWAY COMPANY, LD.

Rs. 302 as the price of 18 maunds of chillies.

The Defendant alleged that no notice in terms of the Carriers Act had been given by Plaintiff, that the consignor should have been made a party, that Plaintiff did not incur any loss owing to negligence of Defendant's servants, that the Defendant was not liable, as the consignment suffered from inherent defects and was booked at owner's risk, that the bags were old and torn and the loss beyond dryage was incidental to transit and might be due to wear and tear.

The Court of first instance found that no notice was necessary and that Plaintiff was entitled to get the price of 18 maunds of chillies. So the suit was decreed for Rs. 249-4-7.

The Defendant appealed. The point urged in the Appellate Court was whether notice in terms of sec. 10 of the Carriers Act as amended by Act X of 1899 was served on the Defendant Company by the Plaintiff?

The Subordinate Judge after hearing the arguments on both sides found the point in the negative and decreed the appeal.

Against his order the Plaintiff moved this Court and obtained the present Rule.

Babu Dhirendra Lal Khastagir for the Petitioner.

Babu Monmatha Nath Mukherjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—In our opinion the Rule in this case should be made absolute on the short ground that the lower Appellate Court decided the suit on a question of fact which was never in issue between the parties in the Court of first instance, through a misapprehension as to what the law required. The Subordinate Judge in the lower Appellate Court was right in his view that sec. 10 of the Carriers Act of 1865, which was enacted in Act X of 1899, applied to the circumstances of this case. The Munsif, however, did not take that view, nor does it seem to have been presented to him by the parties ; and it is clear from the terms of his judgment and the manner in which he formulates the points for determination that this section (sec. 10) was not present to his mind. Now, sec. 10 raises a question of fact ; and, had proper issues been settled under Or. XIV, the issue appropriate in the light of that section would have been framed and tried. It was not done, and so the position arose which is contemplated in Or. XLI, r. 25, which deals with the circumstances under which the Appellate Court may frame issues and refer them for trial to the Court whose decree is appealed from. The Appellate Court perceived that the Court of first instance had omitted to frame and try the requisite issue as to the service of notice in writing of the loss or injury, but failed to utilize the procedure contemplated in r. 25 of Or. XLI. In the circumstances of the case, this was a material irregularity in the exercise by the Appellate Court of its jurisdiction—an irregularity which, for ought we can tell, may have led to an injustice in this case. The result is that we must make the Rule absolute, set aside the decree of the Appellate Court, and send back the case to that Court in order that it may frame the requisite issues and refer the same for trial to the Court from whose decree the appeal was preferred.

The costs of this Rule will abide the result, and we assess the hearing-fee at two gold mohurs.

N. R. CHATTERJEA, J.—I agree.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1383 OF 1911.

HOLMWOOD, J. SHARFUDDIN, J. 1912, Heard, 16, January. Judgment, 22, January.	ALIAR RAI and others, Petitioners, *v.* JHINGUR TEWARI, Opposite Party.

Local inspection, power of Magistrate to make—Evidence Act (I of 1872), sec. 3—"Proved"—"Matters before Court"—Omission of the Magistrate to make a note of the local inspection on the spot—Irregularity or illegality—Prejudice.

There are in effect three different kinds of local inspections. (1) Those that are authorised or directed by the Code of Criminal Procedure and which are governed by the rules and limitations imposed by the Code itself. (2) Those which are in the nature of the view by the jury laid down in sec. 293 of the Code. It is not only not objectionable, but in many cases, highly advisable, that a Magistrate trying a criminal case (having the functions of both judge and jury) should view the place in order to understaud fully the bearing of the evidence given in the Court. But if he does so, he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other. [IN RE LALJI (3) *referred to*]. *(3) Local inspections, not provided for as above in the Criminal Procedure Code, but which in so far as they conform to the provisions of the Evidence Act cannot also be excluded.*

The Evidence Act gives the Court power to adjudge the existence of facts on "matters before it" as well as according as they are deposed to in the evidence. In adjudicating on matters before him, which require proof, the Judge may use his eyes as well as his ears. A Court of Appeal therefore cannot exclude from its consideration the personal observations made by the trying Court at a local investigation.

JOY COOMAR *v.* BUNDHU LALL (2) *followed.*

A case cannot be decided merely on an observation made by the Court locally. But if in looking at a place in order to understand the evidence the Magistrate thereby understands that the description of the place given in the evidence is erroneous or false, he is not precluded from holding that the facts as stated by the witnesses who gave that description are not proved and in so holding he does not make himself a witness but acts as a Judge deciding on "matters before him."

BABBON SHEIK *v.* EMPEROR (1) *considered.*

GIRISH CHUNDER GHOSH *v.* QUEEN-EMPRESS (4) *distinguished.*

It is very desirable that the results of the local investigation should be placed upon record as soon as it is completed. If the facts which the judicial officer considers to be established by the local investigation be impugned, and there is no contemporaneous record of them, the Judge would not be able to act upon them. But where they are not impugned the Appellate Court cannot exclude them from consideration merely because the facts observed were not immediately placed upon record, for it is not a positive rule of law that a note must be placed on the record on the spot.

Where the observations of the Magistrate were not placed on the record on the spot but were embodied in his judgment soon after:

Held—*That the Appellate Court was right in refusing to exclude them from its consideration, when the correctness of the observations was not impugned before him and the accused did not appear to have*

(1) I. L. R. 37 Cal. 340: s. c. 14 C. W. N. 422 (1910).

(2) I. L. R. 9 Cal. 363 (1882).

(3) I. L. R 19 All. 303 (1897).

(4) I. L. R. 20 Cal. 857 (1893).

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been prejudiced by the irregularity in the matter of recording them.

This was a Rule granted on the 10th of November 1911 against the order of Mr. H. D. Christian, Sub-Divisional Magistrate of Bhabua, dated the 27th of July 1911, convicting the Petitioners under secs. 147, 323/149, I. P. C., and sentencing them (Petitioners Nos. 1—6) to six months' rigorous imprisonment under each section (concurrently) and Petitioners Nos. 7 and 8 to a fine of Rs. 25 under sec. 323, I. P. C., and directing all to execute bonds for Rs. 150 each to keep the peace for 2 years: an appeal from which order was dismissed by Mr. G. J. Monahan, Sessions Judge of Shahabad, on 23rd September 1911.

The facts material to the report will appear from the judgment.

Babus Dwarka Nath Mitter and *Manindra Nath Banerjee* for the Petitioners.

Babu Sirish Chandra Chowdhury for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This was a Rule calling upon the District Magistrate of Shahabad to show cause why the conviction of the Petitioners should not be set aside on the ground that the lower Court inspected the place where the offence is said to have been committed and did not record a note of what he saw.

Now what happened in this case was this; the defence urged that the sides of the "kote" or mound on which the assault took place are unscaleable and the space was not sufficient to hold so many persons. This being a point on which the Magistrate says he could satisfy himself, he visited the place on the 23rd of July and found, as he puts it, that his trouble for the defence had been wasted; there was no question of the place being inaccessible, it was merely a slight slope on the south and on the north it was practically on a level with the village, while as for the place of assault it was sufficient to hold twice the number of persons.

The learned Judge in appeal in dealing with this point briefly recapitulated the above finding and says that the Magistrate visited the spot as there were points that could be verified by a local enquiry. Before the Judge it was urged that the Magistrate had made no note at the time of his local inspection. This the Judge says he certainly should have done. However he had embodied the result of his inspection in his judgment which was delivered only four days later and when what he saw must have been fresh in his memory. Thus, in the Judge's opinion, his omission to make a note at the time, though irregular, cannot be said to have caused any failure of justice.

In this we fully agree and the only question we have to consider is whether in all cases the omission to place on the record the result of a local inspection is a fatal error of jurisdiction apart from any prejudice which it may cause to the accused.

We do not find any authority for such a proposition. The case relied on by the learned Vakil who obtained the Rule is that of *Babbon Sheik* v. *Emperor* (1). But none of the judgments delivered in that case considers or deals with the ruling in the case of *Joy Coomar* v. *Bundhu Lall* (2), though that case was cited in argument for another reason.

That ruling imports a reason for giving evidentiary value to local inspections

(1) I. L. R. 37 Cal. 840: s. c. 14 C. W. N. 422 (1910).

(2) I. L. R. 9 Cal. 363 (1882).

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which seems to have been overlooked in subsequent decisions. What those reasons are we shall deal with later on.

But what we desire to point out here is that there are in effect three different kinds of local inspections—1st. Those that are authorised or directed by the Code of Criminal Procedure and which are governed by the rules and limitations imposed by the Code itself. 2nd. Those which are in the nature of the view by the jury laid down in sec. 293 of the Code. Magistrates having the functions of both Judge and jury in cases decided by them may in our opinion view the place in any case in order, as the rulings on the point say, to follow or understand the evidence. We are fortified in this opinion by the ruling in *In re Lalji* (3). It is, as the Judges there say, not only not objectionable, but in many cases highly advisable, that a Magistrate trying a criminal case should himself inspect the scene of the occurrence in order to understand fully the bearing of the evidence given in Court. But if he does so he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other.

This is the same rule which is applied in the Code itself to the inspection by the jury. But there is a third class of local inspections under which we think the present and very many other cases fall and that is the class referred to in the ruling in *Joy Coomar's* case (2) above-mentioned.

There is express provision for these local investigations in the Code of Civil Procedure but there is nothing that can be deemed to prevent them in the Code of Criminal Procedure and in so far as they conform to the provisions of the law of evidence it is obvious they cannot be excluded.

Now we desire to draw particular attention to what the Judges say as to the evidentiary value of such local inspections. They say "The Judge also appears to have been of opinion that the results of the enquiry conducted by the Munsif in this case could not be considered by him because it was not evidence according to the definition of that word in the Evidence Act. He is perhaps right in this view. The definition of the word 'evidence' as given in the Evidence Act means and includes (1) all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry; such statements are called oral evidence; (2) all documents produced for the inspection of the Court: such documents are called documentary evidence. The result of a local enquiry by a presiding Judicial Officer does not come under either of these two heads; but the District Judge has not taken into consideration the definition of the word 'proved' which comes immediately after. It is to this effect:—'a fact is said to be proved when after considering the matters before it the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.' It would appear therefore that the Legislature intentionally refrained from using the word 'evidence' in this definition, but used instead the words 'matters before it.'" The Judges then proceed to hold that the Appellate Court cannot exclude the personal observations of the lower Court from its consideration. Whether

(2) I. L. R. 9 Cal 368 (1882).
(3) I. L. R. 19 All. 303 (1897).

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there are good grounds for accepting the results of the local investigation as correct, or rejecting it as incorrect, are matters with which the High Court in second appeal (and we may add also in revision) has nothing to do. It is for the Appellate Court to decide these questions. In this very case the Judges for the first time emphasize the importance of putting upon paper the result of the investigation when completed. "It is very desirable," they say, "that judicial officers conducting local investigations should place upon record the results of their investigations as soon as they are completed, so that the parties may have an opportunity of seeing what the facts are which the judicial officers consider to be established by the local investigations." But where none of those facts are impugned as incorrect the Appellate Court cannot exclude them from his consideration. It would seem to follow that if they are so impugned and there is no contemporaneous record of them the Judge would not be able to act upon them, but it is certainly not a positive rule of law that a note must be placed on the record on the spot. In this case none of the objections that have been taken in the various cases cited in this Court apply. The defence practically said: "The mound itself is our witness. Go and look at it." The Magistrate went and saw that it was a witness against them. This finding was not impugned before the Judge but it was sought to exclude this most relevant and important matter before the Court on the mere technical ground that the observation was not made matter of record on the spot. The Judge considered the point and rightly considered it from only two points of view.—1st, whether the fact observed was correct; 2nd, whether the defence had been in any way prejudiced and he found that the correctness of the finding was not impugned and that there was no prejudice in the irregularity in omitting to record a note at the time. The present case is clearly not touched by the decision in *Babbon Sheikh* v. *Emperor* (1). There are no doubt passages in the judgment of Woodroffe, J., which might seem to imply that the observation of a fact by the Magistrate could not be admitted. But a careful perusal of the judgment as a whole shows that what is meant is that mere observation cannot be allowed to override the necessity of evidence and a case cannot be decided merely on an observation made by the Court locally. If in looking at a place in order to understand the evidence the Magistrate thereby understands that the description of the place given in the evidence is erroneous or false he is certainly not precluded by the laws of evidence from holding that the facts as stated by the witnesses who gave that erroneous or false description are not proved and in so holding he does not make himself a witness but acts as a Judge deciding on matters before him. We have shown that the judicial system in this country of which the Evidence Act is a most important factor gives the Court power to adjudge the existence of facts on matters before it as well as according as they are deposed to in the evidence. To hold otherwise would be in direct conflict with *Joy Coomar's* case (2), which as far as we know has never been dissented from. Woodroffe, J., clearly shows that the danger to be guarded against is the supersession of all evidence

(1) I. L. R. 37 Cal. 340: s. c. 14 C. W. N. 422 (1910).

(2) I. L. R. 9 Cal. 363 (1882).

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by mere observation and the head-note of the case appears to us to go too far in saying that the Magistrate cannot import into the case matters or facts which he has himself observed, if that is what is intended. But the use of the word 'import' and the words 'other matters' leave it doubtful what is intended. No such words occur in either of the concurrent judgments which govern the decision and the words that do occur are those cited in the next paragraph of the head-note with which we partly agree that a Magistrate cannot import in'o his judgment matters of opinion and inference based in circumstances not on the record.

The case of *Girish Chunder Ghosh* v. *Queen-Empress* (4) is one which, we may observe, has nothing to do with local investigations made af:er hearing evidence by a trying Magistrate. Upon it is based a contention in this and similar cases that a Magistrate constitutes himself a witness by holding a local inspection in a case in which he is the presiding Judge. The facts of that case clearly show that the District Magistrate who had seen the occurrence and was the best witness for the prosecution constituted himself the Judge for the trial of the case, and the decision was that a witness could not be Judge in the case inasmuch as it is impossible that a Magistrate can be a witness in a case in which he is the sole Judge of law and fact. In other words a man who is *a priori* a witness to an occurrence cannot assume jurisdiction which he might otherwise have to decide on the facts of that occurrence as a Judge. But as local inspections are recognised by the law and as the Magistrate must make observations of fact in such an inspection and cannot, as Chatterjee, J., points out, fail to believe the testimony of his own senses, it is clear that by making such observations he cannot constitute himself a witness in the case. As long as he is a witness he cannot be a Judge and as long as he is a Judge he cannot be a witness. If he is a witness he ousts his own jurisdiction. If he is a Judge he may adjudicate on all matters before him which require proof, and in doing so he may use his eyes as well as his ears. We do not for one moment desire to minimize the importance of making a note of what is observed at a local inspection nor to in any way appear to condone the introduction either into the report or the judgment of matters of opinion and inference depending on the facts observed. But if the facts observed support or rebut the evidence adduced by either side and cause the Court to understand that that evidence is true or false, inaccurate or exaggerated, then the statement that the facts observed negative or support any of the evidence in the case is not a matter of opinion or inference but a matter of observation and it is in our opinion the duty of the Judge as laid down in *Joy Coomar's* case (2) to consider the results of such observation, and state them in his judgment. Here the case is clearly one where direct observation explained and cleared up a doubt which had been thrown on the prosecution evidence by the allegations of the defence and there was clearly no impropriety in the course of the inspection nor in the way in which its results were used. The rule must therefore be discharged.

Rule discharged.

(4) I. L. R. 20 Cal. 857 (1893).

(2) I. L. R 9 Cal. 363 (1882)

[CRIMINAL REVISIONAL JURISDICTION.]

MISC. No. 167 OF 1911.

HOLMWOOD, J.
SHARFUDDIN, J.
1912,
4, January.

HARBANS SAHAI and ors., Petitioners,
v.
EMPEROR, Opposite Party.

Evidence Act (I of 1872), secs. 123, 124, 125, 155, 162, 163—Privilege—Departmental enquiry into conduct of Police officers, statements made by witnesses at—Trial of Police officers on charge of taking illegal gratification—Court's duty to send for the statements and allow accused to cross-examine thereon.

Statements made by witnesses in the course of a departmental enquiry into the conduct of Police officers who were subsequently put upon their trial on charges of taking illegal gratification are not privileged under secs. 123, 124 or 125 of the Evidence Act, and the accused are entitled to cross-examine the witnesses under sec. 153 of the Evidence Act on the statements made by them at the departmental enquiry.

EMPRESS *v.* RAMADHAN MAHARUN (1) *followed.*

This was a Rule issued upon the Deputy Commissioner of Ranchi to show cause why certain statements made by certain witnesses for the prosecution and recorded by the Police should not be produced at the trial of the Petitioners, then pending before Babu Charu Chandra Mukerjee, Deputy Magistrate, upon charges under sec. 161 of the Indian Penal Code.

The application upon which this Rule was issued was made in the course of the trial of the Petitioners, who were Police officers under orders of suspension, under sec. 161 of the Indian Penal Code, the charges against them being that they had taken illegal gratification from various persons during the investigation of a case of murder and rioting. The prosecution was started as the result of an enquiry held at the instance of the higher Police authorities of the District, at which enquiry statements of a number of witnesses had been taken down. On or about the 19th September 1911, some of the prosecution witnesses in the course of cross-examination admitted that they had made statements before the enquiring officers which were taken down in writing and one witness stated he had affixed his thumb-impression thereto. The accused who had previously endeavoured to obtain copies of the statements from the Police authorities thereupon applied to the Court to call for these documents. The Magistrate forwarded the application to the Superintendent of Police for report. On the 9th November 1911, the report of the Assistant Superintendent of Police was received by the Magistrate and it was in the following terms :—"Begs to inform him that the papers under requisition are departmental enquiry papers and I am not bound to produce the same and as advised by the G. P. (Government Prosecutor ?) I decline to do so." Upon this report the Magistrate recorded his order "File," and declined to take further steps for the production of the statements. The accused thereupon moved the High Court and obtained this Rule.

The trying Magistrate in the course of his explanation submitted that the case was a non-cognisable one and the statements, if any in fact had been recorded, were recorded in the course of a departmental enquiry, and as such were claimed by the Police to be privileged under secs. 123, 124, 125 of the Evidence Act ; that the proper course for the accused was to summon the officer in charge of the records to produce them and that had not been done.

Babu Nagendra Nath Ghosh (with *Babu Atulya Charan Bose*), for the Petitioner,

(1) 2 Bom. L. R. 329 (1900).

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referred to sec. 94 of the Criminal Procedure Code, under which the Court had power to send for the documents. If sec. 162, Cr. P. C., did not apply, secs. 155 (3) and 162 of the Evidence Act would apply. As to the claim of privilege, sec. 123 of the Evidence Act is obviously inapplicable, so is sec. 125 as the statements were taken down after information of the alleged offences had been received and in the course of an investigation as to the truth or otherwise of that information. That section refers to informers and spies, not to witnesses: sec. 124 of the Evidence Act, also, does not apply as the statements of witnesses could not be said to have been made to Police officers in official confidence. No such relation of official confidence exists between higher Police officers and members of the public who may have grounds for complaint against the conduct of subordinate Police officers.

[HOLMWOOD, J., refers to *Empress* v. *Ramadhan Maharum* (1)].

That case is entirely in my favour.

[HOLMWOOD, J.—But the Magistrate says you wanted the help of the Court in first getting the documents produced and then to use them or not according as they turned out to be in your favour or against you]

Any such apprehension is met by sec. 163, Evidence Act.

THE JUDGMENT OF THE COURT was as follows;—

The question that arises upon this Rule is whether the statements made by witnesses in the course of a departmental enquiry into the conduct of Police officers are privileged under secs. 123, 124 or 125 of the Evidence Act, when those witnesses are subsequently examined in a Criminal Court on a charge against the said Police officers of taking illegal gratification, or whether they do not fall within the ordinary rules of evidence as laid down in secs. 155 and 162 of the Evidence Act. It appears to us clear that they are not so privileged, and we are supported in that finding by the decision of the Bombay Court in the case of *Empress* v. *Ramadhan Maharum* (1). The reasons which are given by the Judges in that case apply exactly to the present case. In that case the Sessions Judge refused to allow the question to be put to the departmental superior of the accused as to where he got his information, because he was of opinion that the Superintendent was protected by secs. 124 and 125 of the Indian Evidence Act, because he had evidently regarded the communication as made to him in official confidence, more especially as at the time the case was being investigated as an attempted fraud on the public revenue, and the learned Judges of the Bombay Court held that the Sessions Judge was wrong in disallowing the question. Now the reasons which the Sessions Judge erroneously held precluded him from allowing this question are precisely the reasons which have been held by the lower Court in this case to preclude it from sending for the documents in question and putting questions to the witnesses upon them. Because there was a departmental enquiry in the District Superintendent of Police's office therefore the Magistrate thinks that these are either unpublished official records relating to affairs of State, or that they are communications made to the District Superintendent in official confidence, or that they are sources of

(1) 2 Bom. L. R. 329 (1900).

(1) 2 Bom. L. R 329 (1900).

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Contents.

NOTES.

WE WONDER WHAT MADE LORD AMPTHILL INTERPELLATE the Secretary of State for India regarding the pay and pension of Sir Lawrence Jenkins at the present moment. If the question had been asked directly after he was appointed Chief Justice of the Calcutta High Court or soon after his Lordship joined that office, we would have presumed that the question was asked in the usual course to ascertain the conditions and terms of his appointment. But now, that his Lordship's appointment is admitted not only by the legal profession but by the public at large as the best appointment that could have been made to this position of great responsibility and now that none can gainsay the fact that but for Sir Lawrence Jenkins peace and order in Bengal and faith in British justice, which is the strongest tie of attachment between the Sovereign and the subject in this country, would never, perhaps, have been restored, a question of the kind is sure to arouse suspicion in the public mind in Bengal.

LORD AMPTHILL IS BY NO MEANS UNPOPULAR amongst the people of this country. He is therefore believed to have been a dupe of somebody in this matter. We suspect that there are some designing men behind the scene who would like to see the judiciary in this country emasculated so that the executive and the police may again have their own way. They are too well aware of the high regard in which the Chief Justice is held in this country for his firm, honest, efficient and fearless discharge of duty both as a Judge and as the head of the judiciary in Bengal. They dare not make any frontal attack on him as that would disclose their hands, their questionable antecedents and also their sinister motives.

SO THIS COVERT ATTACK IS THE WORK OF A secret fraternity of absolutism in India who not very long ago got hold of some credulous member of the House of Commons to seriously enquire in the House whether it was not a fact that a Chief Justice in league with the Executive in India was letting loose political dacoits in Bengal and undermining the Indian constitution and jeopardising the cause of good government in the country. It is these champions of good government again who did not even hesitate to charge the King-Emperor with violating the constitution in India for allaying the unrest and disaffection that had spread over the whole of the country as a direct result of their superior idea of efficient government in India.

WE ARE, THEREFORE, NOT MUCH SURPRISED THAT this fresh attack on the Chief Justice has come in the garb of an enquiry as to the propriety of his being allowed to draw his pension and salary at the same time. As might have been expected the answer given by the Secretary of State has given great satisfaction throughout Bengal and caused no less mortification to those who practised this trick on the unsuspecting Lord Ampthill. Sir Lawrence Jenkins's pension is paid for his past services in another Presidency and his salary is paid for his present services as Chief Justice in Bengal and it is difficult to see how any reasonable man can object to his being entitled to both. Sir John Budd Phear after earning his pension as a Judge of the Calcutta High Court became Chief Justice in Ceylon and he was paid both his pension and salary.

IT IS, THEREFORE, ONLY THE PETTY MEANNESS OF some ill-deposed person that made him put the

question in Lord Ampthill's mouth. In reply we would add to what Lord Crewe said that the service of a Judge who can inspire a sense of security in the people and confidence in the King's justice cannot be valued in gold. It is bare truth when we say that for the pacification of this Province it would be incumbent on the Government, both in England and in India, to try to prevail upon the Chief Justice to serve out his full term in Bengal. We shall take this occasion to express the general desire that the high sense of duty that induced his Lordship to undertake the responsibilities of his present office amidst serious public troubles and no less personal inconvenience and worry will make him ignore all these petty annoyances and keep him steadfast to his charge till his Lordship can feel sure that he may safely leave this momentous charge in other hands.

THE FOLLOWING IS REUTER'S SUMMARY OF LORD Ampthill's question and Lord Crewe's reply above referred to.

In the House of Lords, Lord Ampthill asked whether Sir Lawrence Jenkins was drawing a pension in connection with his former post as well as full pay at present and also put various other questions arising out of the original question.

Lord Crewe replied to the first question in the affirmative and explained that the rules relating to judicial salaries were statutory rules made by the Secretary of State and were in no way affected by the ordinary pension rules of the Civil Service. As the rules stood in 1899, they did not provide for the suspension of pension where an ex-Judge had been re-appointed to the office But a rule had since been made empowering the Secretary of State to decide in any future case of the kind whether the salary ought not to be reduced. He did not say that special cases might never occur where a man might not be allowed to receive both his pension and his full salary. There was no rule preventing the return to an official appointment in India of a retired official who had held an appointment on the Council of India Lord Crewe added that Lords Morley and Minto had both considered Sir Lawrence Jenkins's appointment as the most suitable by virtue of his quite remarkable ability, his exceptional legal knowledge, his judicial experience and his knowledge of India. Lord Crewe declared: "I am of the same opinion. Sir Lawrence Jenkins in no way applied for the post but accepted it in deference to the strong wish of Lord Morley and Lord Minto though the acceptance meant inconvenience and some sacrifice."

Lord Middleton thought that in most cases the pension and salary system would be undesirable but said that the Secretary of State ought to have some latitude.

The subject was then dropped.

THE JUDGMENT OF LORD MACNAGHTEN IN *Ragho Prosad* v. *Lala Mewa Lal*, which we report in this issue, may not very improperly be described as a serio-comic commentary on the strange and exaggerated notions of State claims that prevail amongst the executive officials in India and the corresponding scanty respect that they have for civil rights of private parties. When any absurd or preposterous claim is put forward on behalf of the Crown or the Government against private individuals there is not or we might say there has never been a Judge on the English Bench who in espousing the cause of the more humble litigant has brushed aside the extravagant claims of the Crown with so little ceremony and pronounced his disapproval of them in such clear and unequivocal language as Lord Macnaghten.

HIS JUDGMENTS IN SUCH CASES ARE SO BRIMFUL of robust common sense, resplendent with such bold exposition of justice, relieved by such subdued touches of humour that they may truly be described as genuine works of art in legal literature. They are so very free from technique and commonplace legal clap trap that one need not be a lawyer to appreciate and admire them. We shall illustrate below by what light touches his Lordship has disposed of the imaginary conflict between a Crown claim and a private party's obvious legal title which led to a tug of war between the executive and the law Courts in India. The former pulling hard for the Crown caused the opponents to carry their conflict all the way to the Judicial Committee where their Lordships half in amusement and half in disgust observed that their Lordships failed to perceive where the question of law came in in a combat of this character.

LORD MACNAGHTEN AT THE VERY BEGINNING OF the judgment, apparently seriously but not without a vein of sarcasm, describes the suit as one brought by the Plaintiffs "to recover property of which they had been deprived through the intervention of a Government official who attached it and got it sold in order to satisfy a debt due to Government from somebody else." There is a lot of latent humour in his Lordship's statement of the facts of this case which becomes patent to any one who can read between the lines as to how it was that the Plaintiff's property came to be sold for some Court-fee claims accruing to Government out of a pauper suit by wife against husband for her dower. The facts are that a Mahomedan zemindar had mortgaged his property to the Plaintiffs and the latter got a decree for sale of the mortgaged property. The wife of the Mahomedan gentleman then filed a suit *in forma pauperis* against the husband for a promised dower of a lakh of rupees which she claimed to be a first charge on the mortgaged property. The Court found that there was no foundation for any such charge on the mortgaged property and gave a decree to the wife for the recovery of the dower from the husband.

UNDER THE WIFE'S DECREE, WHATEVER MAY BE its worth, she in theory at any rate ceased to

be a pauper and the Government in consequence became entitled to recover under the decree first of all the amount due for Court-fees in the wife's suit from the husband. The Collector, however, knowing apparently that the decree against the husband was not worth the paper on which it was written, obtained execution against the mortgaged property and had it sold for the value of Court-fees in the dower suit quite in disregard of the fact that the claim for dower against the property had failed and that the mortgagee had already got a prior decree for sale of the mortgaged property. A Rai Bahadur, as his Lordship calls him, appeared on the scene at the Collector's sale and purchased the property for Rs. 1,529, which, as his Lordship very shrewdly observes, was just enough to pay for the Court-fees in the decreed pauper suit. After this sale the executive officers were convinced that the legal title of the mortgagees and decree-holders could not be allowed to prevail as against that of the Rai Bahadur who purported to purchase the property for satisfaction of a Crown debt.

It is after this purchase by the Rai Bahadur that all the Plaintiff's troubles began. The mortgagee's decree for sale was sent back at the instance of the Collector to the Civil Court with the remark that "there was no property left for sale under the mortgage decree." To quote their Lordships, "In the Collector's opinion the authorities clearly affirmed 'the principle that the Government takes precedence of other creditors, whether or not they have a lien on the property.'" At the instance of the Civil Court, however, the property was again directed to be sold under the mortgage decree. Upon this the Collector made a reference to the Subordinate Judge as to "whether it was in fact intended that the property should be sold over again." The Subordinate Judge replied "I think when once a decree is passed, it must be executed unless and until it is set aside or it becomes inexecutable by lapse of limitation period." So the mortgage sale took place and the mortgagees purchased the property at the sale.

The Plaintiffs then applied to the Assistant Collector for the mutation of their names and this officer dismissed their application, to quote again their Lordships, "blaming them for trying to avoid payment of the Government dues 'instead of quietly paying off' the Court-fees and getting the property in satisfaction of their larger debt." On appeal the Collector affirmed his assistant's view with the additional observation that after hearing argument he must confess that he "had not hitherto realised that the position of the Crown in such matters was so strong." The mortgagee purchasers then appealed to the Commissioner who also dismissed the appeal with the observation that he did "not think that any fairer decision could be come to than that at which the Collector arrived." This unanimity in the executive idea of fairness is not very uncommon in India but unfortunately it does not often agree with the ordinary idea of it.

Thus the only lawful purchaser of the property after being baffled in obtaining any recognition of his title from the executive officers in three ascending scales of eminence, was obliged again to retrace his steps to the Civil Court to establish his title against the Rai Bahadur. It is worthy of note in this connection that their Lordships seem to suggest that the Plaintiffs should have come before the Civil Court without wasting time in the manner they did. It need hardly be said that the Court of first instance as also the High Court declared in his favour and against the Rai Bahadur. The High Court of Allahabad, it may be out of courtesy to the Government, gave leave to the Rai Bahadur to appeal to the Privy Council. Their Lordships of the Judicial Committee, to quote their words, "were at a loss to discover what question of law was involved in this case."

Their Lordships then went on to observe on the first point, (*i.e.*, whether for the Court-fees in the dower suit Government could attach and sell the mortgaged property) "that the claim put forward on behalf of the Government was absurd." Then as regards the prerogative of the Crown, their Lordships observe that "the claim advanced by the Collector on behalf of the Government is a preposterous claim." And finally as regards the whole case their Lordships observe that "the Crown has no more right than a common person to seize A's property and apply it in or towards the discharge of a debt due from B." It is characteristic of Lord Macnaghten that his Lordship often interprets the law in such simple form that the justice of it becomes quite self-evident to all. Be one a lawyer or no lawyer, every one reading this judgment will join in his Lordship's conclusion that what he has decided "is not a question of law. It is a question of common justice and, it may be added, of common honesty."

MOTHER'S SHARE ON PARTITION UNDER MITAKSHARA.

The important decision of the Privy Council in *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh*, reported at p. 409 of our last number, carries to its logical consequence the progressive curtail-

ment of the rights of women under the Mitakshara law which was commenced by the cases of *Mussammat Thakur Deyhee* v. *Rai Baluk Ram* [11 M. I. A. 139], and *Bhugwandeen* v. *Myna Baee* [11 M. I. A. 487], decided by the Privy Council.

It is well-known that the Mitakshara makes no distinction between the so-called woman's *peculium* and her other property but understands the word *stridhana* in its derivative sense of property belonging to a woman. The enumerations of *stridhanas* in Yajnavalkya, Manu, Katyayana, &c., are interpreted by Vijnaneswara as illustrative and not as limiting the meaning of *stridhana*. [Mitakshara II, sec. xi]. And, as their Lordships of the Judicial Committee pointed out in the *Ramnaad* case, it is wholly beside the point to enquire whether this interpretation was accurate or faithful for it is the law of the Mitakshara and not that of Manu and Yajnavalkya that our Courts have to administer.

In this view of law whatever property came to a woman would be her *stridhana* no matter whether it was obtained by her by inheritance, partition or by any of the methods of acquiring *stridhana* enumerated by Katyayana. The effect of this interpretation would not necessarily be to give to the woman absolutely unfettered powers of disposition over any property—these would be subject to certain limitations—but there can be no doubt that it would affect the course of descent of such property.

The Judicial Committee dealt the first blows against this law by the decisions in *Thakur Deyhee* v. *Balak Ram* [11 M. I. A. 139], and *Bhagwandeen* v. *Myna Baee* [11 M. I. A. 487], where they held that the property inherited by a woman from her husband was not her *stridhana* and that the word *stridhana* was to be taken in a technical sense to imply property over which a woman had absolute rights. Subsequently in cases like *Chotay Lal* v. *Chunnoo Lal* [L. R. 16 I. A. 15], where a daughter's heritage was held not to be *stridhana*, the rights of women over other properties were also cut down to the mere life-estate given to widows by the Dayabhaga.

The case of the share taken by a mother on partition of her husband's estate by her sons did not before this come before the Judicial Committee. With reference to this the Calcutta High Court expressed their opinion that it was not *stridhana* but in the cases of *Chiddu* v. *Naubat*, I. L. R. 24 All. 67 and *Sripal* v. *Suraj*, I. L. R. 24 All. 82, the Allahabad High Court held such property to be the mother's *stridhana* according to the Mitakshara. In the case under consideration the Judicial Committee has overruled these decisions and held that even this property is not the woman's *stridhana*.

gically, there is no doubt that, starting with the principles laid down in cases like *Bhugwandeen* v. *Myna Baee*, the conclusion arrived at in this case follows. But the attempt of their Lordships in this case to show that this decision may not be wholly inconsistent with the Mitakshara is inconclusive. For one thing it does not seem clear that their Lordships sufficiently had before their mind the fact that according to the Mitakshara there is no technical *stridhana*. Then, again, even if it be allowable to go back to Manu, Yajnavalkya and Katyayana from Vijnaneswara, their Lordships in considering the bearing of those texts on the subject might well have taken into consideration the historical growth of the idea of woman's property.

In the older texts of Smritis a woman is entirely incapable of holding property. The texts relating to *stridhana* in their origin only specified the circumstances under which a woman could, with a slight relaxation of the rigour of the old law, be allowed to hold property. There is little doubt that when these were enumerated the widow or daughter had no right to inherit any property at least of a male. In extending the term *stridhana* to properties which a woman acquired by inheritance (after their right to inheritance had become recognised) Vijnaneswara need not therefore be necessarily understood as making an innovation but rather as carrying the words of text-writers to their logical consequences. When after enumerating some kinds of property the text-writers go on to say "these and others are woman's property" [see Yajn. II, 143], it is possible to say no doubt, that 'and others' imply other things *ejusdem generis* as Mr. Mayne contends and their Lordships hold in this case. But what is the distinguishing mark of the class which would identify a property as *stridhana*? It is suggested, in the light of Jimutavahana's explanation, that it is the woman's absolute power of disposal over the property. But, having regard to history it might well be said that the property which would fall within the class would be all property which a woman is allowed to hold—remembering always that in those times the enumeration of Katyayana and Manu very likely exhausted all the properties that a woman might possibly possess.

This view would be strictly consonant to the grammatical meaning of the texts of Manu, Yajnavalkya and Katyayana. In saying "Adyagni &c., are alone the woman's property" [Manu, IX, 194], they should then be understood as implying that she was otherwise what Manu calls her *Adhana* or incapable of holding property. If this is so, Vijnaneshwara's interpretation including property acquired by other means (when such acquisition became possible) in the same class with these special kinds of proper y is surely consistent with the true spirit of the texts.

Their Lordships find a difficulty in apprecia'ing the Mitakshara position with regard to the devo-

tion of a woman's property. The Mitakshara ter describing woman's property as meaning all operty acquired by a, woman, no matter how, includes, "a woman's property has been thus scribed" and then goes on to show the order inheritance to *stridhana*. [Mitakshara II, xi 8, *seq*.]. Their Lordships observe with reference to is passage "When Vijnaneshwara says 'a woman's operty has been thus described' he may have en referring to the description given by the thor (Yajnavalkya) and Katyayana and have inended to confine Yajnavalkya's rule of devolution Yajnavalkya's classification." We fail to see ow, having regard to the context, that view tenable and there is no doubt that the right ew is what their Lordships refer to later on, *viz*., at it means that a woman's property of whatever kind descends to her own heirs. Taking e Mitakshara as a whole there is no doubt that at is the meaning of its author. And the argument from the fact of there being different lines descent for woman's property according to the ode of acquisition, which their Lordships put rward, does not affect the position in the l ast. ajnavalkya and following him Vijnaneshwara ere lay down only the general rule of succession a woman's property. If the succession to any rticular class of such property is determined a different rule based on special texts, that ould be no argument for taking out any other operty from the general law of inheritance here no special rule is laid down by the texts.

No doubt the case of property obtained by heritance has been settled by judicial decisions. ut if, as is submitted, these decisions were based n a wrong interpretation of the law, though the ourts might refuse to interfere with them on e principle of *stare decisis* their Lordships ould surely be justified in refusing to carry the rinciple further and bringing under the same le property obtained by a woman upon partition ith her sons. Even assuming that the two kinds property were on exactly the same footing, eir Lordships are under no obligation to be ways strictly consistent in administering Hindu w. Where the law depends on the interpretaon of positive texts it would scarcely be a safe inciple to require the Courts to be strictly content in all parts of the law they administer. hat may possibly lead to the evolution of a body law which may be artistically superior, but may be that the law thus evolved would not actly be law as it obtains amongst the Hindus.

And it may well be argued that the two cases e not exactly on the same footing. No doubt jnaneshwara adds property obtained by partion as well as that obtained by inheritance to jnavalkya's enumeration and so far seems to place is class of property on the same footing with the operty inherited. But it may be pointed out that according to the Mitakshara the right of property does not arise from partition. [Mitakshara I, i 17, *et seq*]. The widow's right must in this view be considered to be an inchoate right existing prior to the partition. It cannot be looked upon as a right by inheritance but as a special property arising by virtue of a special text of law. The idea that it is given in lieu of maintenance cannot also be supported in view of the direct negation by the Mitakshara of such a position. If then it is a special property vested in the widow by a special text of law it stands on a footing distinct from property taken by inheritance. Their Lordships might on this view well have refused to apply to this property the principles which have been laid down for property inherited.

In this view of law there would also be strong reason for holding this particular property to be *stridhana*. For it is like the properties mentioned in the *stridhana* texts of Manu, Yajnavalkya, &c., a special creature of positive law distinct from the general kinds of property. This might very well be a good test of *stridhana* taking it in the technical sense. The test generally laid down, *viz*., that that is *stridhana* of which the woman has absolute power of disposing is in fact defining a term by itself. If we ask further, what is the property which a woman has absolute power to dispose of we will very probably be referred to the enumeration of Manu and Yajnavalkya. And if we ask what 'and others' in that enumeration means, we will be referred back to where we started from. There is absolutely no reason why this definition in a circle should be grafted from the Dayabhaga on Mitakshara. In any case, there was nothing to prevent the Judicial Committee from holding that as a special proprietary right given to women by a special text of law this particular right might very well be looked upon as *ejusdem generis* with the kinds of *stridhana* enumerated by texts.

There can be no question that any interpretation of the law which would make this property *stridhana* would not only be consonant with the principles laid down in the Mitakshara but entirely conformable to public policy. The policy of our Courts should be to expand and not to restrict the proprietary rights of women so far as possible. In the history of Hindu law in the midst of a world of uncertainties the progressive evolution of the proprietary rights of women stands out in bold relief. The decisions of the Judicial Committee in the cases referred to have taken a retrograde step and restricted the rights of women to a considerable extent. It would be a pity to think that it should be under the British rule that the progressive evolution of women's rights would not only be stopped but set back. It is surely necessary that in these respects the law should be set right.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Victor* v. *Victor*. Before THE MASTER OF THE ROLLS AND LORDS JUSTICES MOULTON AND FARWELL. 11th December 1911.

Contractual obligation of husband to pay maintenance to wife provable in bankruptcy—An order of discharge in bankruptcy—Its effect upon such obligations between husband and wife.

This was an appeal from a decision of Darling, J. The Respondent, a married woman, sued her husband for arrears of maintenance under a covenant in a separation deed. The Defendant pleaded that he was adjudicated a bankrupt and was afterwards discharged and was not therefore liable. The Court below held that the Bankruptcy Act, 1883, did not alter the obligation of a man towards his wife and ruled against him. The Court allowed the appeal. In the course of his judgment the Master of the Rolls said :—

It might suffice to say that he thought that it was not open to the Court to take Mr. Justice Darling's view, having regard to the decisions of the Court of Appeal in *Exparte Bates* (11 Ch. D., 914) and in *Exparte Neal* (14 Ch. D., 579). Both those cases arose under separation deeds, and the view of the Court was that, however difficult it might be to measure the liability incurred by the husband, still it was a liability which had to be estimated and, if it could not be estimated in any other way, must be left to a jury to estimate. Mr. Vaughan Williams, who had said everything that could possibly be said on behalf of the Plaintiff, did not really attempt to dispute the Appellant's argument on that point, but he contended that questions of public policy came in, that in both the cases referred to the wife had elected to come in and prove in the bankruptcy, and that the decisions were of no force so far as they purported to bind a wife who did not desire to come in. His Lordship could not follow that contention. It seemed to him that the whole policy of the Bankruptcy Act was that the bankrupt was to get a full discharge from his obligations to pay sums of money, and that the only right of a person who under a contract had a pecuniary claim against the bankrupt was to come in and prove in the bankruptcy. The extent to which that doctrine had been carried was illustrated by the case of *Hardy* v. *Fothergill* (13 App. Cas., 351), in which it was held that a future and contingent liability, however difficult to assess, was provable in bankruptcy.

In the present case he was clearly of opinion that the contractual obligation of the husband was provable in the bankruptcy, and that being so, no action could be maintained by the wife either for arrears or future payments. He only wished to say one word about *Linton* v. *Linton* (15 Q. B. D., 239), which was a claim for alimony. That case was entirely different. Alimony was paid under an order of the Divorce Court, which might be varied from time to time. The Court had held by decisions, which were binding on the Court of Appeal, that that was a peculiar liability and had distinguished it from the liability under a separation deed.

Mr. Trapnel for the Appellant.

Mr. Williams for the Respondent.

B. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. CRIMINAL REVISION NO 211 OF 1912. IN THE MATTER OF KUDRUTULLA AND OTHERS, Petitioners. 4th March 1912.

Penal Code, sec. 149—Charge—Necessity of setting out the common object—De novo *trial—Omission, effect of.*

This Rule was issued on the grounds *inter alia* that the charge was defective as no common object was specified therein and that there should have been a *de novo* trial, when a different Magistrate had to try the case after it had proceeded to some extent before another Magistrate. It appears on the application of the accused the District Magistrate transferred the case to another Magistrate who proceeded to try the case from the point where it was left by the first Magistrate.

Their Lordships observed :—

"The law is clear that as regards the offence of rioting the offence can be legally described by its specific name and the question whether any further particulars are necessary under sec. 22[illegible] Cr. P. C., must be a question of discretion according to the circumstances of each case. [illegible] has been laid down in numerous rulings of this Court that in cases of rioting the common object should be stated in the charge, but the omission to state it under secs. 143 and 147 does not vitiate a conviction if there is evidence on the record to show it * * * * * * * We think as a matter of law it is otherwise with a charge under sec. 149, I. P. C. There is no specific name for the offence and the fact that any offence is committed in prosecution of the common object is of the essence of the case and there could be no conviction for any offence committed with a different common object. It

...refore in our opinion obligatory to set out the ...mmon object in a charge under sec. 149 unless ... has been already specified in the main charge ...der sec. 147."

As regards the *de novo* trial their Lordships ...served it was a question of prejudice and unless ...was proved that the accused were prejudiced, ...e conviction should not be set aside on that ...ound.

Their Lordships referred to 12 All. 66; 12 C. W. N. 416; 13 C. W. N. 420; 12 C. W. N. 140; ... W. R. Cr. 12.

Mr. Donogh with *Babu Monmatha Nath ...ukherjee* for the Petitioners.

B. C. *Rule discharged.*

...IMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. CRIMINAL REVISION No. 50 OF 1912. AMO RAI AND OTHERS, Petitioners. 1st March 1912.

...rosecution evidence mostly disbelieved—Whether ...viction could be based upon so much as was ...ainst the accused.

This Rule was issued on the grounds, *firstly*, that ...e judgment of the Appellate Court was not in ...cordance with law inasmuch as it says that ... Court had no hesitation in accepting so much ...the prosecution evidence as went against the ...cused and, *secondly*, that so much of the evidence ...ving been disbelieved it became necessary for ... High Court to consider whether there should ...any conviction at all in the case.

Their Lordships observed:— * * * "The ...gistrate disbelieved the greater part of the ...dence and he acted in a wholly unjudicial ...nner in finding that he has no hesitation in ...cepting so much of the prosecution evidence ...goes against the accused. The evidence which ...entirely disbelieved was so extensive that we ...tainly do not think that there was any just ...ound for any conviction at all in this case * *."

Mr. K. N. Chaudhuri and *Mr. Rajendra Prasad* ...the Petitioners.

B. C. *Rule made absolute.*

...MINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. CRIMINAL REFERENCE No. 3 OF 1912. KING EMEPOR *v.* KALIMUDI SARDAR AND OTHERS, Accused. 28th February 1912.

...riminal Procedure Code, sec. 307—Verdict of ...jury upheld though different view could be ...n of the evidence.

This was a Reference by the Sessions Judge of ...dia who disagreeing with the verdict of "not ...ty" of the jury, made a reference to the High ...t under sec. 307, Cr. P. C.

Their Lordships observed:—

There were circumstances in the case on which the jury would be justified in entertaining doubts as to the matters connected with the first information. There was grave cause for suspicion and the view taken by the Sessions Judge might conceivably be correct, but still it could not be said that the jury were not justified in their view of the case.

Verdict of the jury upheld and accused acquitted.

Babu Brajendra Nath Chatterjee for the Accused.

Mr. Orr, Deputy Legal Remembrancer, for the Crown.

B. C.

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. CRIMINAL REVISION No. 70 OF 1912 SURENDRA MOHAN RAI, Petitioner *v.* THE KING-EMPEROR, Opposite Party. 23rd February 1912.

Arms Act, sec. 14—Using a gun lent by its licensed owner.

This was a case under sec. 14 of the Arms Act.

Their Lordships observed:—

"It appears that he (the Petitioner) was a friend of the owner of the gun, and whether the owner of the gun intended to join him or not in shooting, he certainly must have made over the gun to him to take along in the boat; and the offence which the Petitioner is found to have committed is that he put the guns together and loaded one barrel apparently with a view to shoot birds if any appeared. . . . The law is perfectly clear that no person shall have in his possession or under his control any fire arms except under a license and in the manner and to the extent permitted thereby. Now this particular license does not permit the owner to lend his gun to any other person for the purpose of shooting as some licenses do we understand. A technical offence was therefore committed but we think that a fine of ten rupees would be quite sufficient to act as a warning."

Babu Bhudeb Chandra Ray for *Babu Horendra Narain Mitter* for the Petitioner.

Mr. Orr for the Crown.

B. C.

CIVIL APPELLATE JURISDICTION. Before BRETT and CARNDUFF, JJ. APPEAL FROM ORDER No. 95 OF 1910 and RULE No. 4178 OF 1909. SUNDRA MOHINI DEBI, Appellant and Petitioner *v.* SHIB COOMARI DEBI AND OTHERS, Respondents and Opposite Party. 22nd February 1912.

Civil Procedure Code (Act XIV of 1882), sec. 311—Decree-holder and judgment-debtor, compro-

mise between—Sale, setting aside of—Auction-purchaser, if necessary party.

A suit was brought by Shib Coomari Debi, who was described in the present Rule as the Opposite Party against other persons, who were also parties to the Rule or against their previous representatives-in-interest, for the recovery of the rent of a certain *durputni.* Shib Coomari obtained an *ex parte* decree, and the *durputni* was sold in satisfaction of that decree on the 12th June 1907, and purchased by the Petitioner in the Rule, Sundra Mohini Debi, who was the wife of the Opposite Party, Jnanendra Nath Chattopadhya. On the 21st July 1907, an application was made under sec. 311 of the old Code of Civil Procedure, by Debendra Nath Chattopadhya, Opposite Party, and, on the same date, three other judgment-debtors filed a similar application. The three last-mentioned persons also filed an application under sec. 108 of the old Code to have the *ex parte* decree set aside. On the 4th January 1908, the application came up for disposal, and a petition of compromise between the decree-holder and the judgment-debtors was filed, by which the decree-holder consented to the sale being set aside on receipt of the amount decreed. The application under sec. 108 was also dismissed on the same day. These proceedings were taken without notice to the auction-purchaser and the case which was set up by the auction-purchaser, who was the Petitioner in the Rule, was that she was not aware of those proceedings. On the 27th March 1908, the Petitioner put in an application under sec. 312, C. P. C., asking that the sale to her might be confirmed and the sale certificate issued. That application was rejected by the Court of first instance on the ground that the sale, having already been set aside, could not be confirmed. Against that order there was an appeal to the lower Appellate Court, which remanded the case. The Court of first instance again rejected the application and the District Judge dismissed the appeal against that order. The auction-purchaser first applied to the High Court and obtained the Rule. Subsequently she also filed an appeal against the same order.

Held—That no appeal lay.

Held—Also, that the auction-purchaser was not a necessary party to an application under sec. 311 of the Code of Civil Procedure.

Babu Ram Chunder Mojumdar for the Appella and Petitioner.

Babus Mahendra Nath Roy, Hara Prasad Ch terjee and *Biraj Mohun Mojumdar* for the Respon dent and Opposite Party.

A. T. M. *Appeal dismissed: Rule discharged.*

CIVIL APPELLATE JURISDICTION. Before BRE and CARNDUFF, JJ. APPEAL FROM APPELLAT DECREE NO. 1079 OF 1908. MAINDI SA KAR AND ANOTHER, Appellants *v.* GOR CHAND GHOSE AND OTHERS, Respondent 27th February 1912.

Limitation—Civil Procedure Code (Act XIV 1882), sec. 332—Suit for possession of immovea property—Limitation Act (XV of 1877), Sch. Arts. 11, 13, 120, 142.

An order was passed in favour of the prese Appellants under sec. 332 of the Code of Ci Procedure on the 7th August 1897, and the p sent suit was instituted on the 16th Decem 1905. It was contended that the suit was barr under the provisions of Art. 120 of the Limitati Act, because it was not brought within 6 ye from the date of the order passed under sec. 332.

Held—That as the suit was brought by t Plaintiff for possession of immoveable property aft establishment of title, the limitation was provid by Art. 142 of Sch. II of the Limitation Act, vi 12 years.

Art. 11, Sch. II of the Limitation Act has application to an order under sec. 332 of the C of Civil Procedure. Under the provisions of s 332 of the Code of Civil Procedure, the suit whi the Opposite Party had to bring, was a suit establish his right to the property, and not a to set aside the order under sec. 332. Hence 13, Sch. II of the Limitation Act cannot apply.

Ayyasami v. *Samiya* (I. L. R. 8 Mad. 82) refer to.

Babu Satindra Nath Mukerjee for the Appella

Babus Mohendra Nath Roy and *Hare Krishna Mukerji* for the Respondents.

A. T. M. *Appeal dismisse*

HARBANS SAHAI *v.* EMPEROR.

information which the Police officer cannot be compelled to disclose. Now it cannot be said that any of these sections applies to the statements of these witnesses. Clearly they are not unpublished records relating to any affairs of State. Sec. 123 has been held to apply to the deliberations of the Parliament, proceedings of the Privy Council, communication between public officials in the discharge of public duty and the like, and not even Government remarks with regard to the conduct of public officials have been considered to be strictly privileged, so that the statements made by witnesses before the departmental superior of the accused cannot possibly be considered to be unpublished records relating to any affairs of State. The permission of the District Superintendent was not therefore in any way necessary for the production of these papers; and if any permission had been necessary that permission would have been that of the Inspector-General of Police of the Province and not of any local superior.

Then as regards sec. 124 it cannot be said that when witnesses come before a Police officer and make accusations against one of his subordinates that those communications are made in official confidence so that when the accused is on his trial he cannot ask to know what his accusers say. It seems to us that the public interest would suffer much more by the concealment of these statements than by their disclosure.

Sec. 125 obviously has no application. It is not pretended that those statements were the source from which the District Superintendent obtained his information that any offence had been committed.

The statements not being privileged the Magistrate was bound to call for them under sec. 162 of the Evidence Act, and to have allowed the accused to cross-examine the witnesses under sec. 155 on the statements made whether they were in favour of the accused or against him. As the provisions of sec. 163 clearly entitle the prosecution to make use of them if they turn out to be not in favour of the defence the danger which the Magistrate appears to apprehend in his explanation does not really exist.

The Rule must be made absolute and the lower Court must take steps to have the documents referred to in para. 7 of the petition produced, and the determination of the trial will be postponed until this is done, and the Magistrate has fully considered the effect of the answers made by the witnesses upon cross-examination on these documents, when he should hear the parties and proceed to decide the case in accordance with law. In the meantime the Petitioners will remain on the same bail.

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.

1911,
Heard,
22, November.
1912,
Judgment,
23, January.

KUNWAR RAGHO PROSAD and others, Appellants, Defendants,
v.
LALA MEWA LAL and anr., Respondents, Plaintiffs.

Crown debt, prerogative if any in respect of, if first charge on debtor's property—"Common person's" claim not concurring if to be postponed to claims for Crown debt—Suit by Mahomedan wife in forma pauperis *for dower—Court-fees, decree against husband in favour of Government for*

KUNWAR RAGHO PROSAD *v.* LALA MEWA LAL.

payment of—Prior mortgage by husband—Crown and mortgagee, priority as between—Civil Procedure Code (Act XIV of 1882), sec. 411.

After a mortgagee had obtained his decree for sale, the wife of the mortgagor who was a Mahomedan sued him and the mortgagee in forma pauperis *for recovery of a sum of money as her dower, alleging that it was charged on the morgaged property in priority to the mortgage; it was found that there was no charge for the dower and the suit was dismissed as against the mortgagee but decreed against the husband; it was further declared that the amount of Court-fees which would have been paid by the wife had she not been allowed to sue as a pauper should be a first charge on the amount decreed to her and also be recoverable from her husband. The Government purported to attach and sell the mortgaged property in execution of that decree and it was purchased by the Appellant. The mortgagee subsequently had the property sold in execution of his decree and purchased it himself:*

Held—*That Government had no right to attach and sell the property in execution of the decree against the mortgagor, though such interest, if any, as remained in the mortgagor from whom the Court-fees were declared to be recoverable might have been reached by a proper proceeding.*

That the first sale was without jurisdiction and passed no title to the Appellant.

That no question of priority of Crown debts arose in the case. It is only when claims of the Crown and claims of common persons concur or come into competition that the Crown is preferred. But the Crown has no more right than a "common person" to seize one man's property and apply it in or towards the discharge of a debt due from another.

This was an appeal from a decree of the High Court at Allahabad, dated 2nd December 1908, which affirmed a decree of the Court of Small Causes exercising the powers of a Subordinate Judge at Allahabad, dated 19th September 1906.

The suit, which was decreed with costs by the first Court, was brought by the present Respondents as Plaintiffs against Mahabir Prasad Narain Singh, since deceased, and now represented by the Appellants, who are the son, grandsons, and great-grandsons of the deceased Defendant, for possession of certain zemindari shares specified in Sch. A attached to the plaint, and for declaration of title to certain other zemindari shares specified in Sch. B, with mesne profits and interest thereon.

The material facts of the case are as follows:—One Tufail Ali Khan, the original owner of the property in dispute, mortgaged it to the Plaintiffs by four mortgage deeds executed between the years 1891 and 1894, securing the aggregate amount of Rs. 15,000. The Plaintiffs obtained a decree for sale on foot of their mortgages on the 17th December 1895, but before the decree was executed, Mussammat Abhasi Begum, the wife of the mortgagor, instituted a suit *in forma pauperis* on the 19th December 1896 against her husband, the mortgagor, and the Plaintiffs for sale of the property in dispute under a *kabinnama* (deed of dower), dated the 20th November 1862, whereby the husband promised to pay the wife a prompt dower of rupees one lakh and one gold mohur, and charged the same on the property in dispute. The Court of first instance found that this deed being unstamped and unregistered was inadmissible in evidence, and created no charge on the property. On these

KUNWAR RAGHO PROSAD *v.* LALA MEWA LAL.

findings it gave a simple money decree against the husband alone, dismissing the suit against the mortgagees. In regard to the Court-fees payable on the plaint, the decree of the Court contained the following order:—"It is further ordered that Rs. 1,450-8-0, the amount of Court-fee due to the Government, shall be the first charge on the amount decreed, and shall also be recoverable from the Defendant, Tufail Ali Khan." This decree was affirmed on appeal by the High Court.

On the 11th December 1897, the Collector of Allahabad on behalf of the Government applied for execution of the decree to recover Rs. 1,450-8-0 "on account of Court-fees due to the Government" by attachment and sale of the zemindari property of the judgment-debtor. In this application Tufail Ali Khan was named as the person against whom the enforcement of the decree was sought, and the details of the property sought to be attached and sold comprised the zemindari shares mortgaged to the Plaintiffs. The property being ancestral, execution of the decree was transferred to the Collector under the provisions of sec. 320 of Act XIV of 1882. The shares specified in the application for execution were sold on the 22nd July 1899, and purchased by Mahabir Prasad Narain Singh. An application was then made by Tufail Ali Khan to the Collector to set aside the sale on the ground of material irregularity in the conduct thereof, and the inadequacy of price. The Plaintiffs' mortgagees were not impleaded as parties to this application, but it appears that the Collector gave them notice and ordered them to appear on the date fixed for hearing. It further appears that the mortgagees did in fact appear by pleader at the hearing. The Collector rejected Tufail Ali Khan's application on the 20th August 1899, holding that there had been no irregularity in the conduct of the sale. As to the mortgagees' claim to priority the Collector observed:—"The ruling in the *Collector of Moradabad* v. *Mohammad Diam Khan* (1) clearly affirms the principle that the Government takes precedence of all other creditors, whether or not they have a lien on the property," and added that "Mewa Lal must take what legal steps he can to assert his rights." The sale was accordingly confirmed on the 29th of August 1899, and a certificate of sale issued to Mahabir Prosad Narain Singh on the 19th September 1899 Tufail Ali Khan appealed from the Collector's order of the 20th August 1899, to the Commissioner, who by his order of the 25th October 1899 held that "the sale having taken place in satisfaction of a Crown debt, it took effect against the Plaintiffs' mortgage."

On the 25th November 1899, Mewa Lal and Lachmi Narain applied for sale of the same property in execution of their decree. Mahabir Prasad Narain Singh objected, but his objection was disallowed on the ground that it could not be entertained under sec. 278 of the Code of Civil Procedure. The execution proceedings were transferred to the Collector under sec. 320 of the said Code.

On receipt of the record the Collector made a reference to the Subordinate Judge, asking "whether it was in fact intended that the property should be sold over again?" The Collector observed that "the decree-holders in this case cannot apparently have a prior claim, as Government claims have a priority over others." The Subordinate Judge returned

(1) I. L. R. 2 All. 196 (1879).

the following reply to the Collector's enquiry on the 21st July 1900:—

"In reference to the enquiry and observation, I think when once a decree is passed, it must be executed unless and until it is set aside or it becomes inexecutable by lapse of limitation period. It cannot be for the Court to create obstacles on its own motion. The Court is not yet called upon to determine any such point of priority or otherwise. If the actual purchaser, Rai Bahadur Mahabir Parshad Narain Singh, should institute a suit against these decree-holders and obtain a decree from the Civil Court declaring that these several items of property could not be sold in execution of the decree of Mewa Lal and others, then only the execution of the decree of Mewa Lal and others would not proceed. But as yet Rai Bahadur Mahabir Parshad Narain Singh has not even instituted any such suit."

The sale in execution of the decree of Mewa Lal and Lachmi Narain was held on the 20th September 1902, and the decree-holders were declared purchasers. The sale being duly confirmed by the Collector on the 22nd October 1902, a certificate of sale was granted to the purchasers on the 29th October 1902.

Under the previous sale of the 22nd July 1899, Mahabir Parshad Narain Singh had obtained possession of the property in dispute, and his name had been recorded in the revenue papers as owner. After the purchase of the 20th September 1902, Mewa Lal and Lachmi Narain applied to the Assistant Collector for the entry of their own names by expungement of the name of Mahabir Parshad Narain Singh. This application was rejected by the Assistant Collector on the 23rd November 1903, and his order was affirmed on appeal by the Collector on the 11th February 1904, and on revision by the Commissioner on the 30th May 1904. An application to the Commissioner to reconsider his order was rejected on the 14th September 1904. On the 8th May 1906, Mewa Lal and Lachmi Narain instituted the present suit on the ground that "by virtue of purchase made at an auction-sale held on the 22nd of July 1899, the Defendant had only acquired the equity of redemption of Tufail Ali Khan, but it was extinguished on the said property being resold and purchased by the Plaintiffs. The Defendant is in unlawful possession of the zemindari shares specified in Sch. A, and as regards the zemindari share specified in Sch. B, he denies the Plaintiffs' right to it." The defence *inter alia* was that Mahabir Parshad Narain Singh having purchased the property at a sale held to satisfy a debt of the Crown, purchased it free of all incumbrances; that the whole property having thus passed to the said Mahabir Parshad Narain Singh on the 22nd July 1899, the Plaintiffs purchased nothing at the subsequent sale of the 20th September 1902, and that in any case the suit was barred by the provisions of secs. 244 and 13 of the Code of Civil Procedure.

The learned Judge of the Court of first instance laid down nine issues for trial. He recorded findings on all the issues, and in the result decreed the Plaintiffs' suit. As to the effect of the two sales he held "that the sale to the Defendant did not extinguish the Plaintiffs' prior mortgages; that all he purchased was Tufail Ali Khan's equity of redemption, and that having failed to redeem the property and allowed it to be sold, he could not now claim to keep it as against the Plaintiffs, who were purchasers on a prior mortgage, and that even if a claim of Government for Court-fee be held to

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be a Crown debt, it did not affect the existing incumbrances upon the debtor's land." As to secs. 13 and 244 of the Code of Civil Procedure he found as follows :—

"This suit is not barred by either sec. 13 or 244 of the Civil Procedure Code, as the Plaintiffs had no reason to object, and did not object to the sale which took place in the Government's claim for Court-fee on the 22nd July 1899. The order of confirmation of the sale, whether by the Collector or the Commissioner, was also passed not against them, but against Tufail Ali Khan, and they as mortgagees were in no sense representatives of the latter."

The Defendants appealed to the High Court at Allahabad. At the hearing of the appeal the two main points argued were, 1st, that the Defendants-Appellants having purchased the property at a sale for the realisation of Court-fees, acquired an absolute title to it discharged of any right which the Plaintiffs, mortgagees, had under their mortgages, and, 2ndly, that the suit was barred by secs. 13 and 244 of the Code of Civil Procedure.

As to the 1st contention the learned Judges (Stanley, C. J., and Banerji, J.) dismissing the appeal observed as follows :—

"It appears to us that there is no substance in the contention. The Appellants purchased *pendente lite*, and in effect purchased nothing, as the mortgagor's equity of redemption passed to the Plaintiffs under the sale made to them by the Court. The appeal is in fact concluded by the decision of a Full Bench of this Court in the case of *Dost Muhammad Khan* v. *Mani Ram* (2)."

On the second point also the learned Chief Justice found against the Defendants-Appellants on the authority of *Wilayati Begam* v. *Nand Kishore* (3).

Hence this appeal.

Mr. Ross and *Mr. Brown* for the Appellants.—The sale, dated the 22nd July 1899, to the Appellants is binding on the Respondents unless and until it is set aside. It was properly confirmed and a certificate in due form was granted, and possession was obtained by the Appellants. The sale could be set aside within one year and the Respondents not having done that the claim is barred by limitation. *Malkurjun* v. *Narhari* (4).

The Respondents having taken no steps to set aside the Collector's order of the 29th August 1899 by appeal or otherwise are bound by it. The Respondents were substantially parties to the proceedings before the Collector. Further the Defendants purchased the equity of redemption which was lost when the sale, dated the 22nd July 1899, was held. Sec. 89, Transfer of Property Act, 1882, applies. On the sale being confirmed the equity of redemption was extinguished. *Faiyaz Husain* v. *Prag Narain* (5). The sale was not made *pendente lite* within the meaning of sec. 52, Transfer of Property Act. When the sale was made to the Respondents the Appellants were not upon the record. They held the legal estate and were in possession. These rights could not be taken away from them without being party to the sale proceedings. Sec. 372, Civil Procedure Code, 1882.

[SIR JOHN EDGE.—Whose title did your client get?]

My client got all that the Crown had. When the rights of a subject collide with

(2) I. L. R. 29 All. 587 (1907).

(3) I. L. R. 30 All. 231 (1908).

(4) L. R. 27 I. A. 216 (1900).

(5) L. R. 34 I. A. 102, 106 (1907).

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those of the Crown the former must loose. Reliance was placed on *Commissioners of Taxation, New South Wales* v. *Palmer and others* (6), *Attorney-General for New South Wales* v. *Curator of Intestate Estates* (7).

[LORD ROBSON.—There the question involved was one of concurrent titles.]

Yes, but it lays down the principle. *Attorney-General* v. *Leonard* (8).

Mr. L. DeGruyther, K. C., and *Mr. Bhugwandin Dubé* (for whom *Mr. A. P. Sen*) for the Respondents were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—This is an appeal from a decree of the High Court at Allahabad, which affirmed a decree of the Court of Small Causes there exercising the powers of a Subordinate Judge.

The suit was brought by the Respondents, Mewa Lal and Lachmin Narain, to recover property of which they had been deprived through the intervention of a Government official who attached it and got it sold in order to satisfy a debt due to Government from somebody else.

The facts are undisputed.

On the 17th of December 1895, the Respondents, who were mortgagees of shares in seven villages belonging to their mortgagor one Tufail Ali Khan, obtained the usual decree for sale. The 17th of April 1896 was the date fixed for payment of principal, interest, and costs which amounted in all to Rs. 19,290-9-6. The mortgagor made default. On the 23rd of April 1896, the mortgagees applied for an order absolute. The order was drawn up on the 16th of May following. On the 24th of March 1897, an application was made for execution of the decree by sale of the mortgaged property, and on the 26th of April 1897 the execution case was transferred to the Collector's Court as the property was ancestral. The decree came into the hands of the sale officer on the 8th of July 1897.

In the meantime, the wife of the mortgagor brought a suit *in forma pauperis* against her husband, Tufail Ali Khan, and the Respondents, claiming from her husband a lakh of rupees under a contract of dower, and alleging that that sum was charged on the mortgaged property in priority to the mortgages, the subject of the decree of the 17th of December 1895. On the 11th of May 1897, the suit was decreed with costs against Tufail Ali Khan, but dismissed with costs as against his mortgagees, and it was ordered that the amount of Court-fees which would have been paid by the Plaintiff had she not been allowed to sue as pauper should be the first charge on the amount decreed to the Plaintiff, and should also be recoverable from the Defendant, Tufail Ali Khan.

The order as regards the Court-fees payable to Government was in accordance with the directions of sec. 411 of the Civil Procedure Code, 1882, as to pauper suits. That section is in the following terms :—

"411. If the Plaintiff succeed in the suit, the Court shall calculate the amount of the Court-fees which would have been paid by the Plaintiff if he had not been permitted to sue as a pauper; and such amount shall be a first charge on the subject-matter of the suit, and shall also be recoverable by the Government from any party ordered by the decree to pay the same, in the same manner as costs of suit are recoverable under this Code."

There was an appeal to the High Court but it was dismissed with costs.

So the Respondents succeeded in preserving the priority of their encumbrances

(6) [1907] App. Cas 179.
(7) [1907] App. Cas. 519, 523.
(8) 38 C. H. D. 622, 626 (1888).

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and in maintaining the decree of the 17th of December 1895. With this success all their troubles began. The Collector on behalf of Government applied for and obtained execution of the decree of the 11th of May 1897 not against Tufail Ali Khan against whom the suit was decreed, but against the mortgaged property, in regard to which the suit failed. That execution case was also sent to the Collector's Court. It was received by the Sale Officer, on the 18th of February 1898, more than six months after the receipt of the decree of the 17th of December 1895. However, the Sale Officer fixed one and the same day, the 22nd of July 1899, for sale in both cases. And when the day of sale came he put the property up for sale under the decree of the 11th of May 1897, and it was sold to Rai Bahadur, the father of the Appellants, for Rs. 1,529, an amount just sufficient to satisfy the claim of the Government.

The mortgagees' decree was returned to the Civil Court with a statement that no property was left for sale in connection with that decree. In taking this course the Sale Officer, according to the opinion of the Collector, acted legally. Possibly, said the Collector, he might have put the property up for sale under the mortgagees' decree, "proclaiming at the same time the debt due to Government as an encumbrance to be satisfied by the purchaser," but there was no material irregularity. In the Collector's opinion the authorities clearly affirmed "the principle that the Government takes precedence of all other creditors, whether or not they have a lien on the property."

At the instance of the mortgagees the Civil Court directed that the property should be put up for sale again under the decree of the 17th of December 1895. Ultimately the mortgagees bought it for Rs. 18,365. They obtained formal possession. But it seems that Rai Bahadur had already obtained possession under his sale certificate. Both parties then exerted themselves to collect rents. Then followed a struggle for mutation of names. The Assistant Collector dismissed an application for that purpose by the mortgagees, blaming them for trying to avoid payment of the Government dues "instead of quietly paying off" the Court-fees and getting the property sold in satisfaction of their large debt. After a learned argument he held that the wording of sec. 411, Civil Procedure Code, was clear that the Government dues were the first charge on the property, and that Rai Bahadur had consequently a preferential claim. Then the mortgagees appealed to the Collector. He took the same view, after argument, though he confessed that he "had not hitherto realised that the position of the Crown in such matters was so strong." Lastly, the mortgagees applied to the Commissioner on second appeal. He, too, rejected their application, in the first instance on reading the record, and then on an application for revision after hearing the parties at considerable length, who "argued as to the equity and legal rights of the case." As to the merits he pronounced no opinion. He thought it essentially a case for the Civil Court. But, he added, that until the question was determined by a competent Court he did "not think that any fairer decision could be come to than that at which the Collector arrived."

So at last the mortgagees betook them to the Civil Court, to which they ought to have applied long before in a regular suit. The Judge of First Instance ordered that the Respondents should be put in possession of the property, and declared that

they were the absolute owners. An appeal to the High Court was dismissed with costs. But the learned Judges, after argument, came to the conclusion that there was a substantial question of law involved, and gave leave to appeal to His Majesty in Council.

Their Lordships are at a loss to discover what question of law is involved in this case. So far as can be gathered from the judgments in the Collector's Court, the validity of the sale to Rai Bahadur was rested on two grounds (1) on the terms of sec. 411 of the Civil Procedure Code, and the decree of the 11th of May 1897, and (2) on the prerogative of the Crown. As to the first point, the claim put forward on behalf of the Government is absurd. The decree of the 11th of May 1897 did not create or purport to create any charge on the mortgaged property in favour of the Government. The Government had no right to attach the property and sell it in execution under that decree, though, of course, such interest, if any, as remained in the mortgagor from whom the Court-fees were declared to be recoverable, might have been reached by a proper proceeding. The order for the first sale was, therefore, without jurisdiction. The sale passed no property to the person declared purchaser. On the second point the claim advanced by the Collector on behalf of the Government is a preposterous claim. It is only when claims of the Crown and claims of "common persons" (to use an old expression) "concur" or come into competition that the Crown is preferred. The Crown has no more right than a "common person" to seize A's property and apply it in or towards the discharge of a debt due from B. That is not a question of law. It is a matter of common justice, and it may be added, of common honesty.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed with costs.

Solicitor : *Mr. D. Grant* for the Appellants.

Solicitors : *Messrs. Barrow, Rogers and Nevill* for the Respondents.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 41 OF 1911.

JENKINS, C. J.
WOODROFFE, J.
1912,
14, February.

RANJIT LAL KARMAKAR Defendant, Appellant,
v.
BIJOY KRISHNA KARMAKAR, Plaintiff, Respondent.

Hindu Law—Bengal school—Adoption—Preferential right to adopt as between senior and junior widows—Anumatipatra—*Construction—Simultaneous or successive adoptions.*

In Bengal as in Bombay, as between co-widows, the senior, that is to say, she whose marriage was earlier, has the preferential right to adopt; the adoption by a junior widow, though earlier in point of time, is void where she adopted without even seeking the senior widow's consent.

Where a Hindu executed an anumatipatra *as follows :—"In favour of the first wife B. S. and the second wife S. B.* * * * *I am giving permission that when I shall be no more, each of my two wives shall be at liberty to act according to their own religious tenets by adopting three sons successively, that is one after another."*

Held—*That the* anumatipatra *did not contemplate simultaneous adoption by the widows but successive adoption in accordance with the rules of law.*

The proper canon of construction to

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apply to the instrument is that the Court would consider that the person giving the authority intended his widows to do that which the law allowed and not to do something which was, if not absolutely illegal, very unusual and not practised among Hindus.

AKHOY CHUNDER BAGCHI *v.* KALAPAHAR HAJI (1) *followed.*

This was an appeal preferred by the Defendant from the decree of Stephen, J., sitting on the Original Side, made in favour of the Plaintiff on 17th May 1911.

The facts material to this report appear in the judgment of Stephen, J., which ran as follows :—

STEPHEN, J.—The question I have to decide in this case is which of two adoptions is legal The facts are simple and, if I accept all the evidence that has been given before me, are as follows:—One Shib Krishna Karmakar, a Hindu governed by the Bengal School of Hindu Law, and a Sudra by caste, died on the 29th November 1903 leaving two widows, Biraja Sundari, the senior and Sashibala Dasee, the junior. The day before his death he executed an *anumatipatra*, the translation of which is as follows: "*Anumatipatra* for taking adopted son is executed to the following effect by Sri Shib Krishna Karmakar, father's name the late Ramkrishto Karmakar, by occupation gold and silversmith, inhabitant of Sabhor, in favour of the first wife Sreemuty Biraja Sundari Dasee and the second wife Shashibala Dasee. I am now ailing, having been attacked with cholera. There is no knowing what may happen to the transient body. I have no son of my loin, although, in the hope of perpetuating the generation, I have married two wives successively, but up till now no son has been born. Consequently by this *anumatipatra* I am giving permission in writing that when I shall be no more, each of my two wives shall be at liberty to act according to their own religious tenets by adopting three sons successively, that is one after another. It is also permitted that each of my wives shall live in my ancestral dwelling-house with her adopted son. On the other hand, if she goes to live in another place with her adopted son, she shall not have any right to the moveable and immoveable properties to be left by me." Acting under the power conferred on her by this instrument, Shashibala, the younger widow, adopted the Defendant on the 13th April 1905. Biraja Sundari, the elder widow, subsequently, that is, on the 9th March 1908, adopted the Plaintiff, for whom she is acting as next friend in the present suit. This suit is brought to have it declared that the adoption of the Defendant is void and inoperative, and that the Plaintiff has been validly adopted. The Plaintiff has satisfactorily proved that his adoption was performed in a valid and regular manner, and it is not sought to impugn its validity on any ground except that the Defendant had been previously adopted, a point which it is admitted is conclusive if it is substantiated The Plaintiff does not admit that the earlier adoption was satisfactorily proved, alleging that the circumstances of the adoption are so suspicious that I ought not to accept such evidence as there is of the identity of the adopting woman with Shashibala. He also argues, supposing that the earlier adoption was regular in point of form, the younger widow had no power to adopt till the elder widow had refused to adopt. The Plaintiff bases his legal argument on the decision in *Rakhmabai* v. *Radhabai* (5) In that case the deceased husband gave no power to adopt, but by the law prevalent in Bombay it was held that a widow had a right to adopt, and the senior widow had a right to adopt without the consent of the junior This case was followed in *Amava* v. *Mahadgauda* (6), and was approved of in *Mondakini Dassi* v. *Adinath Dey* (4), where it was held that, when a power was given to two widows to adopt a particular person, the younger widow had power to adopt on the refusal of the elder to do so.

These cases do not, it will be observed, completely cover the present, but they recognise the prior claims of the senior widow in a way that suggests that where two widows have a power to adopt, the general rule is that the senior widow has a right to exercise her power of adoption before the junior one does so. In the text-books it is laid down that the junior widow cannot adopt

(1) L. R. 12 I. A. 198 : s. c. I. L. R. 12 Cal. 406 (1885).

(4) I. L. R. 18 Cal. 69 (1890).
(5) 5 Bom. H. C. App. 181 (1868).
(6) I. L. R. 22 Bom. 416 (1896).

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without the consent of the senior widow, unless the latter is leading an irregular life; see Mayne, para. 118, and West and Bühler, Bk. iii, s. iii, B 3; 16, p. 976. Counsel for the Defendant does not deny that the law is so, as far as Bombay is concerned, but suggests that the law is not the same in Bengal. This contention seems to me to be baseless, particularly in a case like the present, where there seems to be no difference in the classes of the husband and the two widows, for the law laid down in *Rakhmabai* v *Radhabai* (5), depends ultimately on the text quoted from Vishnu in Art. XLIX of Book IV of Colebrook's Digest, and perhaps on that quoted from Dackshaiyana, Art. LI, and both of these writers are, I understand, of as much authority in Bengal as they are in Bombay In addition to this, counsel for the Defendant has not attempted to show me any authority for the rule which he suggests applies, namely, that the first adoption should prevail, whichever widow adopts, a rule the demerits of which I need not discuss.

The result is, that I hold that, apart from the terms of the *anumatipatra,* the junior widow had no right to adopt before the senior widow had refused to do so

As to the terms of the *anumatipatra,* a consideration of their contents only makes the Plaintiff's case stronger. It is to be observed that in the Bombay cases there was no specific authority to adopt. In Bengal, of course, there must be such an authority, and in this case it is the *anumatipatra* that I have quoted It is suggested by the Defendant that that instrument gives a power to the two widows to adopt simultaneously, and that, as I understand the argument, the whole deed is therefore bad, as simultaneous adoptions are illegal. The proper construction of the document seems to me, however, to be quite contrary to this view. According to the decision in *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (1), which is also the authority for saying that simultaneous adoptions are illegal, as also by the general rules of construction, I must read the *anumatipatra* as enjoining something in accordance with the law if I can. If it leaves the power to adopt to be decided by the question of which widow adopts first, it may sanction a simultaneous adoption. I therefore hold that it did not have this effect; but left the power of adoption to be exercised according to the general law, and enforced this by indicating which was the senior and which the junior widow: that its effect was to give a power of adoption to the two widows successively, and that under the terms used the junior widow had no power to adopt till the senior widow had exhausted her right or refused to use it. The terms of the document will fully bear this construction; and it probably accords with the testator's intention.

(1) L. R. 12 I. A. 198: s. c. I. L. R. 12 Cal. 406 (1885).
(5) 5 Bom. H. C. App. 181 (1868).

The Defendant appealed.

Mr. H. D. Bose (with him *Mr. I. B. Sen*) for the Appellant, submitted that the evidence and the pleadings left no doubt as to the identification of Shashibala as being the person who took the Appellant in adoption on 13th April 1905. The law in Bengal and the law in Bombay are different. In Bengal a widow's right to adopt depends upon the assent of her lord which must be express. In Bombay where the husband died separated from the joint family and the widow herself is the heir or she and a junior widow are heirs, the widow may adopt without express sanction of husband and without the sanction of his kindred. *Ramji v. Ghamau* (2). In Bombay where there are several widows, the senior alone may adopt without the assent of the junior but the junior cannot without the assent of the senior *Padajirav* v. *Ramrav* (3). The reason given in *Padajirav* v. *Ramrav* (3) for the senior widow's preferential right is that she is the *patni.* There is no authority for the proposition that the senior wife alone is *patni*, even where the senior and the junior belong to the same class. Nor is there any authority for the proposition that a man can have but one *patni* though several wives. The texts Dacksha in Jagannath's Digest, Book IV, Art. 51, to the

(2) I. L. R 6 Bom. 498 at p. 503 (1879).
(3) I. L R. 13 Bom. 160 at p. 166 (1888).

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effect that "the first is the wife married from a sense of duty ; the second promotes sensual gratification ; sensible not moral effects proceed from her" cannot apply to the present case of a Sudra-woman, who, as the *anumatipatra* says, was married from a sense of duty as the first wife turned out barren. The text of Vishnu in Jagannath's Digest, Book IV, Art. 49, as also the text of Yajnavalkya apply only to twice-born castes not to Sudras referred to the religious disability of the Sudra. In Bombay the senior widow's right to adopt is not merely preferential but exclusive. *Mondakini* v. *Adinath* (4) shows that in Bengal the senior widow's right to adopt is certainly not exclusive and that the junior widow by adoption against the wishes of the senior where the senior has refused to adopt, can divest the estate of the senior widow. And this though the authority to adopt is merely permissive and never mandatory in the eye of law. The Calcutta decision favours much more than the Bombay decisions the equality of rights of two widows where both are authorised and practically reduces to a nullity the senior widow's option recognised in Bombay, to adopt or not to adopt. The Plaintiff has failed to establish the senior widow's preferential and exclusive right to adopt in Bengal.

The *anumatipatra* contemplates two adopted sons at the same time. "Each of my wives shall live in my ancestral dwelling-house "with her adopted son" can have but one meaning, namely, that there should be two sons to two mothers, one to each mother. "If she goes to live in another place with her adopted son, she shall not have any right to the moveable and immoveable properties to be left by me" can only mean that Shib Krishna

(4) I. L. R. 18 Cal. 69 (1890).

intended that the other adopted son would get the property in such an event. The intention of Shib Krishna was clearly expressed and he contemplated two adopted sons—one by each widow. An authority contemplating simultaneous adoption is invalid.

Mr. B. C. Mitter (with him *Mr. N. N. Sircar*) was not called on.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The Plaintiff, who is the Respondent before us, has brought this suit against the Defendant to have it declared that the alleged adoption of the Defendant is void and inoperative in law. The case was heard before Mr. Justice Stephen who has pronounced a decree in the Plaintiff's favour. From that decree the present appeal has been preferred.

The points urged on behalf of the Defendant are two : *first*, he says that the document of authority under which the adoption both of the Plaintiff and himself purports to have been made is bad ; and, *secondly*, that if it is good then his adoption and not the Plaintiff's is valid although made by the younger of the two widows of the deceased.

The facts are briefly these : one Shib Krishna Karmakar, a Hindu governed by the Bengal School of Hindu Law, died on the 29th of November 1903, leaving two widows, Biraja Sundari Dasi and Sasibala Dasi, and no son. The day before his death he executed this authority to adopt in favour of his two widows. The junior widow, Sreematy Sasibala Dasi, purports to have adopted the Defendant on the 13th of April 1905, without even seeking the elder widow's consent. The elder widow purports to have adopted the Plaintiff on the 9th of March 1908 : and

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it is in these circumstances that the contentions to which I have referred arise. The argument, by which the Defendant would annihilate his own position, is by contending that the deed of the power of adoption is inoperative. It is, in my opinion, one that cannot succeed. The document was executed under circumstances which may account for certain degrees of vagueness and uncertainty in its terms, and we are entitled to apply to it the canon of construction which has been laid down by their Lordships of the Privy Council in *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (1), where it was said at p. 202, in construing a document then before their Lordships, that they would consider that the person giving the authority intended his widows to do that which the law allowed and not to do something which was, if not absolutely illegal, very unusual and not practised amongst Hindus. It appears to me that it is a fair and reasonable interpretation to put on this document to say that it did not contemplate simultaneous adoption by the widows but successive adoption in accordance with the rules of law as now established and as established at the time when this document came into existence. Treating the document as a valid document, was the junior widow entitled to adopt without the consent of the senior widow or without even asking for that consent? Now, it is well-established in the Presidency of Bombay that, as between co-widows, it is the senior, that is to say, she whose marriage was earlier, who has the preferential right to adopt in circumstances like the present. Those decisions rest upon fundamental principles and on views of Hindu life and economy which appear to me to be fully applicable here. Any other view would merely lead to an unseemly scramble for the purpose of performing this solemn act. In my opinion, the decision of Mr. Justice Stephen is correct, and we must dismiss the appeal with costs. The reserved costs will be costs in the appeal.

WOODROFFE, J.—I agree.

Mr. J. C. Dutt, Attorney for the Appellant.

Mr. D. M. Ghose, Attorney for the Respondent.

Appeal dismissed with costs.

A. K. G.

(1) I. L. R. 12 I. A. 198: s. c. I. L. R. 12 Cal. 406 (1885).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER
No. 153 OF 1911.
WITH
RULE No. 1935 OF 1911.

MOOKERJEE, J.
CARNDUFF, J.
1911.
30, August.

SAHADRA KOER and ors., Opposite Party, Appellants,
v.
RAMADIN CHOWDRY and anr., Petitioners, Respondents.

Gurdians and Wards Act (VIII of 1890), orders apparently under, made without jurisdiction—Proceedings not had bonâ fide, *orders ill—Consent obtained by judicial pressure—Judge, no arbitrator.*

One D died leaving a minor unmarried daughter by a predeceased wife and three widows. One R with a view to secure the marriage of his son with the girl (so that ultimately the property left by D might pass into the hands of the representatives of his own family) got the maternal grandfather of the girl, who was his servant, to apply for the appointment of himself as the guardian of the property and person of the

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minor, but no part of D's property had yet vested in her, the widows being according to Hindu law D's heirs. The widows objected to the application, but the District Judge having, owing to a misconception, passed orders directing that unless the widows placed their properties in charge of R he would remove the girl whom they dearly loved from their custody to that of the maternal grandfather, they were induced to grant a lease of the properties to R, after which they were made to present an application for the appointment of themselves as guardians of the person of the girl and they were formally appointed as guardians.

Held—*That no guardian was needed for the protection of the person of the girl and she had no property of which a possible guardian could take charge. The application of the widows for appointment as guardians of her person was not voluntary, and the application of the maternal grandfather was not made* bonâ fide, *and the orders passed by the Judge were without jurisdiction.*

"*Orders passed in proceedings so instituted and conducted, even if they were nominally in conformity with statutory provisions could hardly be regarded as invested with the efficacy of legal orders made in* bonâ fide *judicial proceedings.*"

That the Judge could not be deemed in this case to have acted as an arbitrator chosen by the parties voluntarily, the ladies having in fact acted under judicial pressure of the highest degree to which they were not as a position to offer effectual and successful resistance, and consequently LEDGARD v. BULL (1) *did not apply.*

This was an appeal preferred on the 3rd of April 1911 against the orders of Mr. Mr. Smither, District Judge of Sahabad, dated the 3rd and 6th of January 1911.

The material facts will appear from the judgment.

Mr. B. C. Mitter, Babus Provash Chunder Mitter, Biraj Mohan Majumdar and *Susil Madhub Mullick* for the Appellants.

Dr. Rash Behary Ghose, Moulvi Syed Shamsul Huda and *Babu Raghunath Singh* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—This Appeal and Rule are directed against a series of orders under the Guardians and Wards Act of 1890, the validity wherof is assailed on the ground that they were made by the Court below wholly without jurisdiction.

It appears that one Dibakar Bhatta, a wealthy Hindu governed by the Mitakshara law, left a daughter Bachhi Sahdei. The mother of this girl, Bunda Koer, who was the fourth wife of Dibakar Bhatta, had predeceased her husband ; but her three co-wives Subhadra Koer, Ram Koer and Mahesha Koer, who are the Petitioners and Appellants before us, survived him. The case for these three ladies is that one Ramadin Chowdhury, a man of considerable wealth, who is the Opposite Party in the Rule and Respondent in the appeal, was anxious to secure the marriage of his own son with Bachhi, so that ultimately the estate of Dibakar Bhatta might pass into the hands of the representatives of his own family. The Petitioners assert that Dhajadhari, the maternal grandfather of Bachhi, was a servant of this Ramadin Chowdhury and was set up by him to make an application to the District Judge for appointment of himself

(1) I. L. R. 9 All. 191 ; L. R. 13 I. A. 134 (1886).

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as guardian of the person and property of the girl. It is necessary to state at this stage that the girl was possessed of no property; she had no present interest in the estate left by her father Dibakar Bhatta, and was merely the reversionary heir, entitled to take the estate after the demise of all the three widows. The application of Dhajadhari was promptly opposed by the three widows. But it appears to have been represented to the District Judge in the course of these proceedings that the widows were under the control of two unscrupulous persons and that the life of the girl was in danger. No evidence, however, was taken at any stage of the proceedings and we have no definite information as to the character and antecedents of these persons, or the nature and extent of their influence upon the three ladies. However that may be, the District Judge deemed it imperatively necessary to place the girl in absolutely safe custody. To achieve this object, he thought it essential to remove the widows from the influence and control of those two persons, and concluded that the end might be attained if the ladies could be induced to place all their properties in the hands of Ramadin Chowdhury. With this object in view, the District Judge proceeded to pass a series of orders of an extraordinary character, which cannot possibly be justified under the provisions of the Guardians and Wards Act. It has not been disputed that it was not competent to the learned Judge to deal in any manner, directly or indirectly, with the estate vested in the ladies. The only matter before him was the question of the appointment of suitable person as guardian of the person of the infant, and also of her property, if, indeed, she had any property at all. The ladies, however, were obdurate, and refused at one stage to place their property in the hands of Ramadin Chowdhury as had been suggested by the District Judge. The learned Judge thereupon preceeded to record in the order-sheet more than one order to the effect that if the widows did not agree to the terms proposed by the Court, the minor, whom they dearly loved, would be taken away from their custody, and placed in the hands of her maternal grandfather who would be appointed guardian of her person. The learned counsel for the Petitioners has described the method pursued by the District Judge as judicial coercion, and there can be no room for reasonable doubt that, although he may have acted from the best of motives, his orders were wholly without authority, and he put pressure upon the widows in a manner never contemplated by the framers of the Guardians and Wards Act. The result was that the widows at last yielded to the pressure of the Judge. A Commissioner was appointed to make an estimate of the assets in their hands. The terms were arranged by the learned Judge himself, and ultimately a lease of the estate in the hands of the widows was granted by them to Ramadin Chowdhury. Finally, the widows were made to present an application for appointment of themselves as guardians of the person of their infant step-daughter. This application was granted and they were formally appointed guardians. But there is no room for reasonable doubt that this application was not voluntarily made; the widows had throughout protested that the appointment of any guardian in respect of the person and property of Bachhi was wholly needless, and that the application of Dhajadhari in that behalf was not only not made *bonâ fide* for the benefit of the infant but had been made at the in

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stance of Ramadin Chowdhury to enable him to get the girl married to his own son and thus ultimately to seize the estate of Dibakar Bhatta. In this view of the matter, it is clear that the orders of the District Judge cannot be supported. The proceedings, from beginning to end, were a grievous misapplication of the provisions of the Statute. No guardian was needed for the protection of the person of the minor; she had no property of which a possible guardian could take charge. The machinery of the law was set in motion by Ramadin Chowdhury who induced his servant, the maternal grandfather of the infant, to make an application for appointment of himself as her guardian in order that she might be ultimately married to his son. Orders passed in proceedings so instituted and conducted, even if they were nominally in conformity with statutory provisions, could hardly be regarded as invested with the efficacy of legal orders made in *bonâ fide* judicial proceedings. The orders are wholly without jurisdiction and must be treated as absolutely null and void.

It has been suggested, however, by the learned Vakil who appeared to show cause that the District Judge acted as an arbitrator chosen by the parties and that his decision cannot consequently be challenged by them by way of appeal to this Court. This argument is wholly fallacious. No doubt, as ruled by the Judicial Committee in the case of *Ledgard* v. *Bull* (1), if the parties have treated a Judge as their arbitrator and have submitted to his decision, even though he had no jurisdiction to deal with the matter in controversy, his decision is binding upon them as if it were the award of an arbitrator. It is plain, however, that this doctrine cannot possibly be applied to the circumstances of the case before us. The Judge cannot be deemed, by any fiction of law, to have been an arbitrator chosen by the parties voluntarily; the ladies acted under judicial pressure of the highest degree, to which they were not in a position to offer effective and successful resistance. It is difficult to appreciate how, under these circumstances, the orders of the learned Judge can be supported either as proper judicial orders or as the adjudications of an arbitrator to whose judgment the parties have voluntarily submitted the matters in controversy between them.

(1) I. L. R. 9 All. 191; L. R. 13 I. A. 134 (1886).

The result, therefore, is that this appeal is allowed, and the Rule made absolute. All the orders of the Court below from the 3rd January 1911 to the 8th March 1911 are discharged as made without jurisdiction. The Appellants are entitled to their costs of this Court as also of the Court below from Ramadin Chowdhury who has been at the root of these extraordinary and mischievous proceedings. We assess the hearing-fee in the appeal at five gold mohurs and make no separate order for costs in the Rule.

Appeal allowed.
Rule made absolute.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL ORDERS
NOS. 354 AND 355 OF 1911.
WITH
RULE NO. 4094 OF 1911.

MOOKERJEE, J.
CARNDUFF, J.
1911,
30, August.

SAHODRA KOER and others, Appellants,
v.
DHAJADHARI GOSAIN, Respondent.

Guardians and Wards Act (VIII of 1890), sec 43, sub-sec. (1), (2) and (4), sec. 45, sub-sec. (1)

SAHODRA KOER *v.* DHAJADHARI GOSAIN.

cl, (a)—Order upon guardian not to marry ward without Court's leave, disobedience of, if punishable, when order without jurisdiction—Order if may be passed when minor a Hindu—Guardian's failure to produce ward in Court—Guardian if may be fined—"Enforcement" of order, meaning of—Civil Procedure Code (Act V of 1908), Or. 39, rr. 1 and 2.

Before proceedings can be taken on account of disobedience of an injunction issued by a Court, it must be ascertained that the Court had jurisdiction over the subject-matter in controversy. If the Court had no jurisdiction over or had exceeded its powers in granting an injunction in matters beyond its jurisdiction, the injunction must be treated as absolutely void and the person who has disobeyed it cannot be punished for the alleged offence. There is in this respect a clear distinction between an order erroneously made with jurisdiction and an order made absolutely without jurisdiction.

Sub-sec. (4) of sec. 43 of the Guardians and Wards Act applies to all cases of disobedience of an order passed under sub-sec. (1) or sub-sec. (2) of that section, whether or not the effect of the disobedience is capable of removal or reparation.

Quære—*Whether there is any bar to a District Judge giving directions in an order appointing a guardian of the person of a minor Hindu that the minor should not be married by the guardian without the consent of another relation and without the Court's leave, where the guardian appointed is also the guardian for marriage according to Hindu law.*

BAI DIWALI *v.* MOTI KARSON (1) *referred to.*

Where it was found that the application upon which the order for appointment of a guardian was made was not made voluntarily:

(1) I. L. R. 22 Bom. 504 (1896).

Held—*That the order was without jurisdiction and disobedience on the part of the guardian of the directions relating to the marriage of the minor could not be punished under sec. 43, cl. (4) of the Guardians and Wards Act like disobedience of an injunction.*

Cl. (a) of sub-sec. (1) of sec. 45 of the Guardians and Wards Act does not contemplate orders on the guardian appointed under the Act for the production of the ward, and such a guardian cannot be fined under the section for failing to produce the ward before the Judge when required.

These were appeals preferred on the 20th of July 1911 against the orders of G. J. Manahan, Esq, District Judge of Zillah Sahabad, dated the 11th and 12th of July 1911.

The facts leading up to the proceedings in which the orders which form the subject-matter of these appeals were passed are set out in the judgment in *Sahadra Koer* v. *Ramadin Chowdry*, reported at p. 444 of this volume. The circumstances in which the orders under appeal were passed will appear from the judgment.

Mr. B. C. Mitter and *Babus Provash Chunder Mitter, Susil Madhub Mullick* and *Biraj Mohan Mojumdar* for the Appellants, Petitioners.

Babu Sarat Chandra Lahiri (for *Babu Chandra Sekhar Prosad Singh*) for the Respondent, Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—We are invited to set aside two orders made by the Court below on the 11th and the 12th July 1911, under somewhat exceptional circumstances. The first of these orders purports to have been made under sec. 45, sub-sec. (1), cl. 4 of the Guardians and Wards Act, 1890;

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and the second under sec. 43, sub-sec. (4) of the same Statute read with Or. 39, r. 2, sub-r. (3) of the Code of Civil Procedure of 1908. It appears that the Petitioners before us were appointed guardians of the person of their step-daughter Bachi Sabdei, and at the time the order was made it was directed that the minor should not be married without the consent of her maternal grandfather and without the leave of the Court. The Appellants, it is admitted, have got the girl married in violation of this direction. The learned Judge, when apprised of this event, called upon the Appellants to produce the minor in Court. That order, however, could not be carried out, because at the time the order was made, the girl was with the family of her husband. The learned Judge thereupon proceeded to impose a fine upon the Appellants under sec. 45. He also took proceedings against the Appellants to punish them on account of their disobedience of the original order and ultimately directed that they should be confined in prison for three months. We are now invited to set aside these orders on the ground that they were made without jurisdiction, and cannot be justified either upon the admitted facts or upon recognised legal principles.

In so far as the first order is concerned, it has been argued that the case is not covered by cl. (*a*) of sub-sec. 1 of sec. 45 of the Guardians and Wards Act, 1890. That clause provides for two cases; namely, *first*, the case in which a direction has been given under sub-sec. (1) of sec. 12; and, *secondly*, the case in which an order has been made under sub-sec. (1) of sec. 25. It is manifest that neither of these sections has any application to the contingency which has happened here. It may further be observed that cl. (*a*) speaks of a person who has the custody of the minor and fails either to produce him or to do his utmost to compel him to return to the custody of his guardian. It is obvious that in a case under sub-sec. (1) of sec. 12, the person who has the custody of the minor has not yet been appointed guardian, while in a case under sub-sec. (1) of sec. 25, the person against whom the disciplinary action is taken is clearly one other than the guardian to whose custody the minor is to be returned. It is obvious, therefore, that the order of the learned Judge for the production of the minor in Court was not made either under sub-sec. (1) of sec. 12 or sub-sec. (1) of sec. 25. Consequently, sec. 45 has no application, and the order must be set aside as made without jurisdiction.

In so far as the second order is concerned, the learned counsel for the Appellants has contended that it must be set aside on three substantial grounds; namely, *first*, that this is not a case contemplated by sub-sec. (4) of sec. 43, because the learned Judge could no longer seek to enforce his original order which plainly could not be enforced after the marriage of the minor had taken place; *secondly*, that the order is bad, because it was not competent to the learned Judge to give any directions to the guardian as regards the marriage of the infant; and, *thirdly*, that as the proceedings for the appointment of the guardian were in their entirety without jurisdiction a violation of an order made without jurisdiction could not render the Appellants liable to be punished under sub-sec. (4) of sec. 43.

In so far as the first branch of this contention is concerned, we are not prepared to accept it as well-founded. Sub-sec. (4) of sec. 43 provides as follows: "In case of disobedience to an order made under sub-

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sec. (1) or sub-sec. (2), the order may be enforced in the same manner as an injunction granted under sec. 492 or sec. 493 of the Code of Civil Procedure of 1882, in a case under sub-sec. (1), as if the ward were the Plaintiff and the guardian were the Defendant, or, in a case under sub-sec. (2), as if the guardian who made the application were the Plaintiff and the other guardian were the Defendant." It has been contended by the learned counsel for the Appellants that this clause applies strictly to cases in which it is possible to enforce the order which has been disobeyed. As a marriage performed in accordance with the rules of Hindu Law cannot be set aside, the order which was originally issued upon the guardians and has been disobeyed by them can no longer be enforced, and consequently they are not liable to be punished in the manner contemplated in cl. (4) of sec. 43. We are not prepared to accept the narrow construction of the word 'enforced' suggested by the learned counsel. If that construction were adopted, the clause would be inoperative in a large class of cases which could not possibly have been intended to be excluded from its operation. In fact, if the term were interpreted as suggested, the clause would be abrogated wherever it might be argued that the order disobeyed could no longer be enforced. For instance, in cases falling under sec. 492 or 493, although the Court may take action by way of attachment of the person and property of the person who has disobeyed the order of the Court, yet he may in the end refuse to carry out the order; that is to say, if he is prepared to suffer the punishment inflicted for disobedience, no one can compel him to carry out the order specifically. In such cases even, it might, on the same principle of interpretation, be contended that the order has not been and cannot be enforced. In the same way, in cases in which an act has been committed in defiance of the order of the Court, even though what has been done is undone, it cannot strictly be said that the order has been enforced. In our opinion, sub-sec. (4) of sec. 43 ought to be read with secs. 492 and 493 of the Code of 1882 or rr. 1 and 2 of Or. 39 of the Code of 1908, and the plain intent of the sub-section is that the same sanction should be applied in the case of disobedience to an order made under sec. 492 or 493 or sub-sec. (3) of sec. 43 as is provided in Or. 39 in cases of disobedience of an injunction issued by a Court. The sub-section is not limited solely to cases where an irremediable mischief has not been done and where, therefore, the *status quo ante* might be restored; it applies to all cases of disobedience, whether or not the effect of the disobedience is capable of removal or reparation. In our opinion, it was competent to the learned Judge to take action under sub-sec. (4) of sec. 43.

In so far as the second branch of the contention of the learned counsel for the Appellants is concerned, it has been argued that it was not open to the District Judge to give any directions to the guardians relating to the marriage of the infant. In support of this position, reliance has been placed upon the decision in *Bai Diwali* v. *Moti Karson* (1). That case admittedly does not expressly decide this point; but a doubt appears to have been expressed by one of the learned Judges, whether a direction of this nature could be given under the Guardians and Wards Act in view of the circumstance that a guardian of the person might in certain cases be different from the person

(1) I. L. R. 22 Bom. 504 (1898).

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recognized as guardian for marriage under the rules of Hindu Law. [Banerjee on Marriage and Stridhan, 2nd Ed., p. 43.] No doubt, that would be an element for serious consideration in cases where such divergence actually happens. But in a case where the person appointed guardian under the Guardians and Wards Act is also the guardian for marriage under the rules of Hindu Law, the distinction can hardly be maintained on principle. It is not necessary for us, however, to decide this question finally, because we are of opinion that the order of the District Judge must be set aside on the third ground urged by the Appellants.

In so far as the third ground is concerned, it has been argued that inasmuch as the original order which has been disobeyed was made without jurisdiction, no proceedings can be taken under sub-sec. (4) of sec. 43. In our opinion, this contention is unanswerable. It is well-settled that before proceedings can be taken on account of disobedience of an injunction issued by a Court, it must be ascertained that the Court had jurisdiction over the subject-matter in controversy. If the Court has no jurisdiction over the matter or if it has exceeded its powers by granting an injunction in matters beyond its jurisdiction, the injunction must be treated as absolutely void and the person who has disobeyed it cannot be punished for the alleged offence: *Lewis* v. *Peck* (2), *Exp. Fisk* (3), *Evans* v. *Pack* (4), *Savage* v. *Sternberg* (5), High on Injunctions, sec. 1425; Joyce on Injunctions, sec. 246. There is in this respect a clear distinction between an order erroneously made with jurisdiction and an order made absolutely without jurisdiction. [*Drewry* v. *Thacker* (6), *Russell* v. *East Ang. Ry. Co.* (7), Laws of England, Ed. Halsbury, Vol. VII, sec. 645, Vol. XVII, sec. 622.] The case before us is of the latter description. As we have already explained in our judgment in the appeal against the order for appointment of guardians [*Sahadra Koer* v. *Ramadin Chowdry* (8)], the application of the Appellants for appointment of themselves as guardians of the person of their step-daughter was not made voluntarily. No proper judicial proceeding can be instituted upon an application so made and the order for appointment of guardians and the directions given to them relating to the marriage of the infant must, therefore, be deemed as wholly without jurisdiction.

The result is that these appeals will be allowed, the Rule made absolute, and the orders of the Court below discharged.

Appeal allowed.
Rule made absolute.

(2) 154 Fed. 278.
(3) 113 U. S. 713.
(4) 2 Flipp. 267, 8 Fed. Cas. 4566.
(5) 67 Am. St. Rep. 751.
(6) 3 Swan. 529 (546) (1819).
(7) 3 Mac. & G. 104 (1850).
(8) 16 C. W. N. 444 (1911).

CRIMINAL REVISIONAL JURISDICTION.

REV. No. 993 OF 1911.

HOLMWOOD, J.
SHARFUDDIN, J.
1911,
Heard,
21, November.
Judgment,
13, December.

ABDUL GHANI and ors., Petitioners,
v.
AZIZUL HAQUE, Opposite Party.

Indian Penal Code (Act XLV of 1860), sec. 494 —Bigamy, Mahomedan woman marrying during the period of Iddat *and after the apostacy of the first husband, if commits—Mahomedan Law—*

ABDUL GHANI *v.* AZIZUL HAQUE.

Husband's apostacy— Wife's right to marry another —Iddat.

A. and I., both Mahomedans of the Hanafi sect, were husband and wife. Some years after their marriage, the husband (A) became a Christian but reverted again to Mahomedanism within a month and a half. The wife (I.) had in the meantime married another man during the Iddat *period,*

Held—*That the wife did not commit an offence under sec. 494, I. P. C.*

Apostacy from Islam, whether it takes place before or after consummation, dissolves ipso facto *the marriage tie of Mahomedans.*

There is a consensus of opinion that a woman's marriage during Iddat *is illegal and sinful, but still the woman marrying a second time after the apostacy of her former husband and during the period of* Iddat, *cannot be said to have gone through the form of the second marriage while her legal husband was alive.*

Per HOLMWOOD, J.—*Whatever view be taken of the uncertain status of the parties during the period of* Iddat *and however illegal and void under Mahomedan law the second marriage of the woman during the period of* Iddat *might be, there was no foundation for any charge under sec. 494, I. P. C., against her. The parties to the marriage acted in good faith and even though they were mistaken as to their rights, they could not be made criminally liable under sec. 494, I. P. C.*

This was a Rule granted on the 14th of August 1911 against the order of commitment of the Petitioners to the Court of Sessions at Faridpur for trial, passed by Babu Nabo Gopal Ghaki, Sub-Divisional Magistrate of Gopalgunj, dated the 23rd of June 1911.

The facts material to this report will appear from the judgment.

Mr. Huq with *Moulvie Syed Shamsul Huda* and *Moulvie Mahomed Mustafa Khan* for the Petitioners.

Mr. B. K. Acharya with *Babu Satyendra Nath Mukerjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

HOLMWOOD, J.—I have had the advantage of reading the judgment which is about to be delivered by my learned brother and I entirely agree with him that the marriages of a Mahomedan man and woman is rendered *ipso facto* void by the apostacy of the former, though there are certain methods as pointed out by my learned brother by which the marriage tie may be renewed.

But what I wish to lay stress upon is that whatever view be taken of the uncertain status of the parties during the period of *Iddat* and however illegal and void under Mahomedan law the second marriage of the woman during the period of *Iddat* may be, there is no foundation for any charge under sec. 494, I. P. C., against her. Her second marriage is not void by reason of its taking place during the life of a prior husband but by reason of a special doctrine of the Mahomedan law of *Iddat* with which the Indian Penal Code has nothing to do.

The parties in this case appear to have acted in good faith on what they believed to be a sound interpretation of a very difficult point of Mahomedan law. Even though they were mistaken the consequences could not be visited upon them in a Criminal Court administering the penal laws against bigamy. The consequence is a purely civil one, namely, the nullity of the second marriage. For these reasons I agree that the commitment of the Peti-

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tioners to the Sessions under secs. 494 and 494, I. P. C., must be quashed and the rule made absolute.

SHARFUDDIN, J.—This is a rule calling on the Magistrate and on the complainant to show cause why the commitment of the Petitioners should not be quashed on the ground that the first marriage has been dissolved.

It appears that one Azizul Haque and Musstt. Jaitan, both Mahomedans of the Hanafi sect, were husband and wife. Some years after marriage the husband, Azizul Haque, became a Christian, but within a month and a half he again reverted to Islam. During the above interval, the woman, Jaitan, married a man named Abdul Aziz, and her father gave her in marriage to the new husband.

The first husband, after his conversion to Islam, complained, with the result that Musstt. Jaitan, her father Abdul Ghani, and her second husband Abdul Aziz have been committed to the Court of Sessions for trial, the first under sec. 494, I. P. C., and the other two for abetment of that offence. On an application by the three accused under sec. 215, C. P. C., to quash the commitment the present rule was granted.

The point of law on which the present application was made is, that as the Mahomedan law does not permit a marriage between a Mahomedan female and a non-Mahomedan male, the marriage tie in the present case was broken on the complainant's conversion to Christianity. It was also contended that in such a case Musstt. Jaitan did not marry Abdul Aziz during the life-time of a husband.

On behalf of the complainant it was urged that inasmuch as Azizul Haque reverted to Islam during the period of *Iddat*, he could continue his conjugal rights without remarrying Musst. Jaitan, and on his behalf a certain passage from Raddul Muhtar was relied on in order to show that the marriage does not become dissolved instantly the man abandons Islam. We have consulted the original book in Arabic and the context relied upon is :—

اَلْمُرْتَدُّ اِذَا لَحِقَ بِدَارِ الْحَرْبِ فَطَلَّقَ
اِمْرَأَتَهُ لَا يَقَعُ وَاِنْ عَادَ مُسْلِمًا وَهِيَ
فِى الْعِدَّةِ فَطَلَّقَهَا يَقَعُ -

The translation of this passage is :—If an apostate goes to Darul Harab (an alien country where the laws of Islam are not in force) and arriving there divorces his wife, this divorce will not take place: but if he returns as a Muslim and divorces her during the *Iddat* period, the divorce will take place (*vide*, Ruddul Mohtar, p. 425, Egyption Edition).

On the strength of the above doctrine it is urged that the marriage tie does not absolutely break during the period of *Iddat* for otherwise a divorce given by the husband after his return to the faith, would not be effective.

The view, however, of lawyers like the authors of the Hedaya, the Fatawa Alamgiri and some other works unanimously is that apostacy from Islam, whether it takes place before or after consummation dissolves *ipso facto* the marriage tie.

The after-effects of separation through *talaque* (divorce) and apostacy are different. There are three forms of *talaque* namely—

(*a*) *Talaque-Rajai* (طلاق رجعي) In this *talaque*, the husband says *Tat-luk-to-*

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kay (طَلَّقتُكَ) without any intention on his part that it should operate as *talaque-Ba-in* (طلاق بائن) which is the second form of *talaque*. In *Talaque-Rajai* the woman has to observe *Iddat*, but during the period of *Iddat* if the husband reverts to Islam, he can continue his conjugal rights without a renewal of marriage tie.

(*b*) *Talaque-Ba-in*—in this form of *talaque*, the husband is required to utter the expression (طَلَّقتُكَ) which means "I renounce thee" with the intention that it should operate as *talaque-Ba-in*, the effects of which are that the woman has to observe *Iddat*, and if the husband relents he can continue his conjugal rights by a renewal of marriage tie. (تجديد عقد)

(*c*) *Talaque-Mogallaz* (طلاق مغلظ)

In this from of *talaque*, the husband is required to utter the above expression three times or he may say "I give you three *talaques*." The effects of this form of *talaque* are that the woman has to observe the *Iddat* period and she becomes *Haram* (حرام) that is within prohibited degrees and the husband cannot remarry her until she has formed another connection by marriage with another man, co-habitation has taken place with this other husband and the latter has divorced her and she has observed the period of *Iddat* after her second divorce. The stage of the second divorce is technically called *Halalah* (حلاله).

From the above it is manifest that in every form of separation caused either by *talaque* or apostacy, the woman has to observe the period of *Iddat*. There is consensus of opinions that a woman's marriage during *Iddat* is illegal but in case of *Talaque-Rajai*, the husband can continue his conjugal rights without a remarriage if he relents during the *Iddat*.

There is a passage in *Sharah Waqaya* (شرح وقايه) Chapter "Al-Murtud" (المرتد) p. 377, Lucknow Edition, which also lays down that after apostacy the marriage tie becomes null, but the man can still exercise his right of *talaque*. The passage referred to is—

وَبَطَلَ نِكَاحُهُ وَذَبِيحَتُهُ وَصَحَّ طَلَاقُهُ -
اِعْلَمْ اَنَّ النِّكَاحَ وَالذَّبِيحَ بَاطِلَانِ اِتِّفَاقًا -
وَالطَّلَاقُ وَالاِسْتِيلَادُ صَحِيحَانِ اِتِّفَاقًا -

which means: The *Nikah* (marriage) of the apostate with his Mahomedan wife becomes *Batil* (باطل) that is, null, but he can still legally divorce her.

It is clear from the above passage that in spite of the marriage tie having been absolutely broken in consequence of apostacy, the man has still the right, which is vested in him, to divorce his Mahomedan wife. It, no doubt, seems an anomaly that an apostate husband can divorce his Mahomedan wife. The Mahomedan jurists have explained the anomaly; as for example the author of Raddul-Mohtar has explained it in the following passage :—

فَيَقَعُ طَلَاقُهُ عَلَيْهَا فِي الْعِدَّةِ مُسْتَتْبِعًا
فَائِدَتَهُ مِنْ حُرْمَتِهَا عَلَيْهِ بَعْدَ الثَّلَاثِ حُرْمَةً
مُغَيَّاةً بِوَطْئِ زَوْجٍ آخَرَ -

which means that the object of vesting

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the power of divorce in the apostate is for a certain purpose only, namely, if an apostate recites *segha* (صيغة) the formula three times and thus divorces his wife in the *Mogullux* (مغلظ) form of *talaque*, she becomes *Haram* to him as stated above in the third form of *talaque*, that is to say, he cannot continue his conjugal rights with the woman without marriage or with a renewal of marriage without the intervention of a *Halala*.

On a reference to the different authorities, we are of opinion that Musstt. Jaitan's marriage with the complainant became absolutely null at the moment he apostatized and that from the date of his apostacy he was not her husband and that he could re-marry her during the period of *Iddat* if he reverted to Islam.

We have observed before that during the period of *Iddat*, a woman cannot marry another husband. In the present case, she is said to have done so. Her marriage with Abdul Aziz is therefore invalid. Her act therefore may be considered as invalid and sinful and according to the Jurists it is the duty of the Kazi to separate them and compel her to observe the *Iddat* period. In the present case we are not concerned with the question as to whether her second marriage was legal or not according to the Mahomedan Law. We are only concerned with the question as to whether her second marriage, if it can be called a marriage took place during the life-time of a husband. On the authorities discussed above we are of opinion that although her second marriage having taken place during the period of *Iddat* was not a legal marriage, yet she cannot be said to have gone through the form of the second marriage while her legal husband was alive. For the above reasons we quash the commitment and make the Rule absolute.

B. C.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 29 AND 30 OF 1912.

HOLMWOOD, J.
SHARFUDDIN, J.
1912,
8, February.

SEW KARAN, Petitioner,
v.
THE CORPORATION OF CALCUTTA, Opposite Party.

Calcutta Municipal Act (B C., III of 1899), sec. 495—Sale of adulterated food by servant, liability of master—Sale by partner—Liability of co-partner—Sec. 507, "seller," meaning of—Sec. 574.

Sec. 495 of the Calcutta Municipal Act like the corresponding section of the English Statute is positive in its prohibition of the sale of adulterated articles and when a servant sells such articles it is the master, firm or the beneficial owner who is liable to punishment and this would be so even when the servant adulterates the articles himself and sells without the knowledge or connivance of the master, firm or owner.

BROWN *v.* FOOT (1) *followed.*

Where the person who sells is one of two partners of the firm the conviction of the other partner would be equally legal.

This was a Rule issued on the 9th of January 1912 against an order of Babu Amrita Lal Mukerjee, Municipal Magistrate of Calcutta, dated the 13th of November 1911, convicting the Petitioner under secs. $\frac{495}{574}$ of Act III, B. C. of 1899, and sentencing him to pay a fine of Rs. 100.

The facts of the case will appear from judgment.

Mr. B. C. Mitter with *Babu Debendra*

(1) 17 Cox C. C. 509 (Q. B. D.); 61 L. J. (M. C.) 110 (1892).

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Chundra Mullick in showing cause.—As to the liability of the master for the act of servants, refers to sec. 6 of the Sale of Foods and Drugs Act, 36 and 39 Vic., c. 63, as amended by subsequent legislation. The provisons of that section are substantially the same as sec. 495 of the Municipal Act. It has been conclusively held in *Brown* v. *Foot* (1) the master is liable. It is an absolute prohibition of the Act irrespective of the person who does it and it is not necessary to establish any *mens rea*.

As to the question whether the accused being a commission agent will in any way alter his position, *vide.*, *Ireland* v. *Livingston* (2).

Mr. K. N. Chaudhuri with *Babu Debendra Narain Bhattacharjee* in support of the Rule.—In view of the ruling in *Brown* v. *Foot* (1), it cannot be contended that the master is not liable for the act of his servant. But the real question is what is the relationship between the accused and the actual seller, Lal Chand. There is no evidence nor any finding by the Magistrate that he was the servant of accused. On the other hand, the license of the shop shows it was one of partnership and the actual seller was the partner of accused. Hence the prosecution against one of the partners is not maintainable. The Opposite Party could have proceeded against the partnership, *vide*, *Pearks, Gunston and Tee Ltd.* v. *Ward* (3). Further the actual seller could not have been the same man in both shops. The case being a criminal prosecution, the principle of civil liability should not have been extended to this case. In any case there should be remand for a finding, on evidence, as to whether Lal Chand was the servant of the accused.

(1) 17 Cox C. C. 509 (Q. B. D.); 61 L. J. (M. C.) 110 (1892).
(2) L. R. 5 H. L. 395 at p. 408 (1872).
(3) [1902] 2 K. B. 1.

The JUDGMENT OF THE COURT was as follows :—

These were two Rules calling upon the Municipal Magistrate, Calcutta, and the Chairman to show cause why the conviction and sentence passed upon Sew Karan, proprietor, should not be set aside on the ground that he did not sell or cannot be said to have sold the ghee himself and to determine whether sec. 495 of the Calcutta Municipal Act applies to any person other than the actual hand employed in the sale.

Now as regards the first question we can have no doubt on the authority of *Brown* v. *Foot* (1), that on the law,—which in England is exactly the same as in this country, indeed sec. 495 appears to have been based entirely on sec. 6 of the English Act,—it has been held that a servant employed by his master to sell any article who adulterates it thereby renders his master liable under the section, although there is no connivance of the master ; and non-connivance of the master is no defence ; though the entire absence of connivance on his part might in the discretion of the convicting Magistrate be a ground for mitigation of the penalty. Now the ground upon which Mr. Justice Wills proceeds in that case is one which equally covers the case of an agent or a firm because it is not directed as a prohibition against a person but, as Wills, J., says, it imposes a positive prohibition against the sale of adulterated articles. This was the point upon which we had doubt when we issued the Rule owing to the wording of the law both in England

(1) 17 Cox C. C. 509 (Q. B. D.); 61 L. J. (M. C.) 110 (1892).

THE

Calcutta Weekly Notes.

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Contents.

NOTES.

MR. C. P. BEACHCROFT, I. C. S., DISTRICT JUDGE, and the Hon'ble Mr. E. P. Chapman, I. C. S, the Legal Remembrancer of Bengal, have been appointed to officiate as Judges of the Calcutta High Court during the absence on leave of the Hon'ble Mr. Justice Caspersz and the Hon'ble Justice Sir Richard Harington.

WE PUBLISH IN ANOTHER COLUMN A LETTER from a retired Subordinate Judge regarding the improvement of the prospects of the Provincial Judicial Service. He urges the claims of men of recognised merit in the service to seats on the High Court Bench. He quotes the famous dictum of Lord Selborne in the House of Lords that the judgments of this able body of judicial officers do not suffer in any way in comparison with the judgments of the English Judges in India. He also gives expression to the grievance of this deserving body of public servants that while in the other Presidencies the members of the Provincial Service have been given opportunities to distinguish themselves on the High Court Benches, in Bengal their claims have been persistently ignored. It may also be added that now that members of the Provincial Service are being appointed District Judges, it would not be at all difficult occasionally to make a selection from amongst them for the High Court Bench.

BUT IT HAS TO BE CONSIDERED THAT BY THE time a member of the service becomes a District Judge or reaches the highest grade in the Provincial Service, he becomes practically superannuated. Further, if promotion is given by merit and not by seniority, the chances under the existing system are that those officers who are good at showing a larger number of disposals and have little regard for justice, will stand the better chance of preferment. It would be very undesirable to have such men in the High Court. If however recruitment of Subordinate and District Judges is made from the profession as recommended by the Public Service Commission, we may have promising men in these positions in the prime of life, and then selections for High Court Judgeships from amongst them would be quite desirable. We would then be prepared to concede that the presence on the High Court Bench of a Judge, who would combine in him professional as the also judicial experience of a Subordinate and District Judge, would be of considerable assistance in the judicial administration of the Province. He would be in a better position to advise his colleagues than any barrister or civilian judge regarding the wants and shortcomings of the Provincial Service and make suggestions for various improvements both with regard to the service and the more efficient discharge of duties by its members.

THE LENGTHS TO WHICH ERRORS MAY GO IF Judges forget their duty mainly to administer the law as it is and are obsessed too much by patriarchal notions of administration are well illustrated by the facts of the two cases, *Sahodra Koer* v. *Ramadin Choudhuri* and *Sahodra Koer* v. *Dhajadhari Gossain*, reported at pp. 444 and 447, respectively, of our last issue. The dispute in the case arose out of a quarrel over the guardianship of a minor girl who, though she had no present property, was

the heir presumptive to property in the hands of her three step-mothers. The maternal grandfather of the girl, at the instigation of a scheming man whose servant he was, applied to be appointed the guardian of the girl. As she had no property the District Judge would very probably have refused to interfere in the matter, or if he did interfere, he would have contented himself with making some reasonable orders with reference strictly to the guardianship. But it was represented to him that the life of the girl was in danger and as the step-mothers were in the hands of two unscrupulous men, whoever they were, there was serious risk of loss to the poor girl.

WE CAN WELL IMAGINE THE RIGHTEOUS INDIGNAtion of the learned Judge at all this and his impatience at the limitations which the scope of the case before him laid on the exercise of his beneficent powers for the aid of the poor girl. He made use of the strong attachment of the step-mothers for the girl to secure from them an agreement to lease the property in their hands to Ramadin Choudhury the man who had set the law in motion against them with a view ultimately to secure the property by getting the girl to marry his son. The widows were not even then allowed to have the girl, whom they loved as their child, left to them without further trouble. They were made to apply for the appointment of themselves as guardians of the person of the girl, evidently for no other purpose than that the Court might limit their powers as guardian by ordering that they might not marry their step daughter without the consent of her maternal grandfather who was a tool in the hands of Ramadin.

THE LEARNED JUDGE HAD NOW THE SATISFACTION of seeing the girl and her property secure,—under the thumb of Ramadin Choudhury. But he had no sooner turned his back on the District than the ladies succeeded in baulking the expectations of all persons concerned by marrying the girl to a person who was not Ramadin's son. Proceedings were forthwith taken against the ladies under various sections of the Guardians and Wards Act which were never meant to be applied to a case like this. And these ladies were not only fined but were also ordered to be imprisoned.

THERE CANNOT BE A BETTER CASE FOR ILLUSTRAting the pitfalls of patriarchal administration of justice. Their Lordships Mookerjee and Carnduff, JJ., who had to deal with the extraordinary proceedings of the District Judge in the High Court, spoke with all the reserve that judicial decorum demanded when they observed, "The proceedings, from beginning to end, were a grievous misapplication of the provisions of the Statute." Their Lordships show in the course of their judgment how utterly foreign to the spirit and letter of the law the whole of the proceedings were. We need not doubt that the learned District Judge who passed the first set of orders acted with the best of motives. Nor need we say that he did not know the limitations that the law imposed on him in the work. But the overpowering sense of the impending injury and a too keen desire to play the part of a protector to an orphan girl led him astray from the path which he in his function as Judge was bound to follow. But this case is one of the many illustrations of how patriarchal ideas in the administration of justice, and more so in the exercise of executive functions, is often likely to make Judges and Magistrates merely tools in the hands of designing persons. The less sentimental and unimaginative course of administering the law as it is laid down in the Statutes is more often than not a surer way of doing good to the people than zealous beneficence.

THE LAW RELATING TO HOMESTEADS OF RAIYATS IN BENGAL.

The law relating to homesteads of raiyats in Bengal is contained in sec. 182 of the Bengal Tenancy Act, which lays down that "when a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be governed by local custom or usage, and subject to local custom or usage by the provisions of this Act (Bengal Tenancy Act) applicable to land held by a raiyat." From a perusal of this section it would seem to apply only to those homesteads of raiyats which they hold with other agricultural holdings under the same landlords. As the term "raiyat" is correlative with "landlord," sec. 182 would not seem to have any application to those homesteads which are held by the raiyats independently of their agricultural holdings and the landlords of which are different from the landlords of their other agricultural holdings. But from the recent decisions of the Calcutta High Court it would appear that the section applies to all homesteads held by raiyats. In *Kripa Nath* v. *Sheikh Anu*, 10 C. W. N. 944: s c. 4 C. L. J. 332, it has been held that in order to make the provisions of the Bengal Tenancy Act applicable to the homestead of a raiyat held by him otherwise than as a part of his holding it is not required by sec. 182 of the Act that the raiyat in occupation of the homestead should be a raiyat in the village in which the hometead land is situate, nor is it necessary for him to be a raiyat under the same landlord as the landlord of his homestead land. (See also *Protap* v. *Biseshwar*, 9 C. W. N. 416).

In the recent case of *Golam Moula* v. *Abdool*, 13 C. L. J. 255, it has been held that when a tenant is a settled raiyat of a village having a right of occupancy in some agricultural land in the village any hometead land which he holds in the same village otherwise than as a part of his holding as a raiyat must, in the absence of any local custom or usage to the contrary, be regarded as held by him in accordance with the provision of the Bengal Tenancy Act applicable to land held by a raiyat and he must be held to have a right of occupancy in the homestead land under sec. 21 of the Bengal Tenancy Act. In delivering judgment in this case Rampini, J., observed "It is quite clear that the Defendant is a raiyat not in respect of the land in dispute, but in respect of the agricultural land which he holds in the village; thus it is clear that the land in dispute is homestead land held otherwise than as part of the Defendant's holding as a raiyat; no allegation of local custom or usage is made by either of the parties; and, therefore, it follows that the land in suit must be regarded as held by the Defendant in accordance with the provisions of the Tenancy Act applicable to land held by a raiyat. Therefore even though the Defendant is not a raiyat in respect of his *bastoo* land in dispute between the parties, still under sec. 182, the provisions of this Act applicable to land held by a raiyat are applicable to this particular piece of land in suit; in other words he has under sec. 21 a right of occupancy in this piece of *bastoo* land as well as in the agricultural land in the village of which he is a settled-raiyat."

From the above observations it is quite clear that all the provisions of the Bengal Tenancy Act applicable to land held by a raiyat are also applicable to homesteads of raiyats in Bengal provided they are not overridden by local custom or usage.

Correspondence.

[TO THE EDITOR OF THE "CALCUTTA WEEKLY NOTES."]

SIR,—I thank you from the bottom of my heart for your championing the cause of the voiceless and friendless Provincial Judiciary. The High Court has power to remove some of the grievances of the service without reference to Government. But the District Judges of the Indian Civil Service who do not as a rule try original civil suits and have no occasion to know what sort of work the Munsifs and Subordinate Judges are called upon to perform, practically rule the destinies of the Provincial Judicial Service. Undue importance is given to figures, so that those who have a knack of shirking work pass for meritorious officers. Vacations and holidays are selected for transfers, so that Munsifs and Subordinate Judges are deprived of the "joining time" to which they are entitled under the Civil Service Regulations. In making transfers from one station to another, the merits of an officer are hardly taken into account. These and other grievances, the High Court may very well redress if they like.

It is high time that there should be a representative of the Provincial Judiciary on the Bench of the High Court. As early as the year 1861, they were found qualified for appointments on the High Court Bench. The Public Service Commission after an exhaustive inquiry strongly recommended the recruitment of Judges on the Bench of the High Court from the judicial branch of the Provincial service and from Vakils. Effect has been given to their recommendation in Madras, Bombay and the North Western Provinces, but the pledge given fifty years ago remains till unredeemed in Bengal. Lord Selborne said, "I repeat that I have no hesitation in saying that in respect of integrity, of learning, of knowledge, of the soundness and the satisfactory character of the conclusions arrived at the native judgments were as a rule quite as good as those of local English Judges," Hansard's Parliamentary Debate, Vol. 277, pp. 1782 3.

Did not the late illustrious Mr. Justice Ranade come from the Provincial service? Were not Mr. Justice Banerjee of the Allahabad High Court, and Mr. Justice Sadasiva Iyer of Madras, members of the same service? In India, a Judge is a Judge of facts as well as of law. There is no jury trial in civil suits here. It is therefore of the utmost importance that there should be Judges of fact of undoubted merit on the Bench of the High Court. In the interest of the country the Provincial Judiciary should be made as strong and effecient as possible, but can this object be secured unless the best talents are attracted to it? With a member of their own service on the High Court Bench, the Provincial Judiciary would have a vigilant friend to safeguard their interests, and to advise the authorities on the right line to adopt for improving their prospects and removing their various grievances.

Yours truly,
A Retired Sub-Judge.

13th March 1912.

Review.

THE TRIAL OF LORD LOVAT. Notable English Trials Series. *By David N. Mackay, Calcutta. Butterworth & Co., (India) Limited. Price Rs. 8-4.*

This volume of the Notable English Trials series deals with the trial of Lord Lovat, that fascinating and romantic Highland adventurer who elbowed his way through life by courage as well as by cunning in the troublesome days of Jacobite

invasion of England. The story brought out in the course of the narration is an interesting episode in the history of Great Britain in those unsettled though romantic time. To the student of the history of law and legal procedure it is of interest as displaying methods of trial and rules of procedure and evidence which have now long become obsolete. Lord Lovat was impeached by the House of Commons at the bar of the House of Lords. The Managers were distinguished men among whom were Lord Coke, Sir William Younge, Sir Dudley Ryder, the Attorney-General, and Murray, who was to be the famous Lord Mansfield. Lord Hardwicke, one of the greatest names in the history of English law, was the Lord High Steward. A trial in which these men participated is bound to be of surpassing interest to the student of law and he will not be disappointed on a perusal of the story as told in this volume.

Among the peculiarities of procedure that strikes one in the story is the fact that though in these impeachments the prisoner was assigned counsel and solicitors to assist him in all matters of law, they had not the liberty to assist in matters of fact or examine or cross-examine witnesses. This privilege was not given to Lord Lovat's counsel though he pleaded his infirmity and inability to cross-examine. Sir William Younge who was one of the Managers was so much impressed with the hardship of this rule, that shortly after the trial, he got the House of Commons to grant impeached persons the liberty to have full use of counsel. In noting this fact the editor quotes the just remark of Horace Walpole, "Thank God, we are a better-natured age than that of William III and have relinquished a savage privilege with a good grace."

Lord Lovat tried to take advantage of a salutary provision of a Statute of those times providing that no person should be capable of giving evidence in the Jacobite cases "against any person by whose attainder, conviction or forfeiture any benefit shall or may accrue to such witness or witnesses." His attempt introduces us to a handicap provided by artificial rules of evidence against the efficient use of this and similar defences. A witness who was objected to on this ground was not sworn in chief but was examined upon a *voire dire*, a special form of oath. Even after a witness had been sworn in chief, he might be examined on the point as to whether he had any interest in the conviction. But the result of the examination of the witness himself on that point was to shut out all evidence to prove that in fact the witness had such interest though he denied it on a *voire dire*. Such evidence could no doubt be given in the course of the defence in any case to shake the credit of the witness but it could not be used to exclude the evidence altogether under the Statute.

The whole volume is brimful of similar points of interest and will surely repay perusal to the student of law. The editor has enriched the volume with a succinct historical introduction giving the life history of Simon Lord Lovat and copious historical, legal and biographical notes. The volume is on the whole well worthy of its predecessors and we are sure that the legal as well as the lay public will watch the whole series with interest.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL.—*Rex* v. *Alexander*. Before JUSTICES BRAY, HAMILTON AND LUSH. 23rd January 1912.

Plea of "Guilty" set aside and conviction quashed—Plea made under misdirection of law.

This was an appeal from a conviction and sentence for abduction. The story for the prosecution was that the girl who had been sent to a home left the home with the object of returning to her parents' home. On her way she called on the Appellant and told him that she was afraid of going to her parents. The Appellant thereupon kept her with him for several days. At the trial the prisoner pleaded guilty, but on the present appeal it was contended on his behalf that the plea was made because of the trying Magistrate's misdirection on a point of law. The following was the statement of the law which he relied upon as being a misdirection. Mr. Commissioner Rentoul, addressing the prisoner after the girl had given evidence, said, "She has given quite sufficient evidence to prove the case against you. She is quite friendly disposed to you. There is no doubt about that at all; but at the same time, what she has told, and truthfully told, means your having taken the girl out of the custody of her parents."

The prisoner.—"She distinctly told me, 'I do not want to go home.'"

Mr. Commissioner Rentoul.—"That does not matter. You might have handed her over to the parents. That is a different matter altogether. It is your keeping her secretly—preventing them from knowing. If you had put her in the best hotel in London and had not called on her yourself it would not have mattered."

The Court quashed the conviction. In the course of his judgment MR. JUSTICE BRAY said—

In the opinion of the Court there had been a miscarriage of justice within the meaning of sec. 4 of the Criminal Appeal Act. The first question which they had to ask themselves was, would the jury upon the evidence as it stood have been likely to convict the prisoner? In the opinion of the Court the jury would not have been likely to do so. Therefore, apart from the

prisoner's plea of "Guilty," *primâ facie* there had been a miscarriage of justice.

They must also ask themselves the further question, "Did the prisoner in fact really plead guilty to have taken this girl out of the possession of her parents?" In their opinion he did not, because the Commissioner did not direct him properly on the question of law. There had been a good deal said by him, the general effect of which seemed to be that he would have to tell the jury that what the prisoner was setting up was no defence to the charge, and that upon the evidence before them the jury would have to find him guilty. He did not think that that was taking an unfair view of what was said. But the last observations made by the Commissioner were clearly wrong.

The plea of the prisoner amounted to an admission that he had merely kept the girl with him and had prevented her parents from knowing where she was. He did not plead guilty to the offence of taking her out of the possession of her parents.

Mr. Attenborough for the Appellant.

Mr. Humphreys for the Crown.

B. D. *Conviction quashed.*

COURT OF APPEAL.—*Monkton* v. *The Gramophone Company, Ld.* Before the MASTER OF THE ROLLS AND LORDS JUSTICES MOULTON AND BUCKLEY. 24th January 1912.

Copyright of a musical composition—Statutory rights; rights at Common Law not protected after publication.

This was an appeal from decision of Joyce, J. The Plaintiff-Appellant was the author of the words and music of a composition. On each copy of the publication of the composition was the following notice:—"Public performance of all or any part of the work strictly forbidden. . . . The right of public performance upon or by means of any mechanical instrument is strictly reserved."

He sued the Defendants who were manufacturers and sellers of gramophones for a declaration that he was exclusively entitled to make or authorize the making of gramophone records of the musical composition. It was contended on behalf of the Plaintiff that he possessed the common law right to prevent any one using his work to his detriment, and that publication of the composition did not interfere with his rights. The Court affirmed the decision of the Court below and in the course of his judgment dismissing the appeal the Master of the Rolls said:—

It was not a case of the rights of the Plaintiff before publication. That was the vital distinction. Then let them consider what the proposition was. It followed from it, as was frankly admitted by Mr. Shearman, that at the end of the statutory term of protection any member of the public might give a performance of the play in which the song was introduced, but that the song could not be sung in private. That seemed extravagant and absurd. But had the law ever recognized any property in an idea expressed not in language but in some form of notation after it had once been made public? The judgments of Lord Camden in *Donalson* v. *Beckett* (4 Burr., 2,408) and of Lord Brougham in *Jefferys* v. *Boosey* (4 H. of L. Cas., 815) seemed to make it unanswerable that the right which the Plaintiff was seeking to assert was one which at common law, with which alone the Court had to do, did not exist. The case seemed so clearly covered by authority that it would not be open to the Court to take any other view.

Reference had been made to *Millar* v. *Taylor* (4 Burr., 2,395), the decision in which was to some extent in favour of the Plaintiff's contention, but that case had been overruled by *Donaldson* v. *Beckett* (*supra*). Then had followed the cases of *Jefferys* v. *Boosey* (*supra*) and of *Caird* v. *Sime* (12 A. C., 326) in the House of Lords. Then there was the decision of the Court of Appeal in *Mansell* v. *Valley Printing Company* (1908, 2 Ch., 441). He would not read his own judgment in that case, but Lord Justice Farwell said at p. 447, "All his (the author's) rights at common law are limited until and cease upon publication."

Messrs. Shearmam, K. C., and *Weatherly* for the Appellant.

Messrs Danckwerts, K. C., and *Macglivray* for the Respondent.

B. D. *Appeal dismissed.*

CHANCERY DIVISION.—*In re Paine.* Before MR. JUSTICE WARRINGTON. 23rd January 1912.

Solicitor's professional charges for friendly talks.

This case raised a peculiar question between a solicitor and his client. The solicitor and his client were friendly neighbours, and the solicitor was employed by the client for certain business. Being friends they used to visit one another and to smoke and to talk over various matters. On some of these visits the client mentioned that he wished to purchase some land and to make some investments. The Solicitor arranged for the land from another client of his, and also advised him about the investments. For these services the solicitor made a charge which was allowed by the taxing master.

MR. JUSTICE WARRINGTON set it aside. He said that on all questions as to the retainer of a solicitor he was guided by the words of Vice-Chancellor Turner in *Crossley* v. *Crowther* (9 Hare, 384), who laid down that where there was a conflict as to the authority between the solicitor and client, without further evidence, weight must be given to the affidavit against, rather than to the affidavit of the solicitor.

As regarded the purchase of land, for all the client knew to the contrary, the work was being done by the solicitor in a friendly way, knowing that he had a client with land for sale and that the other client was minded to buy some land. This client positively denied that he gave any instructions to the solicitor to do business as such in regard to the matter, and the Court could not draw any inference of retainer. As to the investments, advising about investments and making them for clients was not solicitors' business; though where a solicitor was retained to act generally for a client, he might properly give advice as to investments and charge for it. But here the solicitor merely did certain specified pieces of business; and the positive denials of the client that he gave the solicitor a retainer must be accepted.

Mr. Tomlin for the Appellant.

Mr. Neilson for the Respondent.

B. D.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD ROBSON.
1912,
21st February.

LALA RAMANUJ DYAL (since deceased and now represented by) LALA MAHABIR PRASAD and ors., Plaintiffs, Appellants, Petitioners,
v.
MUSSAMMAT TAJ BEGUM and ors., Defendants, Respondents.

Appealable case—Leave to appeal to Privy Council refused by High Court because vakil did not appear with fresh vakalatnama*—Special leave given.*

This was a petition for special leave to appeal to His Majesty in Council under the following circumstances:—

The Petitioners' father, Lala Ramanuj Dyal (since deceased), instituted the present Suit No. 174 of 1908 in the Court of the Subordinate Judge of Meerut for recovery of a debt due on a mortgage bond, dated the 3rd June 1895. The principal Defendant to the said suit was the said Respondent, Mussammat Taj Begum. The Plaintiff prayed for payment of Rs. 36,000 with costs and interest *pendente lite* and for a decree for sale of the mortgaged property in default of payment.

Mussammat Taj Begum alone defended the suit and the remaining Defendants three of whom were transferees from her did not appear.

After considering evidence produced by the parties the Additional Judge of Meerut who tried the suit delivered judgment on the 12th January 1909. He allowed the Plaintiffs' claim to the extent of Rs. 22,995 odd against the principal Defendant and passed a decree accordingly.

Both parties appealed against the said decree to the High Court of Judicature for the North Western Provinces at Allahabad. The High Court delivered judgment on the 2nd December 1910 and allowed the principal Defendant's appeal, dismissing that of the Plaintiff. In the result the High Court made a decree dismissing the whole suit with costs.

Babu Girdhari Lal Agarwala, a vakil on the Rolls of the said High Court, prosecuted the said appeals on behalf of the Plaintiff under a *vakalatnama* (power-of-attorney) executed by the Plaintiff.

Dissatisfied with the said decree of the High Court the Plaintiff, Ramanuj Dyal (since deceased), desired to appeal against it to His Majesty in Council. He therefore presented a petition to the High Court under the provisions of Or. 45, r. 2 of the Code of Civil Procedure (Act V of 1908) through the said vakil, Babu Girdhari Lal Agarwala. He prayed for a certificate that the case fulfilled the requirements of sec. 110 of the said Code of Civil Procedure, that is, that the value of the subject-matter of the suit in the Court of the first instance and of the subject-matter in dispute on appeal to His Majesty in Council was over Rs. 10,000.

The High Court (RICHARDS, C. J., and TUDBALL, J.) rejected the said petition by an order, dated the 30th June 1911, in terms following:—"Upon reading the office report and considering the terms of the *vakalatnama* of Mr. G. L. Agarwala on the present record we are of opinion that he had no authority to make the application. For very many years it has been the practice to file fresh *vakalatnama* giving authority to present such applications as these: and we think that they ought not to be made without the authority of the client evidenced by a clear *vakalatnama*. This application is accordingly rejected."

Hence this petition.

Mr. Bhugwandin Dubé for the Petitioners submitted that the Court below was wrong in refusing to grant the certificate. Mr. Girdharilal Agarwala was competent to make the application he did. The point was expressly decided as far back as 1867 in *Shah Mukhun Lal* v. *Sreekishen Singh*, 8 Suth W. R. 92. Sec. 18 of Act VIII of 1859 was substantially the same as Or. 3, r. 4. No fresh *vakalatnama* was necessary. In any case Petitioners were entitled as of right to appeal to His Majesty in Council.

Their Lordships granted special leave.

Solicitors: *Barrow, Rogers and Nevill* for the Petitioners.

B. D. *Leave granted.*

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD ROBSON.
1912,
21st February.

SAYAD HASIM valad SAYAD AHMAD, Appellant,
v.
SAYAD ALAMSAHEB valad MIAH SAHEB SAYADAR, Respondent.

Special leave to appeal—Question relating to right of worship amongst Sunni Mahomedans.

This was a petition for special leave to appeal made under the following circumstances:—

The Petitioner claimed to be the hereditary Kazi and Khatib of Gadag a town in the Presidency of Bombay and as such Khatib the sole right to conduct certain religious services including the preaching of a Khutba or sermon at the Idga or public praying place in Gadag at the two great Mahomedan Ids or festivals falling in the months of Ramzan and Jilhoja of every year.

After the holding of such services it is customary for members of the congregation to make money offerings to the Khatib at a neighbouring place.

On or about the 15th of December 1902, the Petitioner filed a suit in the Court of the Subordinate Judge of Gadag against the Respondent charging in effect that the Respondent had on the 4th of March 1902, being the occasion of one of the said festivals, held and conducted a Khutba service in Gadag at a place which was contiguous to the said Idga and had thus invaded the exclusive right of the Plaintiff to hold such service and deprived him of offerings which he would otherwise have received and praying for an injunction against the Respondent and Rs. 20 as damages.

The Petitioner's suit having been dismissed by the said Subordinate Judge he appealed to the District Court of Dharwar.

The following amongst other issues were raised in the said appeal *viz.*:

Is the Plaintiff the Khatib of Gadag?

If so. Has he as Khatib the sole right to read the Khutba at the Idga on the occasion specified in the plaint?

If so, has the Defendant infringed that right?

The District Judge found all the said issues in the affirmative and granted the Petitioner an injunction restraining the Respondent from conducting the Id service publicly on either of the two said festivals at any place within the revenue limits of the village of Gadag and also awarded the Petitioner the damages claimed and costs.

The Respondent filed a second appeal in the High Court of Bombay which was heard by Mr. Justice Chandravarkar and Mr. Justice Heaton who by their decree, dated the 19th of August 1909, in effect set aside the decree of the District Court granting the Petitioner in lieu thereof an injunction only restraining the Respondent from reading the Khutba at any time at the Idga on the said two festivals in opposition to the Petitioner's right and ordering each party to pay their own costs throughout.

The reasons given by the learned Judges in their judgment for setting aside the decree of the District Court were as follows.

"The District Judge has gone in his decree further than he was warranted by the jurisdiction given to a Court by law in such cases, the decree which he has passed entitled the plaintiff to prevent the Defendant from reading the Khutba or holding religious services at any other place besides the Idga within the limits of Gadag. Such a decree has the effect of giving the Plaintiff a monopoly of the right in question in the town of Gadag and depriving other Mahomedans thereof of the liberty to read the Khutba and preach. So large a right given to the Plaintiff interferes with the freedom of religious worship of the class of His Majesty subjects in Gadag affected by it, besides that it is supported by no evidence. It is urged that the Plaintiff's sanad gives it, but that sanad is not binding upon others and the right in question is not in the nature of a franchise. Such a decree as the District Judge has given would virtually compel the members of the Mahomedan community to confine themselves to the religious services of the Plaintiff. That would be interference on the part of the Court with the righ s of each subject of His Majesty to perform his worship and attend religious services at any place and at any time he likes."

On the 27th of September 1910, the Petitioner applied for a review of the said judgment which was granted on the ground (as stated in the judgment of the Court) that it was doubtful whether the injunction granted would prevent precisely the same kind of infringement of the Petitioner's right as that which had given occasion to the suit.

On the 28th of July 1910 upon rehearing the said appeal on this point the High Court in effect confirmed its previous decree only inserting therein after the word "Idga" the words "which is the public place referred in the suit." Permission to pppeal against the said decree of the High Court having been refused the present petition was filed.

Mr. G. R. Lowndes (with him *Dr. A. Majid*) for the Petitioner submitted that the appeal raised a question of great importance to Sunni Mahomedans. The High Court did not give full force to the rights of the Khatib.

Their Lordships granted special leave.

Solicitors: *Edward Dalgado* for the Petitioner.

B. D. *Special leave granted.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. REVISION No. 230 OF 1912. JHARU SHEIKH, Petitioner *v.* NAGUDDI SHEIKH, Opposite Party. 8th March 1912.

Charge in a summary trial must be definite—Misjoinder.

This Rule was for setting aside a conviction on the ground that the Magistrate did not amend the charge under secs. 457 and 380, I. P. C., before convicting the Petitioner under sec. 456, I. P. C.

Their Lordships observed :—

" We think that there can be no doubt on the authorities that the charge under sec. 456 of entering the house with an object not specified but which is presumed to be criminal cannot be sustained when the person is being tried for the specific charge of theft in a dwelling-house and house-breaking with intent to commit theft. It is obvious he must be seriously prejudiced by not knowing what really is the charge against him. Although it is not necessary under sec. 456 to specify any particular offence, when such particular offence is specified under sec. 457, it is incompetent in our opinion to convict of house-breaking with some other intent. * * * * We would remark with reference to the explanation of the learned Magistrate that he is wholly in error in supposing that because the case is tried summarily that a charge under the Penal Code is not necessary. No formal charge need be drawn up but the accused must be called upon to answer to the particulars of the offence charged, whether the proceeding be summary or otherwise. . . . . The same rules of law as apply to charges in warrant cases must apply to the particulars set out in sec. 263 in a summary record.

Mr. Donogh and *Babu Jyotish Chandra Hazra* for the Petitioner.

B. C. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before STEPHEN and CHATTERJEE, JJ. APPEALS FROM APPELLATE DECREES Nos. 448 AND 546 OF 1909. BILAS CHANDRA MOOKHOPADHYA *v.* AKSHOY KUMAR DAS SARKAR AND OTHERS. Heard, 7th March 1912. Judgment, 11th March 1912.

Limitation Act (XV of 1877), Sch. II, Art. 144—Adverse possession—Sale of share of estate—Revenue Sale Law (Act XI of 1859), sec. 54.

Taluk Hari Narain was originally one property. It was subsequently divided into three separate taluks, Taluka Hari Narain Touji No. 75, Taluka Gauripriya, Touji No. 76, Taluka Rampria, Touji No. 77. These three taluks lay to the east, north and west of a Government *khas* mehal named Uddamdi No. 37. There was a river named Gaontia between the *khas* mehal and those taluks. The river shifted northwards and cut away the lands of the three taluks and as the river receded these diluviated lands reformed and the present suit was in respect of lands reformed *in situ* of the three taluks 75, 76 and 77.

The Government *khas* mehal No. 37 was from time to time settled temporarily with the proprietors of the three taluks until 1885 when it was sold for arrears of revenue and purchased by one Bango Chandra as the *benamdar* of the contesting Defendants who in return for his services gave him an one anna share in the purchase. The possession of the contesting Defendants became adverse to the owners of taluks 75, 76 and 77 in respect of the disputed lands which they claimed as parts of their newly purchased mehal, *khas* mehal No. 37, from the year 1885. The residuary share of Taluk Hari Narain No. 75 was sold for arrears of revenue in 1892 and purchased by the predecessor in title of the Plaintiffs who subsequently purchased the entire taluks Gauripriya and Rampria in 1894.

The present suit was brought just within 12 years of the purchase of the residuary share of Taluka Hari Narain by the predecessor in title of the Plaintiffs and the main question in the appeal was whether the suit so far as that taluk was concerned was barred by limitation. The sale (revenue) was under sec. 54 of Act XI of of 1859.

Held, that the purchaser of a share purchased the *share* and not the right, title and interest of the defaulter.

The purchaser under sec. 54 was not a person claiming from or through the defaulter. Subject to the restrictions imposed by the Statute, each of them purchased the property sold by the Collector and claimed under a permanent title not derived from the defaulter but obtained adversely to him. In a suit for possession by him, when he was not in possession after his purchase, the Defendant must show that his possession was adverse to him for more than 12 years.

Mr. B. Chuckerbutty and *Babus Hem Chandra Sen* and *Ambica Charan Das* for the Appellants.

Dr. Rash Behari Ghose and *Babus Girija Prosanna Rai Chowdhury* and *Biraj Mohun Mozumdar* for the Respondent.

A. T. M. *Appeal No. 448 allowed.*
Appeal No. 546 dismissed.

SEW KARAN *v.* THE CORPORATION OF CALCUTTA.

and in India, the section saying "no person shall sell," but it appears to be settled law that the prohibition is positive as we have seen against the sale of adulterated articles, and any person who is legally responsible for such a sale comes within the section.

But it has been argued that this Sew Karan is only a commission agent for certain producers of ghee up-country, that he collects ghee and other things from them; and as they sell in Calcutta at certain shops which go in the name of Lal Chand Sew Karan the Health Officer appears to have taken proceeding against Lal Chand Sew Karan, and we see that the license for wholesale dealers in ghee at No. 2, Ram Kumar Rakhit's Lane and for selling ghee at No. 9, Ram Kumar Rakhit's Lane is Lal Chand Sew Karan. The Magistrate however treated the case as if Lal Chand was the servant of Sew Karan, and the finding on the evidence is that Lal Chand was the hand that actually sold the ghee to the Inspector. On the view we take of the law, if Lal Chand and Sew Karan are partners, they are both responsible for everything which is sold in their name at shops bearing both their names; and if they are master and servant it is clear on the English authorities that the master is liable for the act of his servant.

We do not think it necessary to go further into the question of what their precise relations are. It is sufficient to say that Lal Chand did not appear in the lower Court and that the conviction in both the cases has been held against Sew Karan.

There are two matters in the Act itself which convince us that the Legislature intended that the beneficial owner of the article should be responsible for its purity. For when the Health Officer goes to make enquiries about food exposed for sale there is the provision in sec. 507 that he can compel the seller to give him enough as is reasonably requisite for analysis and that this quantity shall be divided into three parts to be then and there separated and the Chairman forthwith will notify to the seller or his agent selling the article his intention to have the same analysed. Now it is clear that in this passage the word "seller" means the owner of the shop or the person who has license to sell goods or who carries on business through his servant or agent and he is contrasted with the agent actually selling the article. This is one point which convinces us of the intention of the Legislature. Then we turn to the condition of punishment under sec. 574. We find that the fine which may be imposed is Rs. 100 for the first offence and Rs. 500 for any subsequent offences. Now it is perfectly clear that this must have reference to the master and not to the servant, because it would not be always the same servant who would be in the shop selling the article and by changing his servant every week a dishonest proprietor could continue to sell adulterated goods without incurring any further penalty.

We, therefore, think taking the view that the Magistrate took, that Lal Chand was the seller or agent and Sew Karan, the owner or principal, that the convictions are right; or taking the view which has been urged upon us by the learned Counsel for the defence who obtained the Rule that they were partners the convictions will be equally right.

The Rules are therefore discharged.

H. G. *Rules discharged.*

[PRIVY COUNCIL.]

[APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1911,
Heard, 14, 15 and 16, November.
Judgment, 14, December.

MUHAMMAD UMAR KHAN, since deceased (now represented by MUHAMMAD FAKHAR DIN KHAN) & anr., Appellants,
v.
MUHAMMAD NIAZ-UD-DIN KHAN, Respondent.

Limitation Act (XV of 1877), Sch. II, Art. 118—Suit by reversioner to recover possession on death of female owner from person alleged to have been adopted by her—Mahomedan law, adoption if permitted by—Family custom against alienation by female who has got property by gift from sonless father—What evidence relevant.

Omission to bring within the period prescribed by Art. 118 of Sch. II of the Limitation Act (of 1877), a suit to obtain a declaration that an alleged adoption was invalid or never in fact took place, is no bar to a suit by the reversioner for recovery of possession upon the death of the female limited owner.

THAKUR TRIBHUWAN BAHADUR SINGH v. RAJA RAMESHAR BAKHSH SINGH (1) ***followed.***

Under the general Mahomedan Law an adoption cannot be made, and if made will not carry with it any right of inheritance.

Held, ***on the evidence, that the alleged family custom,*** **viz.,** ***that a female could take only a life interest in property which had come to her by gift from her sonless father and had no power to alienate it by a gift in her life-time was not only not proved but disproved in this case.***

Evidence of a custom limiting the right of a widow in her deceased husband's property was not evidence from which the custom alleged could be inferred. Nor was evidence that a Muhammedan father had been prevented by some local custom from giving the bulk of his property to one of his sons, evidence which had any bearing on the issue as to the existence of the alleged custom.

(1) L. R. 33 I. A. 156: s. c. 10 C. W. N. 1065 (1906).

This was an appeal from the judgment and decree of the Chief Court of the Punjab, dated the 18th April 1906, reversing the judgment and decree of the District Judge, Jullundur, dated the 13th January 1902, decreeing Plaintiffs' claim.

The Plaintiffs claimed possession of the property in suit on the ground that they were the reversionary heirs of Mussammat Zainab who died in May 1899. The Defendant pleaded that Mussammat Zainab was absolute owner; that she and her husband adopted him and made a gift of the property to him and put him in possession in 1888; that mutation was effected in Defendant's favour with the full knowledge of the Plaintiffs; and that subsequently, in 1895, the Plaintiffs partitioned some of the land with him and treated him as owner.

The parties were Sheikh Ansaris. The property was originally owned by Muhammad Ali Sher. On his death his estate was divided equally between his three sons Muhammad Sarwar Khan, Alamgir Khan and Jahangir Khan. Jahangir had a daughter, Mussammat Maryam, who was married to Alamgir's youngest son, Sarfraz, and to her Jahangir gifted by deed in 1832 the whole of his property in lieu of the dower of her mother. Mussammat Maryam during her life-time made a gift of this property to her husband Sarfraz.

After the death of Mussammat Maryam, Jahangir's brother's sons, Bahadur Khan, Muhammad Said and Saraj-ud-din (father

of the Plaintiffs), sought to recover the property from Sarfraz. Sarfraz thereupon instituted proceedings and on the 16th May 1849 obtained a judgment in his favour. Only one of the Defendants Bahadur Khan appealed. His appeal was dismissed on the 3rd August 1849.

Subsequently, *viz.*, in 1851, Sarfraz executed a deed of gift whereby he conveyed the whole of his own property inherited from his father Alamgir together with the property received from his wife, to his daughter Mussammat Zainab (who was married to his sister's son, Baghe Khan) in lieu of her mother's dower. Mussammat Zainab took possession as absolute owner.

On the death of Sarfraz in or about 1853, Saraj-ud-din, father of the Plaintiffs, brought a suit for possession on the ground that as Sarfraz had died sonless the property passed to his collaterals. The Court on the 25th June 1859 dismissed the claim. On appeal the judgment of the first Court was affirmed. The collaterals made a further appeal to the Commissioner who by his judgment, dated the 25th February 1860, dismissed the appeal and affirmed the judgments of the Courts below.

On the 3rd May 1888 Baghe Khan and Zainab by deed, gifted the whole of the property in suit along with certain other property to the Defendant. This deed was duly registered and the Defendant was placed in possession and mutation was effected.

Mussammat Zainab died on the 4th May 1899. The present suit was filed on the 11th May 1900, the Plaintiffs claiming possession of the property on the following grounds: The property being ancestral Mussammat Zainab had only a life interest and that on her death it devolved on the Plaintiffs, the reversionary heirs; that the Defendant had unlawfully taken possession of the property on Mussammat Zainab's death and had his name wrongly entered in the official papers as her adopted son; that Mussammat Zainab did not effect any settlement in favour of the Defendant, nor did she ever adopt him, nor was she competent either in law or by custom to transfer the property in suit or to make an adoption and that such transfer is null and void as against Plaintiffs, the reversionary heirs. The Defendant denied the alleged custom and relied on the said deed of gift.

On the pleadings the District Judge framed the following issues :—

(1) Whether Sarfraz Khan made the gift in favour of Mussammat Zainab in lieu of her mother's dower, or in consequence of her being his daughter?

(2) Whether by law or custom Mussammat Zainab had, under the gift in question, become an absolute owner so as to have a right of alienation of property, or whether she, in case of her being childless, had only a life interest in the said property, and whether it was to revert to her reversioners on her death?

(3) Whether Mussammat Zainab adopted the Defendant, and whether she was competent to do so?

(4) Whether the settlement of the property in dispute effected by Mussammat Zainab in favour of the Defendant was lawful?

(5) Whether the Plaintiffs are entitled to the property in dispute? If so, what improvements has the Defendant made by building and repairing houses and by planting trees and a garden, and whether he is entitled to compensation therefor?

(6) Whether the present suit is within time or not, having regard to denial of adoption and the fact of possession?

MUHAMMAD UMAR KHAN *v.* MUHAMMAD NIAZ-UD-DIN KHAN.

After recording evidence both oral and documentary the District Judge delivered judgment on the 13th January 1902. He found that whether the property came to Mussammat Zainab by way of payment of a dower or not the gift was merely for her life; that the property not being self-acquired was ancestral in her hands and that having no customary or other power of alienation her gift to the Defendant was void. He also found that the adoption of the Defendant became known to the Plaintiffs in 1888 but inasmuch as the adoption of the Defendant as heir to the ancestral property of Musammat Zainab was "inherently invalid and *ipso facto* void," Art. 118 of the Second Schedule of the Limitation Act was inapplicable, and the suit was therefor within time.

The Plaintiffs were accordingly granted a decree for possession with costs.

Against the said judgment and decree of the District Judge the Defendant appealed to the Chief Court of the Punjab. The appeal was heard before a Division Bench of the said Court (Johnstone and Rattigan, JJ.) and judgment delivered on the 18th April 1906. In their judgment the learned Judges find that by their silence after their objections in the mutation proceedings of 1888 and their actions in regard to the partitions in 1895 and 1896 the Plaintiffs acquiesced in the Defendant's possession and were now estopped from denying the Defendant's title; that the factum of the adoption by Mussammat Zainab was proved and that it became known to the Plaintiffs at latest in 1888, that such adoption was not "inherently invalid" and that the suit was barred by Art. 118.

The Chief Court accordingly allowed the appeal and passed a decree dismissing the suit with costs. Hence this appeal.

Messrs. L. DeGruyther, K. C., and *Abdul Majid* for the Appellants.—The Chief Court is wrong in applying Art. 118, Sch. II, Limitation Act, 1877. Under the Limitation Act of 1871 a suit to set aside an adoption covered suits for possession and for declaration that an adoption was invalid. The Chief Court appears to have relied on authorities under that Act. But the subsequent Act of 1877 is in different terms. Suits covered by Arts. 118 and 119 are declaratory suits brought under sec. 42 of the Specific Relief Act. The present suit is a suit for possession and Art. 141, Sch. II, Act XV of 1877 applies. It is not obligatory to obtain a declaratory decree before suing for possession. The decision in *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (1) is conclusive. It distinguished the case of *Jagadamba Chowdhrani* v. *Dakhina Mohan* (2). Under Art. 91, Limitation Act, 1877, a reversioner has the option of bringing a suit to set aside a deed of alienation made by a Hindu widow or of instituting a suit for possession after her death. *Bijoy Gopal* v. *Krishna Mahishi Debi* (3). Similar considerations apply to the present suit.

As to estoppel by acquiescence it is a question of fact.

It was not raised in the written statement and was not put in issue nor was it discussed before the Court of first instance. The Chief Court erred in allowing the plea to be raised for the first time at the hearing of the appeal. Further the facts and evidence on the record do not establish any acquiescence on the Plaintiffs' part precluding them from

(1) L. R. 33 I. A. 156, 163: s. c. 10 C. W. N. 1065 (1906).
(2) L. R. 13 I. A. 84 (1886).
(3) L. R. 34 I. A. 87: s. c. 11 C. W. N. 424 (1907).

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maintaining their claim. The parties are not governed by the Mahomedan law. The evidence shows that the parties are ordinary agriculturists and are consequently governed by the customary law. The contention that the parties being Moslems Mahomedan law applies cannot be supported. Even the Defendant relies upon custom inasmuch as he bases his claim upon adoption which is repugnant to Mahomedan law. The previous litigation between the present *basti* and others shows that Mahomedan law has never been applied and customary law has been applied. The custom that in the family of the parties a female could take only a life-interest in the ancestral property given to her by her sonless father and that she had no power to alienate such property was proved by the evidence. Reference was made to *Hijju* v. *Nur Mahomed* (4), *Mahomed* v. *Jaffir Khan* (5), *Lehna* v. *Thakri* (6), [cf. *Changhatta* v. *Mohkam Din* (7) and *Gulam Bhikh* v. *Massania* (8)], *Miran Bakhsh* v. *Alla Ditta* (9), *Muhammad* v. *Umar Bibi* (10), *Hayat Muhamad* v. *Alla Bakhsh* (11); Rattigan's Customary Law (1909), pp. 14, 19, 26, 27, 34, 39, 40, 100 and 101; Pun. District Gazetteer (1904), Vol. XIV. A., p. 96.

Sir R. Finlay, *K. C.*, and *Mr. O'Gorman* for the Respondent.—There is no such thing as the territorial customary law of the Punjab. There are many tribes or races and the customary law is the customary law of those races. It is for the Plaintiffs to prove the custom. The Plaintiffs are not agriculturists and are not a tribe to which the customary law of the Punjab applies. The Sheikh Ansaris are not governed by the so-called Punjab Customary Law. If they have adopted certain peculiar customs in place of the strict Mahomedan law such rules must be proved. Plaintiffs have failed to prove that where a daughter receives by an absolute deed of gift her father's property she only takes a life estate. There is not a single instance of such custom applicable to the parties. The cases cited by the other side refer to other tribes such as Jats, etc. There is no adoption in the sense of Hindu law among the Mahomedans. By adoption in the present case is meant a nomination of an heir made to strengthen the deed of gift. Partitions effected in 1895 and 1896 showed conclusively that the Plaintiffs acquiesced in adoption and the rights of the Defendant and they were now estopped from questioning them. The greater portion of the property in suit belonged to Jahangir. He gifted it to his daughter Maryam by deed. She made oral gift in her life-time to her husband. The husband's suit in 1849 was decided in his favour. If the daughter's estate was only an estate for life as contended by the Plaintiffs the husband's possession was adverse and property in his hands was self-acquired and not ancestral. As to the evidentiary value of a *wajib-ul-urz* reference was made to Baden Powell's Land Systems of India (1892), Vol. 2, Bk. 3, Pt. IV, p. 566.

Mr. L. DeGruyther replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal from the decree of the Chief Court of the Punjab, dated the 18th of April 1906,

(4) 54 P. R. 1867, p. 118.
(5) 2 P. R. 1883.
(6) 32 P. R. 1895, F. B, p 154.
(7) 75 P. R. 1893.
(8) 22 P. R. 1893.
(9) 126 P. R. 1894, p. 482.
(10) 129 P. R. 1893, p. 501.
(11) 19 P. R. 1903.

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reversing the decree of the District Judge of Jullundur, dated the 13th of January 1902, which had decreed the Plaintiff's claim.

The Plaintiffs brought this suit on the 11th of May 1900 to obtain possession of certain immoveable property, lands and houses, in Basti Danishmandan, in the Punjab, which they claimed as their ancestral property. In their plaint they alleged that the property in question had been held for her life by Mussammat Zainab, by virtue of a gift made to her by her father Sarfraz Khan, an uncle of the Plaintiffs, and that on her death on the 4th of May 1899 the right of inheritance in the property devolved upon them as reversionary heirs. They also alleged in their plaint that Mussammat Zainab had not, in fact, transferred the property to the Defendant, and that if she had transferred the property to him such transfer was, by law, according to the custom of the tribe to which the parties belong, and the Riwaj-i-Am, null and void as against the Plaintiffs as reversionary heirs.

The Defendant by his pleadings alleged title as owner in himself by gift from Mussammat Zainab, alleged that Mussammat Zainab was entitled to the full estate in the property in question and not merely to an estate for her life, that the Plaintiffs had any right to the estate, denied that the property was ancestral, denied that any law or tribal custom existed which made the gift to the Defendant unlawful or void, and amongst other things alleged that he had been adopted as her son by Mussammat Zainab.

The parties to the suit are Sheikh Ansaris of a Pathan tribe of Punjab Muhammadans. The Defendant is in possession of the property in dispute under a gift from Mussammat Zainab made to him in her life-time. The Plaintiffs' case, the only case on which they could have succeeded, is that, according to a custom which they alleged to be existing and binding in their family, no woman could take by gift more than a mere interest for her life without any power of alienation in any ancestral property of the family, and consequently that the gift by Mussammat Zainab to the Defendant was void. Many issues, some of which, in the view which their Lordships take of this case, were immaterial or irrelevant, were raised by the parties, and much evidence was recorded. The District Judge of Jullundur gave the Plaintiffs a decree for possession. From that decree the Defendant appealed to the Chief Court of the Punjab. The Judges in the Chief Court mainly directed their attention to a question of acquiescence, which their Lordships consider did not arise on the facts, and to the alleged adoption of the Defendant by Mussammat Zainab, which was an immaterial issue, and having apparently, although somewhat uncertainly, found that Mussammat Zainab had adopted the Defendant, they applied Art. 118 of the Second Schedule of the Indian Limitation Act, 1877, to the case, allowed the appeal, and dismissed the suit with costs.

Although their Lordships consider that the question of an adoption was an immaterial issue they think it advisable to say that the omission to bring within the period prescribed by Art. 118 of the Second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Thakur Tirbhuwan Bahadur Singh* v.

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Raja Rameshar Bakhsh Singh (1). Under the General Muhammadan Law an adoption cannot be made; an adoption, if made in fact by a Muhammadan, could carry with it no right of inheritance.

It may be further observed that, even if an adoption by a Muhammadan was permissible by any valid custom in the Punjab, the Chief Court found that it had not been proved that the parties to the suit belonged to a family to which the Punjab agricultural or other similar restrictive customs must be presumed to apply.

In order to understand the material evidence in this case it is necessary to refer to the pedigree of the Plaintiffs. Muhammad Ali Sher, the common ancestor of the Plaintiffs and Mussammat Zainab, had three sons, one of whom, Jehangir Khan, had by his wife, Mussamat Fatima, a daughter, Mussammat Maryam, who married her cousin, Sarfraz Khan. Alamgir, another son of Muhammad Ali Sher, had three sons, one of whom was Sarfraz Khan, who married his cousin Mussammat Maryam; another son of Alamgir was Shahbaz Khan; and the other son of Alamgir was Seraj-ud-Din, otherwise called Seraj-ud-Din Khan, who was the father of the Plaintiffs. Another son of Muhammad Ali Sher was Sarwar Khan, who had two sons, one of whom was Muhammad Said; the other son of Sarwar Khan was Muhammad Bahadur Khan. Sarfraz Khan had by his wife Mussammat Maryam, a daughter Mussammat Zainab, who married Ghulam Mohy-ud-Din *alias* Baghe Khan. The Defendant is a son of Jamal-ud-Din, who was a son of a sister of Sarfraz Khan. Jamal-ud-Din Khan was a brother of Mohy-ud-Din *alias* Baghe Khan.

On the 3rd Ramzan 1248 A. H., Jehangir Khan, by his deed of gift, gave to his daughter Mussammat Maryam, wife of Sarfraz Khan, absolutely all his one-third share of the property of his ancestors which had fallen to his lot according to law, in lieu of the dower of her mother Mussammat Fatima. Mussammat Maryam obtained possession of the property which had been given to her by her father Jehangir Khan, and remained in possession for 15 years, when she gave that property to her husband Sarfraz Khan, who took possession on her death. Mussammat Maryam died in 1846 or 1847. After her death Sarfraz Khan's right to the possession of the property which had come to him from Mussammat Maryam was challenged by Muhammad Said Khan and Muhammad Bahadur Khan, sons of Sarwar Khan, and Sheraz-ud-Din Khan, the father of the Plaintiffs, who contested the alienation to Sarfraz Khan, alleging that by custom daughters had no right of succession. Sarfraz Khan brought a suit for maintenance of possession in the Court of the Deputy Collector against Muhammad Bahadur Khan, Muhammad Said Khan, and Sheraz-ud-Din. In that case Sheraz-ud-Din Shahbaz Khan, and Muhammad Bahadur Khan, proved that Mussammat Maryam had been in possession of the property, and had, through the agency of her husband Sarfraz Khan and his brother Sheraz-ud-Din, received the rents of the land together with zemindari dues, and had paid the Government revenue. In that case Muhammad Said Khan testified to the facts of the gift and delivery of possession to Mussammat Maryam, and Sheraz-ud-din admitted that a deed of gift had been executed and that possession had been delivered to Mussammat Maryam.

(1) L. R. 33 I. A. 156; s. c. 10 C. W. N. 1065 (1906).

Several other witnesses, including the marginal witnesses to the deed of gift, proved that the property had remained in the possession of Mussammat Maryam for her life-time, and had, after her death, passed to Sarfraz Khan, her husband. On the 16th of May 1849, the Deputy Collector ordered that a decree for Sarfraz Khan's claim be passed to the effect that Sarfraz Khan should retain possession of the land then in suit. From that order of the Deputy Collector Muhammad Bahadur Khan appealed to the Settlement Officer, who, on the 3rd of August 1849, dismissed the appeal, holding that the inquiry before the Deputy Collector had established Sarfraz Khan's possession, occupation of, and title to the land, and that if Muhammad Bahadur Khan had any claim to the land he was at liberty to lodge a suit in a Civil Court. No suit was brought in a Civil Court to contest the right or title of Sarfraz Khan to the land which had come to him from Mussammat Maryam. The facts above referred to afford, in their Lordships' opinion, strong evidence that there was no custom applying to this family which limited the estate in ancestral lands which came to a daughter by gift to a mere life estate, and which prevented a daughter alienating such lands by gift in her life-time.

On the 15th of December 1851 Sarfraz Khan, who was then in possession of the lands which had come to him by gift from his wife Mussammat Maryam, and was also in possession of his own third share of three shares in the ancestral property which had come to him by lot according to law, made a deed of gift by which he gave to his daughter, Mussammat Zainab, absolutely his entire property of every kind, and gave her possession. To that deed Shahbaz Khan, son of Alamgir, was one of the witnesses. Sarfraz Khan died on the 10th of May 1852, and on that day the Patwari of Basti Danishmandan, on enquiry of Mussammat Zainab, was directed by her to enter the entire share of Sarfraz Khan, which had come to her, in the official papers in the name of her husband, Ghulam Mohy-ud-din, whose name was accordingly entered on the 10th of May 1852. In or about 1859 Muhammad Bahadur Khan and Muhammad Said Khan brought a suit in the Revenue Court of the extra Assistant Commissioner of Jullundur against Ghulam Mohy-ud-Din, in which they claim possession of the lands which had come through Mussammat Maryam and Sarfraz Khan to Mussammat Zainab. The Plaintiffs in that suit alleged that Sarfraz Khan had not executed the deed of gift in favour of Mussammat Zainab; that the property in suit could not have passed through his wife, Mussammat Zainab to Ghulam Mohy-ud-Din, and that as Sarfraz Khan had died without a son the property had vested in them, Muhammad Bahadur Khan and Muhammad Said. In that suit the Patwari of Basti Danishmandan was examined as a witness, and in reply to the question—"In Basti Danishmandan what custom prevails in respect of an estate left by a sonless proprietor?" said—

"The following custom prevails:—The estate of a proprietor dying childless goes to his daughters. Should he make a gift of his property during his life-time in favour of his daughters, they succeed to their father's estate. If he does not make a gift in favour of his daughters during his life-time, his brothers and brother's sons succeed to his estate."

Ghulam Mohy-ud-Din gave evidence in that suit; he claimed no title in himself; he said that his wife Mussammat Zainab was the proprietor, and that she had full authority to have her own name inserted

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in the official papers or to allow the entry in his name to stand. Many other witnesses were examined in that suit, and on the 25th of June 1859 the extra Assistant Commissioner of Jullundur dismissed the suit. From that order dismissing the suit Muhammad Siraj-ud-Din (Sheraz-ud-Din Khan), who had apparently come into the suit as a Plaintiff, Muhammad Bahadur Khan, and Muhammad Said Khan, appealed to the Deputy Commissioner, who on the 31st of December 1859 rejected the appeal, but holding that as Mussammat Zainab alone was the proprietor, directed that her name should be entered in the column of owners. From the order rejecting their appeal Muhammad Seraj-ud-Din (Sheraj-ud-Din Khan), Muhammad Bahadur Khan, and Muhammad Said Khan, appealed to the Commissioner of Jullundur, who on the 25th of February 1860 dismissed their appeal.

On the 6th of May 1887, Baghe Khan (Ghulam Mohy-ud-Din) executed a deed in which he stated that he had adopted Niaz-ud-Din when he was two years old and that he and his wife had brought him up. Niaz-ud-Din, who is mentioned in the deed, is Muhammad Niaz-ud-Din Khan, the Defendant in this suit.

On the 22nd of May 1888, Ghulam Mohy-ud-Din Khan and his wife Mussammat Zainab executed a deed of settlement by which Ghulam Mohy-ud-Din gave certain property of his Basti Danishmandan, which is not in dispute in this suit, to Muhammad Niaz-ud-Din Khan, and Mussammat Zainab gave to Niaz-ud-Din Khan the property which is in dispute in this suit. In that deed it is stated that Muhammad Niaz-ud-Din Khan had been placed in possession. An application was made to enter the name of the Defendant, Muhammad Niaz-ud-Din Khan, in the column of proprietors in respect of the property in dispute in this suit, and Mussammat Zainab having stated to the Tahsildar that Muhammad Niaz-ud-Din Khan was in possession, and no objector appearing, the Tahsildar sanctioned the mutation of names, and the name of Muhammad Niaz-ud-Din Khan was accordingly entered in the column of proprietors.

In 1895 and in 1896 the principal lands which had been held in unpartitioned shares by Muhammad Niaz-ud-Din Khan, Muhammad Umar Khan, and Muhammad Pirdad Khan, were by agreement between them partitioned, each having allotted to him lands which represented his share. Muhammad Niaz-ud-Din's shares in the partition represented shares which had come to him by the gift of Mussammat Zainab. Mussammat Zainab was then alive; she died on the 4th of May 1899.

Their Lordships consider that these partition proceedings between Mahammad Umar Khan, Muhammad Pirdad Khan, and Muhammad Niaz-ud-Din Khan, who were the original parties to this suit, afford very strong evidence in favour of Muhammad Niaz-ud-Din, who is the Defendant in the suit, and Respondent in this appeal. The evidence which was given on behalf of the Plaintiffs to prove that a custom existed and applied to this family, by which a female could take only a life interest in the ancestral property which had come to her by gift from her sonless father, and had in such property no power to alienate it by a gift in her life-time, was of the most shadowy description and failed to prove the custom alleged by them. Evidence as to the limited rights by custom of a widow in her deceased husband's property was not evidence

from which the custom alleged by the Plaintiffs in this suit could be inferred. Nor was evidence that a Muhammadan father had been prevented by some local custom from giving the bulk of his property to one of his sons, evidence which had any bearing on the issue in this case. The evidence, to which reference has been made by their Lordships, relating to the devolution of Jehangir Khan's share to Mussammat Zainab, is entirely inconsistent with the existence of the custom which has been alleged by the Plaintiffs.

Their Lordships find that not only have the Plaintiffs failed to prove the custom alleged by them, but the alleged custom has been disproved. They also find that Mussammat Zainab had a full proprietary estate in the property in dispute, and that she made a valid gift of that property to the Defendant.

Their Lordships will humbly advise His Majesty that the decree of the Chief Court of the Punjab dismissing the suit of the Plaintiffs should be affirmed and this appeal be dismissed with costs.

Solicitor: *Mr. E. Dalgado* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondent.

B. D. *Appeal dismissed with costs.*

[PRIVY COUNCIL.]

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1911,
Heard, 9 & 10, November.
1912,
Judgment, 23, January.

JEOLAL MAHTON and anr., Defendants, Appellants,
v.
LOKE NARAYAN MAHTON and ors., Plaintiffs, Respondents.

Hindu Law—Mitakshara—Joint-family property—Acquisition by joint labour of co-parceners—Exclusion of a member—Suit for partition—Limitation.

Where Plaintiff sued as a co-parcener for partition of his share in joint-family property. and the defence was that the Plaintiff's father was expelled from the family for misconduct and that his share in the family property was given to him in 1874, and it was proved that the Plaintiff who in 1874 was a child and left the family with his father and mother, reappeared in the village in 1889 on his father's death and was then recognised as a member of the family and was not excluded till within 5 or 6 years of the suit when there was exclusion from commensality but no partition of the family property,

Held—*That the defence failed and the Plaintiff's suit should succeed.*

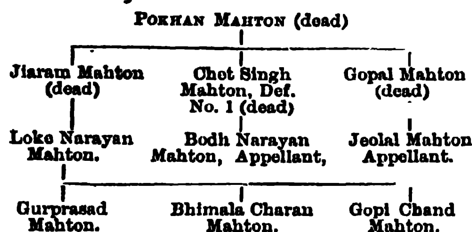
This was an appeal against a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 4th April, 1907, which reversed a judgment and decree of the Court of the Third Subordinate Judge of Patna, dated the 23rd June, 1904.

The principal questions for determination on the present appeal were whether the Appellants and the Respondents con-

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stituted a joint undivided Hindu family within the meaning of the Mitakshara Law—and whether the suit was barred by limitation.

The following represents the pedigree of the family:—



The facts giving rise to the litigation shortly stated were as follows:—Pokhan was the founder of the fortunes of the family. Pokhan obtained service with Rai Makhanlal, Zemindar, and in 1864 he induced the zemindar to also employ his sons, Jiaram and Chet, in the management of the zemindari. By taking leases and lending money he had, in the year 1874, acquired property of the value of Rs. 12,000 or 15,000. His sons lived with him.

In the month of October, 1874, Jiaram was alleged to have left the family house, in the village of Miar, with his wife and son Loke Narayan, Respondent, and went to live with his father-in-law Kirat at a village called Makhriawan. He died about the year 1880. The Appellants asserted that on his departure he received a proportionate share in the property then held by Pokhan, whether in law entitled to it or not, and that from that time he ceased to be a member of the joint family, or entitled to any further or other share in the family property. Loke Narayan returned to Miar in 1889 and he and his sons instituted the present suit in the Court of the Subordinate Judge of Patna.

The Plaint alleged that Jiaram was a member of a joint undivided family with Pokhan and his other sons, and remained as such till the date of his death, and that Loke Narayan and his sons continued to be joint members of the family till the date of the institution of this suit. The relief sought was separate possession by partition of a one-third share in all the properties set out in schedules annexed to the Plaint.

The Defendants, Chet Singh, his son, and the son of Gopal, who had died prior to suit, filed a written statement in defence. Their main pleas were that the property in possession of Pokhan at the time of Jiaram's separation in 1874, was not joint property of which Jiaram could claim a share by partition, that if it were, Jiaram had in fact separated, and ceased to be a member of the joint family, that on such separation he had received his share in the property with the result that he no longer had a claim on the remainder of the estate, or on the properties subsequently acquired by the remaining members of the family. It was also urged that the suit was barred by limitation, and that in any event only a portion of the properties specified in the schedule to the plaint constituted the joint-family property.

On these pleadings the Subordinate Judge fixed several issues of which the following are material:—

"Is the suit barred by limitation?

"Was Jiaram separated by his father in 1281, as alleged by the Defendants, and did he and his family continue to live and have all along lived separately from the Defendants as alleged by them?

"Did the Plaintiffs or their ancestors Jiaram and the Defendants and Pokhan hold and acquire the properties in suit as co-parcenary properties forming a joint family?

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"Whether the properties in suit except the properties Nos. XXXXX, which were acquired after the alleged separation of Jiaram are the exclusive properties of the Defendants as alleged by them, and whether the property that was acquired before that alleged separation of Jiaram came to be the exclusive property of the Defendants on account of that separation?

"Have the Defendants treated and dealt with the properties they claim exclusively as their exclusive properties, the Plaintiffs not having asserted their claim thereto? Are the Plaintiffs by their conduct estopped from claiming those properties?

"What reliefs, if any, the Plaintiffs are entitled to."

After recording evidence, both oral and documentary, the Subordinate Judge delivered judgment on the 23rd June 1904.

He held that Pokhan had no ancestral property except a straw thatched hut, and nothing which formed the nucleus of the after-acquired properties, that Pokhan and his sons, Jiaram and Chet Singh, had been earning members of a joint family, and that their acquisitions were joint properties up to the expulsion and exclusion of Jiaram, which he held took place in 1281, B. S. (1874), that in those joint properties the Plaintiff (Respondent) No. 1 took no interest on his birth they not being ancestral; that the fact of Jiaram's expulsion and exclusion had been known to the said Plaintiffs for more than 12 years prior to suit; that the possession of the properties by the Defendants (Appellants) had been adverse for more than 12 years, and that therefore the suit was barred by limitation.

As regards the factum of the expulsion and exclusion of and the separation from Jiaram, he believed the evidence of the Defendant No. 1, Chet Singh and his witnesses, and he disbelieved the story told by the Plaintiff (Respondent) No. 1, and his witnesses in this connection.

He held that from and after his expulsion, Jiaram ceased to be a member of the joint family, and that the Plaintiffs and Defendants thereafter lived separate from each other in every respect.

He held that the subsequent purchase by the Plaintiff (Respondent No. 1) of the share in Pariawna jointly with Chet Singh instead of proving that the family was joint proved the contrary. Having decided the third and fourth issues in favour of the Defendants, it was not necessary for him to deal with the other issues at length, and he accordingly made a decree dismissing the suit with costs.

Against the said judgment and decree the Plaintiffs appealed to the High Court at Calcutta, while the Defendants (Appellants) filed cross-objections against certain of the findings in the judgment.

On the 4th April, 1907, the High Court (Mookerjee and Holmwood, JJ.) delivered judgment on the said appeal, and made a decree reversing the decree of the lower Court, declaring the Plaintiffs' (Respondents') right to and directing a partition of the disputed properties with costs.

The High Court held as facts beyond doubt that Pokhan had no inherited ancestral estate, that whatever was acquired by him and his sons was by their joint labour and up to the disappearance of Jiaram in 1281 was joint family property; that Pokhan originally managed the family affairs, and subsequently on his becoming too old, Chet Singh, Defendant No. 1, did so. In the course of their judgment they said:—

"This is the only notice of exclusion that we can find as against Loke Narayan and as it was only 5 years before suit it could not operate as a bar to his suit for

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a partition. In the case of *Hari* v. *Maruti* (1), it was held that even if the Defendant had been in possession of the property 15 years, still under Art. 127, Act XV of 1877, time would not run against the Plaintiff until his exclusion (if he was excluded) had become known to him. This view has been uniformly followed in the Bombay High Court, see *Dinkar Sadashiv* v. *Bhikaji Sadashiv* (2), *Krishnabai* v. *Khangowda* (3) and *Jivanbhat* v. *Anibhat* (4). The case of *Ram Chandra Narayan* v. *Narayan Mahadev* (5) is in no way against this view, since in that case there had been admittedly partition 30 years before and the Plaintiff set up a special case of the reservation of a certain house from that partition and as that house had been in Defendant's sole possession ever since, the onus lay very heavily on the Plaintiff to show that he had preserved his own right. We may also note the cases of *Das* v. *Maya Das* (6) and *Moro* v. *Keso* (7) and *Ganpat Rao* v. *Vinayak* (8). In a very recent ruling, *Ganesh Dutt Thakur* v. *Jewach Thakoorain* (9), their Lordships of the Judicial Committee have held that cesser of commensality is an element in determining whether there has been a partition or not, but it is not conclusive. After pointing out that the evidence in that case on both sides was, as in the present case, very voluminous, very conflicting, and for the most part unsatisfactory, their Lordships go on to say that cesser of commensality being established, it is necessary to consider whether the evidence in other respects supports or negatives the theory that the cesser in this case was adopted with a view to partition in the legal sense of the word. Having found that there was no exclusion of Jiaram in 1281, F. S., and no partition made in his favour and that Loke Narayan returned to Meyar in 1295, and set up in the family house under circumstances which lead us to suppose that he was recognised as a member of the family, and that he and Chet Singh did deal with certain properties as if they were joint, it seems to us impossible to hold that the Plaintiffs' suit for partition is barred unless it can be shown that some time between his return in 1295 and the 8th August, 1890, which would be equivalent to Bhadra, 1397, his exclusion from the family property became known to him.

"Having given the whole evidence our most careful attention, we are compelled to find that there has been no partition of the ancestral property the nucleus of which was acquired by Pokhan Mahton and contributed to as earning members of the family by Jiaram, Plaintiff's father, and Chet Singh Mahton, Defendant, and that there has been no exclusion set up against Loke Narayan at any rate till five or six years ago when there appears to have been exclusion from commensality but no partition of the family property."

They accordingly made a decree reversing the decree of the Subordinate Judge. Hence this appeal.

Mr. L. DeGruyther, K.C., and *Mr. Dunne* submitted that the conclusions at which the Subordinate Judge had arrived were right. The circumstances under which Jiaram left Meyar in 1874 operated in Hindu law as a separation from the family.

(1) I. L. R. 6 Bom. 741 (1882).
(2) I. L. R. 11 Bom. 365 (1887).
(3) I. L. R. 18 Bom. 197 (1893).
(4) I. L. R. 22 Bom. 259 (1896).
(5) I. L. R. 11 Bom. 216 (1887).
(6) Punj. Rec. No. 118 (1889).
(7) Bom. P. J. (1887-89).
(8) Bom. P. J. 1888 p. 3 (1886).
(9) I. L. R. 31 Cal. 262 (1903).

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He never returned to the family house, and clearly showed an intention to separate. Mere intention to separate on the part of a member operates as partition of the Hindu joint family. *Parbati* v. *Naunihal Singh* (10).

Mr. Bhugwandin Dubé (attended at delivery of judgment) for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—This case was heard *ex parte*. The suit was brought by one Loke Narayan Mahton and his three sons as members of a joint undivided Hindu family under the Mitakshara Law, asking for a declaration that thay were entitled to one-third share of the family property, and for an order for partition on that footing. The defence was that Jiaram Mahton, Loke Narayan's father, who was the son of Pokhan Mahton, was expelled from the family in 1874 in consequence of some scandalous conduct which brought upon him the displeasure of the Zemindar in whose service the family were employed —that on his expulsion there was a partition so far as he was concerned, and he then received his share of the family property which had been all acquired in the service of the Zemindar by Pokhan and his sons, and that thereupon Jiaram disappeared with his wife and his son, Loke Narayan, who was a mere child at the time, and so his connection with the family came to an end. It was also contended that the Plaintiffs' claim was barred by the law of limitation.

The suit was dismissed with costs in the Court of the Third Subordinate Judge of Patna. On appeal to the High Court at Calcutta this judgment was reversed and a decree was pronounced in favour of the Plaintiffs.

The evidence is very voluminous and very contradictory. The oral testimony on both sides seems to be even more than usually untrustworthy. After a most elaborate and careful review of the whole case, from which nothing of importance appears to be omitted, and to which nothing can be usefully added, the learned Judges of the High Court came to the conclusion that the case set up of Jiaram's expulsion in 1874 and the alleged partition of the family property on that occasion failed completely. Then they proceeded to consider the position of affairs when Loke Narayan reappeared in 1889 after his father's death and took up his abode in the village where the surviving members of the family lived. The view of the Court was that he was then recognised as a member of the family, and that no case of exclusion from the joint property could be made out against him till five or six years before suit, when there appeared to have been exclusion from commensality but no partition of the family property.

The case was very fully and very ably presented to this Board by the learned Counsel for the Appellants, but their Lordships are not satisfied that there is any ground for disturbing the judgment of the High Court.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed with costs.

Solicitors: *Messrs. Milner and Bickford* for the Appellants.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Respondents.

B. D. *Appeal dismissed.*

(10) 13 C. W. N. 983: s. c. I. L. R. 31 All. 112 (1909).

[ORDINARY ORIGINAL CRIMINAL JURISDICTION.]

WOODROFFE, J.
1912,
23, January.

EMPEROR
v.
SALIMULLA.

High Seas, murder by a British Indian on a British vessel bound for Calcutta—Jurisdiction of Calcutta High Court, Criminal Sessions—Substantive law applicable, English or British Indian —Sec. 684, Merchant Shipping Act (57 and 58 Vict., c. 60)—Sec. 3, Colonial Act (37 and 38 Vict., c. 27)—Sec. 4, Indian Penal Code (Act XLV of 1860).

The High Court of Calcutta at the Court of Criminal Sessions has jurisdiction under sec. 684 of the Merchant Shipping Act (57 and 58 Vict., c. 60) to try a British Indian who is charged with committing murder on a British vessel in the Red Sea when the accused has been brought to Calcutta, no matter how he may have been brought there.

When the offence was committed in the High Seas the substantive law applicable to the case is the English law.

The fact that the accused is a British Indian does not make any difference in the applicability of the English substantive law.

QUEEN-EMPRESS *v.* SHEIK ABDUL RAHMAN (1) *dissented from.*

Sec. 3 of the Colonial Act (37 and 38 Vict., c. 27) does not deal with the trial of case but with the sentence after conviction, the statute adapting the local machinery for punishment to the English definition of crime.

It is possible to give sec. 4 of the Indian Penal Code (Act XLV of 1860) a construction which is not inconsistent with the English Statute, but in any case it could not affect the specific Statute of Parliament.

This is a case in which one Salimulla, a fireman on board the British Ship *S. S. Clan Lamont*, was charged with the murder on the High seas of one William McCrae, the second engineer of the vessel.

Mr. S. A. Ashgar for the defence contended that the Court had no jurisdiction to try the case. The offence was alleged to have been committed on the high seas (Red Sea) and the vessel touched at Perim where certain proceedings were taken against the accused. The vessel also touched at Tuticorin, from where the accused was brought to Calcutta by train. The accused ought to have been tried at either of these places and not in Calcutta. Submitted that the accused is an Indian and if he has committed an offence on the high seas he must be tried by the substantive laws of the country, and under the Criminal Procedure Code. [*Queen-Empress* v. *Barton* (3), *Queen-Empress* v. *Gunning* (4)]. The following cases were cited: *King-Emperor* v. *Chief Officer of "S. S. Mushtar"* (2) and *Queen-Empress* v. *Sheik Abdool Rahman* (1). Submitted that the charges should be framed under the Indian Penal Code in accordance with these two Bombay cases.

Mr. B. C. Mitter for the Crown submitted that he relied on the Statute 57 and 58 Vict., c. 60, secs. 684 and 686, and amendment of the Indian Penal Code (1898), sec. 4. Statutes 37 and 38 Vict., c. 27, sec. 3. The English Act must apply in this case and the charges must be framed under the English Statutes.

The JUDGMENT OF THE COURT was as follows:—

WOODROFFE, J.—Learned Counsel for the accused, before the charge was read, contended, *firstly*, that this Court had no

(1) I. L. R. 14 Bom. 227 (1889).

(1) I. L. R. 14 Bom. 227 (1889).
(2) I. L. R. 25 Bom. 636 (1901).
(3) I. L. R. 16 Cal. 238 (1889).
(4) I. L. R. 21 Cal. 782 (1894).

EMPEROR *v.* SALIMULLA.

jurisdiction to try the case, and, *secondly*, that if it had, the Penal Code and not the English law was the substantive law applicable. The first contention is based on the fact that after the offence the ship touched at the ports of Perim, Aden and Tuticorin. Assuming for the sake of argument (though I do not consider the point) that the accused might have been tried at any of those places, sec. 684 of the Merchant Shipping Act (57 and 58 Vict., c. 60) provides for jurisdiction in any place in which the offender or person complained against, may be. The accused is now here, however he may have come here, (though it is to be noted that this port was that of the destination of the ship) and I hold therefore that this Court has jurisdiction to try him. Learned Counsel's argument on the second contention assumes that the question he now raises could not have arisen prior to the Colonial Jurisdiction Act (37 and 38 Vict., c. 27, sec. 3) and that even after that Act English law would be applicable if the accused had been by nationality British. The accused who is a British subject is however an Indian native of Sylhet. Learned Counsel therefore contends that so far as such subjects the law was altered by the Colonial Jurisdiction Act and he relies upon the decisions of the Bombay High Court reported in *Queen-Empress* v. *Sheik Abdool Rahman* (1) and *King-Emperor* v. *Chief of* "*S. S. Mushtar*" (2). His contention is that the substantive law varies with the nationality of the accused. The correctness of the Bombay decision, *Queen-Empress* v. *Sheik Abdool Rahman* (1), has been doubted by M. Mayne in his Criminal Law of India (3rd Ed., sec. 76) for reasons with which I agree. As he states, and I agree, sec. 3 of the Colonial Act does not deal with the trial of the case but with the sentence after conviction, the Statute adapting the local machinery for punishment to the English definition of crime. Moreover the very terms of sec. 3 is against the contention now raised in so far as it provides for the case of an offence which is not punishable by the law of the Colony in which the trial takes place. This negatives the view that the law governing the offence is the substantive law of the Colony. Sec. 686 of 57 and 58 Vict., c. 94, speaks of British subject which includes an Indian subject. Reference has been made to sec. 4 of the Penal Code. It is possible to give the section a construction which is not inconsistent with the English Statute but in any case it could not, (assuming that the Indian Legislature had jurisdiction in this matter) affect the Specific Statute of Parliament. I hold therefore that the substantive law applicable to the case is the English law and that the charge has been rightly framed in this respect. The accused will therefore be called upon to plead to the charge and the trial will proceed.

(1) I. L. R. 14 Bom. 227 (1889).
(2) I. L. R. 25 Bom. 636 (1901).

Mr. G. K. Ghosh, Attorney for the Accused.

Mr. J. T. Hume, *Public Prosecutor*, for the Crown.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

FLETCHER, J.
1912,
19, February.

In re MR. ROMESH CHANDRA SEN.

Specific Relief Act, sec. 45 and proviso (c)—*Mandamus, issue of, by High Court against public officer for non-performance of statutory duty—Election roll, preparation of—The Calcutta Municipal Act (B. C., III of 1899), Sch. IV, r. 8—Time, place and officer for lodging notice of claim*

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an objection to voter's list as provided by the Act, it may be varied.

Where the Calcutta Municipal Act, Sch. IV, r. 8, provides that the notice of any claims or objections to the voter's list should be lodged with the Chairman on or before the 1st of January and some persons instead of filing such notice of claims before the duly authorised Deputy Chairman, who kept the Election Department open on that day, left the notice of claims on the 1st of January with the Secretary to the Corporation in his private residence and then on the 2nd of January they took the papers from the Secretary and filed them with the Deputy Chairman:

Held—*That the requirement under the Act had not been satisfied and the Deputy Chairman had no authority to extend the time to the 2nd of January and allow the claim.*

The omission of a statutory officer to perform the public duties as to the settlement of election roll in the manner provided by the Act amounts to doing or forbearing to do something not consonant to right and justice and it is within the jurisdiction of the High Court to issue an order in the form of a mandamus on the officer under sec. 45 of the Specific Relief Act.

The facts are stated in the judgment.

Mr. B. Chakravarti (with him *Mr. H. D. Bose* and *Mr. N. Sircar*) for Mr. R. C. Sen.

Mr. B. C. Mitter for the Chairman of the Calcutta Corporation.

Mr. S. R. Das for Mr. Cohen.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This is a Rule granted under sec. 45 of the Specific Relief Act calling upon Mr. S. L. Maddox, Chairman of the Calcutta Corporation, to shew cause why he should not prepare and publish a revised list of voters for Ward No. 13 of the Municipal town of Calcutta under Sch. 10 of the Calcutta Municipal Act by rejecting the claims, objections and applications filed by Mr. I. J. Cohen, Commissioner of the said Ward No. 13, on the 2nd day of January 1912, and by giving effect to the claims, objections and applications filed by Mr. Romesh Chandra Sen as if the said claims, objections and applications filed by the said Mr. I. J. Cohen were not filed at all, and why he should not pay the costs of and incidental to this application.

Now the Rules for preparation and publication are contained in Sch. IV of the Calcutta Municipal Act, 1899. Rule 8 provides that every person who claims to have his name inserted in the list as being qualified under any of the clauses of sec. 37, or who claims to be entitled to more votes than are allotted to him in the list must give notice of his claim on or before the first day of the succeeding month of January.

The point in dispute which arises in this case is as follows: The Chairman delegated all his duties to the Deputy Chairman, Mr. Goode. Sec. 18 provides that the Chairman has the power to delegate his powers. The Deputy Chairman says quite frankly that the office was kept open not only on the 1st January but also on the 2nd and he said quite frankly that in settling all the lists of voters he did not consider whether the claims were lodged on the 1st or 2nd. It is quite obvious to my mind that there is nothing in the Act to suggest that the Chairman can extend the time beyond the 1st January for lodging claims or objections. The point is that Mr. I. J. Cohen took these claims

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on the 1st January not to the Election Department, but to the private residence of the Secretary to the Corporation who happens to live in the same building as the Corporation keeps its office. However that may be, the place where the papers were lodged by Mr. I. J. Cohen was not the office of the Corporation, but the private residence of the Secretary to the Corporation, the Chairman having appointed a certain place known as the Election Department as the office for taking work with reference to the election of the Corporation and that office was open on the 1st January. The order of Mr. Goode, the Deputy Chairman, is as follows :—"It is admitted that Messrs. I. J. Cohen and D. G. Cohen, Commissioners of the Calcutta Corporation, made over a number of applications to Mr. Mukherjee, Secretary to the Corporation, on the evening between 5 and 6 on the 1st January asking him to receive them as the Election Department was closed. Mr. Mukherjee received the applications and placed them in a box in his office. The box was not locked. Next day about noon Messrs. Cohen came to Mr. Mukherjee who sent a Chaprasi with them taking the applications to the Election Department. The first point is that there is nothing to show that the Secretary to the Corporation is the proper person with whom to lodge the election papers. The person directed by Sch. IV to carry into effect preparations and publications of the Municipal Election Roll is a separate Municipal authority as defined in the Act, namely, the Chairman of the Corporation, and the duties are cast upon the Chairman, and not upon any other authority to carry into effect the provisions of Sch. IV. Moreover the evidence seems to establish that the Election office remained open on the 1st January till 9 P.M. Then the next point is that the next day about noon Messrs. Cohen came to the Secretary and took these papers to the Election Department. It seems to me that on the ordinary reading of English language the papers were not lodged in the Election Department by the Secretary but by Mr. Cohen on the 2nd. In my opinion whether they were lodged for safe custody, or with a view to be lodged in time on the 1st, the lodging with the Secretary was not a proper lodging as required by the terms of the Act unless it is shown that the Chairman of the Corporation had authorized the private residence of the Secretary to the Corporation as a place where the claims could be lodged. The Chairman of the Corporation has a private residence of his own. If it were necessary to lodge the papers with the Chairman when the Election office was closed, there was nothing to prevent Mr. Cohen going to the Chairman and lodging the papers with him. I think the more probable story is that these papers were left with the Secretary on the night of the 1st and Mr. Cohen came the next day and took them to the Election officer, and in fact the papers were lodged in the Election office on the 2nd by this gentleman. Then the only question is, ought this Court to issue an order in the form of mandamus. The representation made by the Chairman of the Corporation is that he really does not know if he has performed his statutory duties or not. The Chairman does not oppose the rule being made absolute. Mr. Das raises the point that under sec. 45 of the Specific Relief Act, proviso (c), it has not been shown that in the opinion of the Court such doing or forbearing is consonant to right and justice. If the

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omission of a statutory officer to perform his public duties as to the settlement of the Election Roll in the manner provided by the Act is not forbearing to do something that is consonant to right and justice, I do not know what is. There can be no standard of right and justice, except to see whether the public officer has properly performed the duties cast upon him by the statute or not. It seems to me, on the representation of the Corporation, there is no option but for the Court to make this Rule absolute, and direct the Chairman to act in accordance with the terms of the rule. The point on which the Corporation has asked for a direction is as to whether these papers lodged with Mr. Mukherjee on the first were properly lodged. I am of opinion that if the facts are as stated in Mr. Goode's order, then these claims, objections and applications were not properly lodged. They were lodged by Mr. Cohen in the Election office on the 2nd January. I accordingly make the Rule absolute.

With regard to costs, the Chairman has acted in good faith. He delegated his duties to a junior officer who kept the office open on the 2nd and 3rd. This appears to have been a slip and I do not therefore order the Chairman to pay the costs. As against Mr. Das's client he came here and fought the Rule but has failed. That being so, I think the ordinary rule must apply. I direct Mr. Das's client to pay the applicant's costs of the Rule.

Messrs. Ghosh & Kar, Attorneys for Mr. R. C. Sen.

Mr. Mani Lall Sen, Attorney for the Chairman of the Corporation for Calcutta.

Messrs. Morgan & Co., Attorneys for Mr. Cohen.

[*Rule made absolute.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2457 OF 1908.

CHATTERJEE, J.
1912,
Heard,
8, February.
Judgment,
12, February.

CHITTY, J.
COXE, J.
1911,
Heard,
27, January.
Judgment,
14, February.

RADHA KANT CHUCKERBUTTY, Defendant No. 6, Appellant,

v.

RAMANANDA SHAHA, Plaintiff, Respondent.

Occupancy holding—Mortgage—Subsequent sale of portion of holding with landlord's consent—Suit on mortgage—Purchaser if may question validity of mortgage—Estoppel—Evidence Act (I of 1872), sec. 115.

A raiyat mortgaged his occupancy holding to A; subsequently a portion of the holding was with the landlord's consent purchased by B who later on took a fresh settlement from the landlord at an enhanced rent:

Held (CHITTY and CHATTERJEE, JJ., COXE, J., contra.)—*That in a suit by the mortgagee B was estopped from questioning the validity of the mortgage.*

ISHWARDHARY SINGH *v.* BIBI SAHEBZADI (2) *distinguished.*

AGARJAN BIBI *v.* PANAULLA (14) *referred to.*

This was an appeal preferred on the 16th of November 1908 against a decree of Mr. A. H. Cumming, District Judge of Zillah Tipperah, dated the 28th of July 1908, reversing a decree of Babu Lalit Mohan Basu, Munsif of Commilla, dated the 17th of June 1907.

(2) 12 C. W. N. 720 (1908).
(14) 14 C. W. N. 779 (1910).

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The facts of the case will appear from the judgment of CHITTY, J.

The appeal came on for hearing in the first instance before Chitty and Coxe, JJ., who delivered the following dissentient judgments :—

CHITTY, J.—This is an appeal by Radha Kanta Chuckerbutty, Defendant No. 6, in a mortgage suit against the decree of the District Judge of Tipperah, making him liable under the mortgage. One Maniram, or Maun Kaibarto, husband of Defendant No. 1, by a kobala, dated 27th Aswin 1307 (13 Oct. 1900), mortgaged 8 kanis 13 gundas 3 karas of land, in which he held raiyati rights, to the Plaintiff to secure Rs. 400 and interest at Re. 1-14 per cent. per mensem. Maniram died without having paid off the mortgage or any part of it. His widow, Defendant No. 1, transferred some portion of the land to Defendant No. 2, who again sold to Defendant No. 3. Defendants Nos. 3 and 4 are puisne mortgagees of those portions. By a *kobala*, dated and registered on 27th Pous 1313 (11th January 1907), Defendant No. 1 with the consent of the landlord sold plots 1, 2, 3, 5, 6, 7 of the lands in suit, measuring between 4 and 5 kanis, to Defendant No. 6. This suit was filed by Plaintiff on 12th January 1907. Defendant No. 6 was not at first made a party. After the institution of the suit, namely, on 13th Magh 1313 (27th January 1907) the Defendant No. 6 took a fresh settlement from the landlord of the land which he had purchased from Defendant No. 1, and a pottah and *kabuliyat* at an enhanced rent were exchanged. Defendant No. 6 was added as a party Defendant on 5th February 1907, and, with Defendant No. 3, contested the suit.

The only points for our determination are: (1) whether Defendant No. 6 was a proper and necessary party to the suit, and (2) whether he is estopped from pleading the invalidity of the mortgage on the ground that the raiyati right of Maniram was not transferable. The District Judge decided against him on both points and Defendant No. 6 has appealed. As to the first point, the Appellant's pleader relied on the case of *Jaggeswar* v. *Bhuban* (13), but in my opinion this is a very different case. There it was held that a third party who is in no way connected with the mortgage and who claims adversely to both mortgagor and mortgagee cannot be made a party to a suit on the mortgage in order to try the question of his title. Here Defendant No. 6 admittedly acquired a title to the land in question in the first instance from the mortgagor but claims to have exchanged it for something better by subsequently taking a fresh settlement from the landlord. The question whether he can be allowed to do this is a question properly arising for determination in the mortgage suit, and he was therefore rightly made a party Defendant. The next question is whether he is estopped as a representative of the mortgagor from denying the validity of the mortgage, in other words can he now be allowed as against the mortgagee to relinquish the title which he derived from the mortgagor and set up the title subsequently acquired from the landlord. The learned pleader for the Appellant cited the case of *Aguyfan Bibi* v. *Panaulla* (14), but in my opinion that case has really no bearing on the present question. The question seems to me one to be decided on general principles of equity. Defendant No. 6 having previously obtained the landlord's consent purchased a portion of this holding from

(13) I. L. R. 33 Cal 425 (1906)
(14) 14 C. W. N. 779 (1910).

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Defendant No. 1, he clearly derived his title to what he purchased from Defendant No. 1 alone and not, as has been argued, from Defendant No. 1 and the landlord together. The whole title to what Defendant No. 6 purchased was in Defendant No. 1, and the fact that the landlord's consent was necessary before she could part with it does not mean that the title was derived in part from the landlord.

Defendant No. 6, therefore, took what he purchased subject to the liabilities which Defendant No. 1 or her husband had incurred, that is to say, he took subject to the mortgage. If the suit had then been brought against him, he could not have denied the validity of the mortgage. Can he subsequently throw off that title and acquire a new one for the obvious purpose, of defeating the mortgagee's claim? I am of opinion that it would be inequitable to allow him to do so, and it would certainly open the door to fraud in a large number of cases.

The case of *Krishna Lal* v. *Bhairab Chandra* (1), Second Appeal No. 35 of 1904, was brought to our notice. The facts of that case appear to be very different from the present. There the contesting Defendant had purchased the right, title and interest of the mortgagor at an execution sale. If the occupancy holding was not transferable by custom, he took no interest in it by his purchase. That appears to me very different from the present case of a voluntary transfer by the mortgagor made with the landlord's consent previously obtained. Here Defendant No. 6 obtained a perfectly good title by his purchase from the mortgagor with the landlord's consent subject only to the mortgage. There could be no possible object in his obtaining a fresh settlement from the landlord at an enhanced rent except to defeat or endeavour to defeat the claims of the mortgagee. This he ought not to be allowed to do. I would dismiss the appeal with costs. Hearing-fee 2 gold mohurs for each hearing.

As my learned colleague is of a different opinion, the case must be laid before the Chief Justice for reference to a third Judge.

COXE, J.—I think that this appeal ought to be allowed. The land to which it relates was purchased by the Appellant on the 9th January 1907 with the landlord's consent, and on the 27th January 1907 the Appellant obtained a settlement from the landlord at an enhanced rent and payment of a premium. The land formed part of a holding which had been mortgaged to the Plaintiff without the landlord's consent by the husband of the vendor of the Appellant. The Plaintiff sued upon the mortgage on the 12th January 1907, not making the Appellant a party. But as the other Defendants objected, the Plaintiff made the Appellant a party on the 6th February 1907. It is found that the holding was not transferable without the landlord's consent and that the sale to the Appellant was effected *bonâ fide* for consideration.

The question for decision is whether under these circumstances the Appellant is estopped from pleading that the holding was not transferable without the landlord's consent. That it was not so transferable is laid down in numerous rulings of which the last is *Agarjan* v. *Panaulla* (14). The mortgagee took nothing by his purchase and all that has to be decided is whether the Appellant is entitled to say so. Now if he had purchased the holding in execution of a money-decree, at which

(1) 9 C. W. N. ccxlviii (1905).

(14) 14 C. W. N. 779 (1910).

no title whatever would have passed and the judgment-debtors' interest would, in the eye of the law, have continued to subsist. [*Bhiram Ali* v. *Gopi Nath* (15)], and had subsequently taken a settlement, he would have been entitled to raise the plea that the holding was not transferable by the judgment-debtor without the landlord's consent [*Krishna Lal* v. *Bhairab Chandra* (1)]. It seems anomalous that a person acquiring title in such a manner should practically get the property free of encumbrances while one who regularly purchases according to the law with the landlord's consent should be bound by all that the original tenant debtor has unlawfully done.

Doubtless there is authority that a tenant who mortgages his property without the landlord's consent is estopped from afterwards pleading that it is not transferable. The learned Judges who decided the case of *Agarjan Bibi* v. *Fanaulla* (14) guarded themselves from expressing an opinion on this point and it has been strenuously argued in this case that there can be no estoppel against the law of the land. If it be assumed that the transferee knows the custom of the country that holdings are not transferable without consent then, it is said, he cannot be misled by the statement of the tenant that his holding is so transferable. But undoubtedly there is plenty of authority from the opposite view and I am not prepared now to question that authority.

But I do not think that the principle of estoppel should be extended to purchasers with the landlord's consent. If a man wants land which he knows to be not transferable without the landlord's consent and buys it with the landlord's consent, I do not see why he should be bound by previous transfers without consent, which he had every reason at the time of his purchase for believing or indeed knowing to be invalid. He is not, I think, a mere representative of the tenant within the meaning of sec. 115 of the Evidence Act but something more than that. Two persons, the landlord and the tenant, had to join in giving him his title and he does not derive his title exclusively from either but from both. So far as he derives it from the landlord, he is not, in my opinion, the representative of the tenant and is entitled to question the tenant's alienations.

Taking this view, I would allow the appeal and restore the Munsif's decision.

(1) 9 C. W. N. ccxlviii (1905).
(14) 14 C. W. N. 779 (1910)
(15) 1 C. W. N. 896 (1897).

[Owing to this difference of opinion the case was referred to D. CHATTERJEE, J., under sec. 98 of the Civil Procedure Code.]

Babus Harendra Narayan Mittra and *Sasadhar Ray* for the Appellant.

Dr. Rash Behary Ghose and *Babus Dhirendra Lal Khastagir* and *Gopal Chandra Das* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

CHATTERJEE, J.—An occupancy-holding, which has been found to be not transferable without the consent of the landlord, was mortgaged to the Plaintiff. Defendant No. 1 who is the heir of the mortgagor sold a part of this holding to Defendant No. 6 with the consent of the landlord who subsequently gave a fresh lease to Defendant No. 6 at an enhanced rent, On a suit being brought on the mortgage the Defendant No. 6 pleaded that the mortgage was void as the holding mortgaged was not transferable without the consent of the landlord and no

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such consent had been obtained. There being a difference of opinion as to whether Defendant No. 6 was estopped from pleading the non-transferability of the holding the question has been referred to me under sec. 98 of the Civil Procedure Code. I shall in this judgment call Defendant No. 1 the mortgagor and the Defendant No. 6 the Appellant.

It is contended by the learned Vakil for the Appellant that there can be no estoppel against a Statute and as an occupancy-holding is not transferable under the Bengal Tenancy Act there can be no estoppel from pleading what the Statute provides. The Statute however does not provide either that these holdings are transferable or not transferable, but leaves the question to be decided by local usage or custom. See secs. 178 and 183. The existence or otherwise of the custom or usage is a fact to be pleaded and proved and I do not think that the principle relied on has any application to the present case. It is next contended that the purchaser is not a representative of the mortgagor within the meaning of sec. 115 of the Evidence Act, as he has derived his title practically from the landlord alone without whose consent the sale would have passed nothing. The landlord alone could not however have given him a title. Any grant by the landlord alone during the subsistence of the tenancy of the mortgagor could not entitle him to the possession of the holding. There is some controversy in the books as to whether a sale of a portion of an occupancy-holding confers any title on the purchaser, and the matter is under consideration by the Full Bench. I would however take it for granted that the mortgagor alone could not confer any title and neither could the landlord by his own act and without the concurrence of the mortgagor. The two therefore joined to pass such title as the Appellant has acquired. In this view the Appellant has derived some title from the mortgagor although he has acquired an additional title from the landlord, and to that extent at least he must be considered a representative of the mortgagor. The mortgagor was bound by his deed of mortgage not to assert against the mortgagee that he had no right to mortgage and the Appellant who derived his title at least in part from the mortgagor cannot be allowed to make a like assertion.

Against this view of the law the learned Vakil for the Appellant has relied on two cases (1) an unreported decision of Ghosh and Pratt, JJ, in Appeal from Appellate Decree No. 35 of 1904, *Krishna Lal Shaha* v. *Bhairab Chandra Dey* (1), and (2) a decision of Rampini, Offg. C. J, and Ryves, J., in *Ishwardhary Singh* v. *Bibi Sahebzadi* (2). In the first case an execution purchaser of the interest of the mortgagor in an occupancy-holding who after his purchase obtained recognition from the landlord was held to be not estopped from pleading the non-transferability of the holding to a suit by the mortgagee on his mortgage bond: the learned Judges said that the Defendant No. 2 (the auction-purchaser of the holding) stood on a higher ground independent of the purchase and could not therefore be estopped from raising the plea of non-transferability. In the second case the landlord himself purchased a mortgaged holding in execution of a money decree and then took the plea in a suit by the mortgagee on his mortgage and was held entitled to do so.

(1) 9 C. W. N. ccxlviii (1905).
(2) 12 C. W. N. 720 (1908).

RADHA KANT CHUCKERBUTTY v. RAMANANDA SHAHA.

I do not think it would be right to distinguish these cases as cases of purchase by auction-sale: for although there were some cases in the books [see *Purbhulal* v. *Mylne* (3), *Gour Sunder* v. *Hem Chandra* (4), *Bashi Chandra* v. *Enayet Ali* (5)], which held on the authority of certain *dicta* of the Judicial Committee [see *Anundamoyee* v. *Dhonendra Chandra* (6), *Dinendro Nath* v. *Ram Kumar* (7)], that estoppels binding upon the judgment-debtor were not binding upon the auction-purchaser, the matter has been finally set at rest by the Judicial Committee itself in the case of *Mozaffer Husain* v. *Kishori Mohun Roy* (8), in which their Lordships held that the auction-purchaser was bound by an estoppel which bound the person whose right, title and interest he purchased. There is however a material distinction and that is that in neither of these cases, the mortgagor co-operated with the purchaser for creating a title in derogation of the mortgage. This upon general principles of equity the mortgagor should not be allowed to do and there is ample authority for this. I may refer in this connection to the case of *Doe* v. *Stone* (9), in which it was held that it was not open to a person who has derived title from a mortgagor to set up against the claim of the mortgagee a title which the mortgagor himself could not set up. In the case of *Doe* v. *Vickers* (10), a mortgagor of a leasehold property suffered an ejectment and took a fresh lease; he was not allowed to set up this new lease against the claim of the mortgagee. In the case of *Hughes* v. *Howard* (11), the mortgagor in collusion with the lessor and the second mortgagee incurred a forfeiture of the mortgaged leasehold and took a fresh lease from the landlord but was not allowed to set up this lease in answer to the suit of the mortgagee. The case of *Debendra Nath* v. *Abdul Samed* (12) may also be referred to as supporting this conclusion.

In the result, therefore, I agree with Mr. Justice Chitty and hold that the Appellant, the Defendant No. 6, is estopped from raising the plea of non-transferability.

Appeal dismissed.

(3) I. L. R. 14 Cal. 401 (1887).
(4) I. L. R. 16 Cal. 355 (360) (1889).
(5) I. L. R. 20 Cal. 236 (1892).
(6) 14 M. I. A. 101 at p. 111 (1871).
(7) L. R 8 I. A. 65 (1881).
(8) I. L. R. 22 Cal. 909 (1895).
(9) 3 C. B. 176 (1846).
(10) 4 A. & E. 782 (1836).
(11) 25 Beav. 575 (1858).
(12) 10 C. L. J. 150 (1909).

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 4821 OF 1910.

MOOKERJEE, J.
CARNDUFF, J.
1911,
24, May.

SYED MAHOMED ZAHURUL HUQ, Plaintiff, Petitioner,
v.
SHAH WAZIRUL HUQ, Defendant, Opposite Party.

Contract Act (IX of 1872), sec. 23—Agreement to remunerate third party for using his influence to bring about settlement of civil dispute, if opposed to morality or public policy.

Where A promises to remunerate C in consideration of the latter undertaking to use his influence over B so as to effect a compromise of a civil dispute between A and B, the consideration or object of the agreement is not illegal and it is enforceable.

This was Rule granted on the 25th of November 1910 against the judgment of Babu Hem Chandra Mukerjee, Small Cause Court Judge of Monghyr, dated the 13th of September 1910.

THE

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Contents.

NOTES.

THE REPORT OF THE PRISONERS' AID SOCIETY which held its annual meeting on Thursday last is more encouraging than that of last year. Last year the Society helped 53 persons of whom seventeen were Europeans and the rest Indians. The list of the persons aided by the Society shows considerable courage in the workers as the large majority of the discharged prisoners who came under the influence of the Society were long-term prisoners with more than one previous conviction. It is encouraging to find that there has been no appreciable number of cases where persons aided by the Society have been convicted during the period while they continued there.

THE BUSINESS SIDE OF THE SOCIETY'S UNDERTAKING, though rather brighter than it was last year, was not quite so good as we should like it to be. Then, its attempt to extend its operations from the making of flat files, &c., "to a rather better class of work," has not been successful. Its endeavours to secure private work by canvassers has deplorably failed and the Society has had mainly to depend on Government work. We expect that the Society will profit by its experiences of the past and next year we hope to find more work placed at its disposal.

WE LEARN FROM THE REPORT THAT A MOST interesting experiment is being tried under the auspices of the Society which, if successful, may be followed up with considerable benefit in future. The report says:—

> Our friends may perhaps remember the case of Benimadhab Chatterji, a man who was sentenced in December 1910 to 10 years' imprisonment for pocketpicking, after having spent about 23 years in jail under nine convictions. Our case about him was that if we had been able to keep him in work he would not have committed the offence of which he was convicted. Sir Edward Baker favoured the idea of making an experiment in this case, and through the kindness of Sir William Duke he was released on the day of Delhi Durbar. The Society has undertaken to make good any depredations he may commit during the next two years up to a moderate amount, and special efforts are being made to supply him with work, or at least with wages. The result is that we have backed our belief in the principles on which the society is founded to an extent that we can in fact afford. But so far it seems as if our money was safe if only we can pay him real wages.

WE TOOK OCCASION TO POINT OUT IN CONNECTION with the debate on Mr. Dadabhoy's motion in the Supreme Council relating to financial assistance to discharged prisoners that it would be very useful to utilise the Society for the purpose of making a beginning in the modern reformed methods of treatment of discharged prisoners. The Society's report takes the same view and observes:

> The subject of the treatment of prisoners in jails and the possibility of rendering them assistance on their discharge was recently discussed by the Imperial Legislative Council on the motion of Mr. Dadabhoy. The practical effect of the discussion seems to be reserved for a future date All we need say is that if the Government of India, or that of Bengal, or any local authorities can, between them, manage to give us a few thousand rupees worth of work that we can do on their own terms, we can undertake to turn a certain number of habitual offenders into men who, from the point of view of the criminal law, may be considered honest.

We hope that the Government will give further consideration to this matter and see its way to begin a new experiment with the assistance of the Society. The Society has within the past few years been able to give a good account of itself and its work in the past, moderate though it be, bears rich promises for the future. We hope that with the daily increasing public support that it is getting and a great deal more of active co-operation of the Government the Society may gradually change the course of the administration of the criminal law in this city and eventually in all Bengal.

LEGALITY OF GOVERNMENT PROCLAMATION IN RESPECT OF BEHAR, ORISSA AND ASSAM.

While thoroughly approving of the administrative changes in respect of Bengal, Behar, Orissa and Assam as announced by His Imperial Majesty the King-Emperor at the Delhi Coronation Durbar, we must express our doubts as to the legality of the Proclamation issued by the Government of India on the 22nd of March last and published in the *Gazette of India* of the following date for bringing about these changes.

We are glad since then to have the Secretary of State's assurance in the House of Lords that a Bill will be introduced in Parliament after Easter recess for giving statutory sanction to the administrative changes. In view of such Parliamentary legislation we would venture to point out in what respect the Proclamations of the Government of India seem to us to conflict with the existing provisions of Parliamentary Statutes so that the grounds covered by the Proclamations may be validated by Parliamentary Statute.

DECLARATION CONSTITUTING GOVERNOR IN COUNCIL.

As regards the Declaration in the said Notification of the 22nd of March last, to the effect that the Secretary of State in Council has been pleased to declare that the Governor-General of India shall no longer be Governor of the Presidency of Fort William in Bengal and that a separate Governor shall be appointed for that Presidency, it will be observed that it is strictly in accordance with sec. 16 of the Government of India Act of 1853 (16 & 17 Vict. c. 95) and therefore thoroughly legal.

But it would be interesting to consider the statutory consequences of this Declaration on Behar and Orissa. Sec. 15 of the Government of India Act of 1853 (16 and 17 Vict. c. 95) suspends the provision for the creation of the North Western Provinces into a Presidency. But sec. 16 expressly reserves the power of appointing a Governor for the Presidency of Fort William in Bengal and provides that a Lieutenant-Governor may be appointed for this Presidency, *i.e.*, in the words of the Statute "of such part of the territories under the Presidency of Fort William in Bengal as for the time being may not be under the Lieutenant-Governor of the said N. W. Provinces." Thus it would seem that now that a Governor has been appointed he will as a matter of course be the Governor for Bengal, Behar, Orissa and Assam. Sec. 16 expressly refers to 3 and 4 Will. IV c. 85 as defining the authority and manner in which the Governor of this Presidency is to be appointed. Referring to sec. 56 of 3 and 4 Will. IV c. 85, we find it expressly provided that the Executive Government of Fort William in Bengal shall be administered by a Governor and three Councillors. So it might be said that the Governor in Council of the Presidency of Fort William in Bengal is under the Declaration of the Secretary of State in Council the lawfully constituted executive of the Presidency; and since the Secretary of State in Council has been under 21 and 22 Vict. c. 106 (Government of India Act of 1858) vested with the power of the Court of Directors and the Board of Control and has in lawful exercise of such powers appointed Lord Carmichael as the Governor of the Presidency of Fort William in Bengal His Excellency the Governor in Council is the only executive authority over the territories comprised in that Presidency.

We shall next examine whether the Governor-General in Council has any powers to limit the authority of the said Governor in Council territorially or otherwise by proclamation. We shall consider first the Proclamation of the Governor-General in Council which purports to constitute the new Province of Behar and Orissa under the India Councils Act of 1861. Sec. 17 of 16 and 17 Vict. c. 95 empowers the Court of Directors and the Board of Control (now Secretary of State in Council) to create a new Presidency and also a Lieutenant-Governorship in addition to the Lieutenant-Governorships of Bengal and North Western Provinces. But these powers are given subject to the proviso that "*such appointments as are hereinbefore authorised, to be continued and made for the territories now and heretofore under the said Presidency of Fort William.*" So it saves the Governor's authority and until his appointment that of the Lieutenant-Governor of Bengal. Further, it makes it clear that the appointment of a Lieutenant-Governor referred to in this section must be for territories other than those comprised in this Presidency. As a matter of fact Sir John Lawrence was in 1859 appointed Lieutenant-Governor of the Punjab under this section and the power was exhausted (see *Ilbert*, 2nd Ed., pp. 192-3; note to Digest, Art. 55).

In any other view the Secretary of State in Council might have appointed a Lieutenant-Governor of Behar and Orissa under this section. But the fact that he has not so done and that the Governor-General in Council purports to constitute the new Province of Behar and Orissa under the Indian Councils Act of 1861 also go to support the above view.

PROCLAMATION RELATING TO LIEUTENANT-GOVERNORSHIP OF BEHAR AND ORISSA.

In view of the saving clause in sec. 17 of the Act of 1853 we entertain serious doubts whether it is competent for the Governor-General in Council to carve out Behar and Orissa from the Presidency of Fort William in Bengal and create them into a Province with a Lieutenant-Governor

under the India Councils Act of 1861 (24 and 25 Vict., c. 67). Turning to sec. 22 of the latter we are confronted with fresh difficulty; for we find it expressly provided by sec. 22 that the Governor-General in Council is not competent to make any laws or regulations affecting any of the provisions of 3 and 4 Will IV, c. 85; 16 and 17 Vict., c. 95 and 17 and 18 Vict., c. 77. We have pointed out above the limitations imposed by the Government of India Acts of 1833, (3 and 4 Will. IV, c. 85) and 1853, (16 and 17 Vict. c. 95) with regard to the establishment of any Lieutenant-Governorship in the Bengal Division of the Presidency of Fort William save and except the one provisionally sanctioned by sec. 16 of the Act of 1853.

We had discussed these limitations at some length with special reference to sec. 4 of 17 and 18 Vict. c. 77 at the time when Eastern Bengal and Assam were constituted into a new Province (*See* 8 C. W. N. cxxix and 9 C. W. N. cclxvi). We have no desire to repeat the same argument here in connection with Behar and Orissa being constituted into a new Province, especially as the Proclamation in question makes no reference to sec. 4 of the Statute of 1854. It will suffice here to say that in the case of Eastern Bengal and Assam, the Government of India had in 1905, some technical justification in constituting Assam, which at the time had no Legislative Council, into a Province under sec. 46 of the Indian Councils Act of 1861, (24 and 25 Vict., c. 67), and then transferring thereto under sec. 47 the territories in Eastern Bengal from the Presidency of Fort William in Bengal. But the same cannot be said with regard to Behar and Orissa.

Behar and Orissa have all along formed an integral part of the Bengal Division of the Presidency of Fort William. Sec. 44 of the India Councils Act of 1861 specifically provided for giving it a Legislative Council and in 1862 a Council was constituted for Bengal (including Behar and Orissa) by proclamation as provided for in that section. When the power has once been exercised by the Governor-General in Council it has become extinct or spent in respect of Bengal. So the Governor-General in Council cannot again assume powers under the general provisions of sec. 46 and constitute a new Province within the Bengal Division of the Presidency. As we have pointed out before, secs. 16 and 17 of 16 and 17 Vict. c. 95 and sec. 22 of the Act of 1861 would also stand in the way.

A further difficulty in the way of the Governor-General in Council constituting Behar and Orissa into a separate Province under the Indian Councils Act of 1861 is that there can be no question (*See* the title and the preamble of the Act and also Ilbert, 2nd Ed., pp. 193 and 195) that the Indian Councils Act of 1861 is intended for creating Legislative Councils where they do not exist and constituting Provinces and Lieutenant-Governorships for the purpose.

Now, since the giving of a Legislative Council to Bengal, Behar and Orissa under sec. 44 of the Indian Councils Act of 1861, the constitution of that Council has been very materially altered by the Indian Councils Act of 1909. This latter is also a Parliamentary statute and when it specifically provides for the constitution of the Legislative Council for the Bengal Division of the Presidency of Fort William in Bengal partly by election and partly by nomination and fixes very different limits and limitations in respect of numbers and of official nominees, how can the Governor-General in Council go back to the Statute of 1861 and create a Province with an obsolete Council and a Lieutenant-Governor within the Bengal Division of the Presidency of Fort William?

After giving the matter our very careful attention we have come to the conclusion that the Parliamentary Statute which is intended to be passed in respect of the administrative changes in Bengal Presidency should specifically provide for the constitution of Behar and Orissa into a separate Province with a Legislative and Executive Council consistently with the India Councils Act of 1909.

PROCLAMATION RELATING TO BOUNDARIES OF THE PRESIDENCY OF FORT WILLIAM IN BENGAL.

The Proclamation of the Government of India fixing the territorial limits of the Presidency of Fort William in Bengal purports to be issued under sec. 47 of the Indian Councils Act of 1861, and sec. 4 the Government of India Act of 1865, (28 and 29 Vict., c. 17). The Indian Councils Act of 1861, as we have seen, cannot have any application to territorial re-distribution in respect of this Presidency. Sec. 4 of the Government of India Act of 1865, would also seem to have no application to a case like the present. It provides no doubt for re-distribution of territories but it is to be noted that the scope of such re-distribution is limited by the section "into and among" Presidencies and Lieutenant-Governorships which are again qualified in the section by the words "for the time being subsisting." The Lieutenant-Governorship of Behar and Orissa was not subsisting, and the Lieutenant-Governorship of Eastern Bengal is supposed to be extinct, so it is difficult to follow how re-distribution as contemplated in the Proclamation can take place under sec. 4 of the Act of 1865, above referred to. The redistribution of boundaries between Bengal, Behar and Orissa made by the Proclamation is, therefore, of very questionable legality.

We would therefore urge on the Government to make provision in the Parliamentary Statute for the abolition of the Lieutenant-Governorship and

the Legislative Council in Eastern Bengal and Assam. For although there may be doubt as to whether the Province of Eastern Bengal and Assam was lawfully constituted in 1905, yet it has been given statutory constitution under the India Councils Act of 1909, and the Indian Legislature or Executive is not competent to abolish it.

THE PROCLAMATION RELATING TO ASSAM.

The same may be said with regard to Assam. It was a part and parcel of a Lieutenant-Governorship with a Legislative Council constituted under Parliamentary authority. It is doubtful therefore whether the Proclamation issued by the Governor-General in Council under sec. 3 of the Government of India Act of 1854 (17 and 18 Vict. c. 77) is at all valid. So far back as 1878 the Government of India were advised that the Governor-General in Council had no authority to take away any portion of the territory under the Lieutenant-Governorship with a Council and transfer it to a Chief Commissionership (see *Ilbert*, 2nd Ed., p. 195; note to Digest, Art. 57). Since the inclusion of Assam in the Indian Councils Act of 1809, it is hardly competent for the Governor-General in Council to suspend or abolish its statutory constitution by a proclamation under the Act of 1854. It would therefore be also absolutely necessary to constitute the Chief Commissionership of Assam with a Council by a Parliamentary Statute.

CONCLUSION.

We would, therefore, suggest that the Parliamentary Statute should provide for the abolition of the Bengal Council and the re-constitution of Executive and Legislative Councils for the Presidency of Fort William in Bengal and the Province of Behar and Orissa, which might be consistent with the India Councils Act of 1809 and also validate all the executive acts in Behar and Orissa and Assam that may be done in pursuance and by the authority of the aforesaid Proclamations on and from the 1st of April 1912 to the date of the passing of the Parliamentary Statute.

We would further suggest that the Bengalee-speaking districts should be included in the Bengal Division of the Presidency before or at the time the Parliamentary Statute is passed, because the re-adjustment of boundaries after that would require Royal sanction signified through the Secretary of State for India if an entire zillah or district has to be transferred from one province to another; and in the case of Assam, after the passing of the Parliamentary Statute, it might lead to further complications (*see* sec. 5 of the Government India Act of 1865).

DECLARATION AND PROCLAMATIONS RELATING TO GOVERNOR IN COUNCIL FOR BENGAL AND CONSTITUTING THE PROVINCES OF BEHAR AND ORISSA AND CHIEF COMMISSIONERSHIP OF ASSAM.

The *Gazette of India* of the 23rd of March 1912 contains the following notifications :—

The following Declaration, made by the Secretary of State for India in Council, is hereby published :—

The Secretary of State in Council for India, under the powers reserved to him by the East India Company Act, 1853, (16 and 17 Vict., c 95), and the Government of India Act, 1858 (21 and 22 Vict., c. 106), is pleased to declare that the Governor-General of India shall no longer be Governor of the Presidency of Fort William in Bengal, and that a separate Governor shall be appointed for such Presidency."

The following Proclamation, to which the sanction of His Majesty the King-Emperor of India has been signified by the Secretary of State for India in Council, is hereby published :—

PROCLAMATION.

The Governor General is pleased to constitute the following territories which are now subject to and included within the limits of the Presidency of Fort William in Bengal, namely :—

the districts of Bhagalpur, Monghyr, Purnea and the Sonthal Parganas, in the Bhagalpur Division,
the Patna Division, comprising the districts of Gaya, Patna and Shahabad,
the Tirhut Division, comprising the districts of Champaran, Durbhanga, Muzaffarpur and Saran,
the Chota Nagpur Division, comprising the districts of Hazaribagh, Manbhum, Palamau, Ranchi, and Singhbhum, and
the Orissa Division, comprising the dictricts of Angul, Balasore, Cuttack, Puri and Sambalpur,

to be, for the purposes of the Indian Councils Act, 1861 (24 and 25 Vict., c 67), a Province to which the provisions of that Act touching the making of Laws and Regulations for the peace and good government of the Presidencies of Fort Saint George and Bombay shall be applicable.

2. The Governor-General is further pleased to direct that the said Province shall be called the Province of Bihar and Orissa, and to appoint the Honourable Sir Charles Stuart Bayley, K. C. S. I., to be the first Lieutenant-Governor of the Province with all powers and authority incident to that office.

3. The Governor-General in Council is also pleased to specify the first day of April 1912, as the time at which the application of the said provisions of the said Act to the Province of Bihar and Orissa shall take effect.

BENGAL PRESIDENCY.

The following Proclamation, to which the sanction of His Majesty the King-Emperor of India has been signified by the Secretary of State for India in Council, is hereby published :—

PROCLAMATION.

In exercise of the powers conferred by sec. 47 of the Indian Councils Act, 1861 (24 and 25 Vict, c. 67), and sec. 4 of the Government of India Act, 1865 (28 and 29 Vict., c 17), and of all other powers enabling him in this behalf, the Governor-General in Council is pleased to declare and appoint that, on and from the first day of April 1912, the territories specified in the schedule hereto annexed shall be and continue subject to the Presidency of Fort William in Bengal.

SCHEDULE.

Part I.—Territories which are now administered by the Lieutenant-Governor of Eastern Bengal and Assam.

1. The Chittagong Division, comprising the districts of Chittagong, the Chittagong Hill-tracts, Noakhali and Tippera.

2. The Dacca Division, comprising the districts of Bakarganj, Dacca, Faridpur and Mymensingh.

3. The Rajshahi Division, comprising the districts of Bogra, Dinajpur, Jalpaiguri, Malda, Pabna, Rajshahi and Rangpur.

Part II.—Territories which are now administered by the Lieutenant-Governor of Bengal in Council.

4. The Burdwan Division, comprising the districts of Bankura, Birbhum, Burdwan, Hooghly, Howrah and Midnapore.

5. The Presidency Division, comprising the town of Calcutta and the districts of Jessore, Khulna, Murshidabad, Nadia and the 24-Parganas.

6. The District of Darjeeling.

In exercise of the power conferred by sec. 3 of the Government of India Act, 1854 (17 and 18 Vict, c. 77), and with the sanction and approbation of the Secretary of State for India, the Governor-General in Council is pleased to issue the following Proclamation :—

PROCLAMATION.

The following territories, which are now included within the Province of Eastern Bengal and Assam, namely :—

the Assam Valley Districts Division, comprising the districts of Darrang, Garo Hills, Goalpara, Kamrup, Lakhimpur, Nowgong and Sibsagar, and

the Surma Valley and Hill Districts Division, comprising the districts of Cachar, Khasi and Jaintia Hills, Lushai Hills, Naga Hills and Sylhet,

shall on and from the first day of April 1912, be taken under the immediate authority and management of the Governor-General of India in Council and formed into a Chief Commissionership, to be called the Chief Commissionership of Assam; and Sir Archdale Earle, K. C. I. E., is hereby appointed to be the Chief Commissioner of Assam, with effect from that date.

H. WHEELER,
Offg. Secy. to the Govt. of India.

Notes of Cases.

ENGLISH LAW COURTS.

CHANCERY DIVISION. *Cuff* v. *London and County Land and Building Company.* Before MR. JUSTICE EVE. 23rd January 1912.

Auditors' statutory right of access to the books of a company—Charge of negligence against them—Apprehension that inspection will disclose Company's evidence.

The Plaintiffs were appointed auditors of the Defendant company. The company discovered some embezzlement by one of its servants, and attributed it to the negligence of the Plaintiffs who denied the liability. They made the present claim to exercise their statutory right of access to the books of the company, and refused to resign. The company objected to the grant of a mandatory order but the learned Judge allowed it. In the course of his judgment he said :—

The appointment of auditors carried with it the obligation to perform certain duties imposed by sec. 113 of the Companies Act, 1908. Mere compliance with the letter of these statutory requirements involved a comparison of the entries in the books with the figures in the balance-sheet, but no one would suggest that the duty of the auditors was limited to ascertaining that the entries in the books were correctly transcribed or summarized in the balance-sheet. As was pointed out by the Court of Appeal, the auditors were bound to inquire and take trouble to ascertain whether the books themselves showed the company's true position, and such investigation must of necessity range over an area which covered accounts, vouchers, invoices, and documents constituting the materials out of which the entries in the books originated. In order to enable them to discharge these duties the auditors were clothed with the powers enumerated in the same section.

Sec. 112 (6) contemplated the possibility of a casual vacancy in the office, but did not in terms empower auditors to resign or the company to remove them, but it was not necessary to consider whether these powers existed, for the auditors declined to resign and the Company had taken no steps to remove them. In these circumstances the auditors were bound to discharge their statutory duties, and in so doing were entitled to exercise the statutory powers conferred upon them. The charges of negligence afforded no sufficient answer to the claim to exercise those powers, nor was there any substance in the objection that the exercise of them would give the auditors an opportunity of ascertaining the evidence on which the Company would rely in any action brought against them, the answers to such objection being, *first*, that there was in fact no such action pending, and, *secondly*, that even if there were, the materials to which the auditors claimed to have access would all have to be disclosed to them in such action.

Messrs. Lawrence, K. C., and Rolt for the Plaintiffs.

Messrs. Gore-Brown, K. C., and Kerly for the Defendants.

B. D. *Application allowed.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN.
LORD MERSEY.
LORD ROBSON.
1912,
28th February.

MUNSHI KALI SHANKAR SAHAY and others, Defendants-Appellants, Petitioners, *v.* MAHARAJA PERTAB UDOY NATH SHAH DEO, Maharaja of Chota Nagpore, Plaintiff, Respondent.

Privy Council—Special leave—Concurrent findings.

This was a petition for special leave to appeal

to His Majesty in Council. The facts stated in the petition were as follows :—

The Petitioners were Defendants in the present suit, which was instituted by the Plaintiff-Respondent and the main question in issue between the parties was whether the Plaintiff was entitled to resume three villages which were purchased by the Defendants in 1896 at an auction sale held in execution of a decree.

The three villages were the zemindari property of three ladies, Musammat Khetrani Koer and two others, of whom the last surviving, Khetrani Koer, died on the 19th August 1901.

The said ladies made a default in the payment of Road and Public Works Cesses in respect of the said villages to the Plaintiff-Respondent. The Plaintiff-Respondent thereupon brought a suit against the said ladies and obtained a decree against them on the 30th March 1895.

The said Plaintiff decree-holder applied for execution of the said decree by attachment and sale of the three villages.

The Court executing the said decree thereupon issued a proclamation of sale under the provisions of Act VIII of 1865 (B. C.) and Act I of 1879 ordering that "the land mentioned above will be sold by auction." The said three villages were accordingly sold and the Petitioners were declared auction-purchasers of the same.

A sale certificate, dated the 6th April 1896, was duly obtained by the Petitioners and on the 10th November 1896 the Court passed an order "to deliver possession to the auction-purchasers over the properties purchased, namely, Mouzahs Koenjara, Dhadhra and Kudarko—the *jaigirdari* properties of the judgment-debtors" which was done.

On the death of the said Khetrani Koer which occurred on the 19th August 1901 the Plaintiff-Respondent began to dispossess the Petitioners from the said villages on the allegation that the said ladies had only a *khor-posh* or life tenure for maintenance in the aforesaid villages. The Plaintiff-Respondent alleged that his predecessors in title had made a grant of the said villages to the said ladies for life and that on the death of the last surviving lady the villages reverted to him.

The Petitioners denied the Plaintiff's claim which led to the institution of the present suit on the 9th January 1905 in the Court of the Subordinate Judge of Ranchi. The Plaintiff prayed for *khas* possession of the said villages and mesne profits and costs on the basis of the title indicated above.

The Petitioners filed a written statement in defence. They pleaded among other things that the Plaintiff was estopped by his conduct in the course of the execution proceedings above-mentioned from denying that the Petitioners were declared purchasers of the said villages, that the claim was barred by limitation, and. that the said ladies were not holders of a grant for life only.

The said Subordinate Judge fixed the necessary issues for trial and recorded evidence, oral and documentary, produced by the parties. In support of his case the Plaintiff produced certain *Mulki* papers of the year 1842 from the office of the Deputy Commissioner. These papers were returns which were made and filed by an agent of the then Maharaja of Chota Nagpore in respect of his zemindari and in which it was stated that the said villages were held by the said ladies under a grant for life only. The Petitioners objected to the said *Mulki* papers being admitted in evidence but the lower Courts admitted them.

The said Subordinate Judge delivered judgment on the 31st January 1908. He found that the said ladies had only a life estate in the said villages which were resumable on their death by the Plaintiff Respondent. He also held that the claim was not barred by limitation or by the doctrine of estoppel. He accordingly made a decree for possession in favour of the Plaintiff.

The Petitioners thereupon appealed against the said decree of the Subordinate Judge to the High Court of Judicature at Fort William in Bengal which delivered judgment on the 24th July 1911. It agreed with the conclusions of the Court below and accordingly made a decree dismissing the appeal with costs.

Dissatisfied with the said decree of the said High Court the Petitioners applied to that Court for leave to appeal against it to His Majesty in Council but the said High Court refused to grant leave by an order, dated the 5th September 1911, in terms following :—

"Inasmuch as the decree of this Court against which an appeal is sought to be preferred affirms the decision of the Court below, we have to be satisfied that the appeal involves some substantial question of law. It appears to me impossible to say that there are any substantial questions of law."

Hence this petition.

Mr. L. DeGruyther, K. C. (with him *Mr. Bhugwandin Dubé*) for the Petitioners submitted that the appeal involved a substantial question of law. The Plaintiff was estopped from denying that the ladies were owners of the villages when the Plaintiff attached them and got them sold in execution of his own decree. The *Mulki* papers were inadmissible in evidence. The statements therein made by the Plaintiff were not adverse to his interests but in his own favour.

Their Lordships rejected the petition remarking that it was a case of concurrent findings of fact.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Petitioners.

B. D. *Leave disallowed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. CRIMINAL REVISION No. 1601 OF 1911. CHANDPUR CO., LTD., 1st Party, Petitioners *v.* MAHARAJA MONINDRA CHANDRA NANDY, 2nd party, Opposite Party. 8th March 1912.

Criminal Procedure Code, sec. 145, passing orders under, without hearing arguments, illegality of.

This Rule was issued calling upon the Magistrate to show cause why the order of the Magistrate under sec. 145, Cr. P. C., should not be set aside on the ground that it was made without hearing the arguments of the Petitioners' pleader.

Their Lordships observed :—

"We are clearly of opinion that the explanation of the District Magistrate cannot mean anything else than that, as it was too late for him on that day both to hear arguments and to deliver his decision he thought that it was in his competence not to allow any adjournment for the purpose of argument but to pass orders at once. No doubt the pleader did not say to him "if you cannot hear me at this late hour I must ask for adjournment." That did not justify the Magistrate in declining to hear him altogether and passing orders at once.

The case must be sent back to the learned Magistrate to hear the arguments of the 1st party's pleader and in the meantime the order passed will remain in abeyance. A fresh order will be passed after considering the arguments of the first party. It is within the discretion of the Magistrate to take any evidence that may be offered on the day of rehearing.

Mr. S. P. Sinha and *Babu Monmatha Nath Mukherjee* for the Petitioners.

Mr. J. N. Roy and *Babu Hemendra Nath Sen* for the Opposite Party.

B. C.

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. CRIMINAL REVISION No. 169 OF 1912. BEPIN BEHARY BANERJEE, Petitioner *v.* THE KING-EMPEROR, Opposite party. 11th March 1912.

Statement of a co-accused, how far admissible.

One of the grounds on which this Rule was issued was that the lower Courts illegally and improperly used the statement of a co-accused against the Petitioner.

Their Lordships observed :—

. . . . We do not think that the Sessions Judge should have taken the statement before evidence is gone into. . . . . . .

Babus Jogendra Nath Mukherjee, Hira Lal Chakravarty and *Purendu Sundar Banerjee* for the Petitioner.

Mr. Sultan Ahmed for the Crown.

B. C. *Rule discharged.*

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and N. R. CHATTERJEA, J. LETTERS PATENT APPEAL No. 24 OF 1910. PEARY MOHON ROY, Plaintiff, Appellant *v.* SRIMATI SARAT KUMARI DEBI AND OTHERS, Respondents. 12th March 1912.

Cess Act (IX of 1880), sec. 41—Raiyat, if tenure-holder—Annual value—Cess, ascertainment of.

The suit was for recovery of rent and cesses. So far as a decree for rent was passed in favour of the Plaintiff, no controversy arose, but the dispute was as to the decree in respect of the cesses claimed. The plaint set out in a schedule the arrears of cesses, and from that schedule it appeared that the claim was made in respect of four separate *jamas.* The decision in the Court of the Munsif, so far as it related to the cesses was adverse to the Plaintiff, inasmuch as it was not shown what was the annual value of each of those four *jamas.* The Subordinate Judge modified that decree, for it appeared to him that he was entitled to utilise the valuation roll filed on behalf of the Plaintiff, and marked Ex. I which showed the annual value of the lands as Rs. 1,290-6 as. and the total amount of rent payable by the Defendant as Rs. 463 6 as. On that basis he passed a decree in the Plaintiff's favour for the excess claimed by him over and above that which had been awarded by the Munsif. From that decree an appeal was preferred to the High Court which came before Mr. Justice D. Chatterjee. He set aside the decree of the lower Appellate Court and restored that of the Court of first instance on the ground that upon the Plaintiff's own document it appeared that the Defendants were treated by the Plaintiff as *raiyats* of the land in respect of which the present suit was brought.

Held—That a raiyat might be a tenure-holder within the meaning of the Cess Act.

That it was incumbent upon the Plaintiff to establish and the Courts to find, what was the annual value of each of the four *jamas*; and, also whether in respect of those four *jamas* the Defendants were 'tenure-holders' or 'cultivating raiyats' within the meaning of the Act, and further, what was the profit, if any, in respect of each of the four *jamas.*

Babu Ram Chandra Majumdar for the Appellant.

Babus Baidya Nath Dutt and *Bepin Behary Ghose* for the Respondents.

A. T. M.] *Appeal allowed: Case sent back.*

High Court Notification.

THE following Rule passed by the High Court of Judicature at Fort William in Bengal is published for general information.

By order of the High Court,

HIGH COURT, *The 13th March 1912.*

R. L. Ross, *Registrar.*

It is ordered that the following amendments be made in the Rules relating to the "Admission of Vakils in the High Court," reproduced in Part IV, Chapter XVI, page 128, *et seq.* of the "Rules of the High Court, Calcutta, Appellate Side":—

I.—In the third line of Rule I (6), at page 129, after the letters "B. A.," *insert* the word and letters "or B.Sc."

II.—In the fourth and fifth lines of the said rule, for the words "Madras, Allahabad, the Punjab, or Bombay," *substitute* the following:—

"Allahabad, the Punjab, of Bombay, or the B.A. examination of the University of Madras."

THE following rules having been framed by the High Court of Judicature at Fort William in Bengal in the exercise of the powers vested in it by section 2 of Act III of 1879, confirmed by the Local Governments of Bengal and Eastern Bengal and Assam and sanctioned by the Governor-General in Council, are published for general information.

Rules framed by the High Court of Judicature at Fort William in Bengal under section 2 of Act III of 1879 for the preservation and destruction of the Civil and Criminal records of the Court on its Appellate Side, to take effect from the 1st of April 1912, and to apply to all cases instituted on and after that date.

Civil Records.

I. The records of every Civil Appeal shall consist of two parts to be styled respectively Part I and Part II. To Part I there shall be prefixed a Title page coloured white and to Part II a Title page coloured blue, forms of which are annexed.

II. Part I shall contain the following papers which shall be preserved for ever:—

(1) The Memorandum of Appeal.
(2) The copies of the judgment and decree filed with the Memorandum of Appeal and not inserted in the paper-book of the case.
(3) The Memorandum of cross-objections.
(4) Vakalatnamas.
(5) Applications for substitution, addition, or removal of parties, the affidavits filed therewith, and the orders of the Court thereon.
(6) Award of arbitrators, or petitions of compromise, if given effect to in the decree; also in the case of minors or lunatics, the order of the Court sanctioning the compromise.
(7) Judgment.
(8) Decree.
(9) Applications for return of documents and orders thereon.
(10) Paper-books; two copies when printed; one copy when not printed.
(11) Any paper whose preservation may be directed by the presiding Judge or Judges.

III. Part II shall contain the following papers which shall be destroyed at the end of 12 years:—

(1) All processes and returns thereto.
(2) All requisitions for records, whether addressed to this Court, or to another Court.
(3) All petitions, affidavits and correspondence relating to the two subjects above-mentioned or to adjournments of the hearing.
(4) Bonds for security for costs.
(5) Petitions to stay proceedings pending appeal and orders thereon.
(6) Petitions for the admission of documents and orders thereon.
(7) Petitions for security for costs of the Respondent and orders thereon.
(8) Applications for translating and printing and for copies and orders thereon.
(9) Copies of documents printed in the paper-book.
(10) Any paper whose destruction may be directed by the presiding Judge or Judges.

IV. The period of 12 years mentioned in the preceding Rule III shall be calculated from the date of the final decree or order which, in cases appealed to the Privy Council, will be that of the decree or order of His Majesty in Council.

V. All copies of paper-books in excess of the number to be permanently preserved as directed in Rule II (item 10) of these rules shall be kept separate from the records to which they relate and be destroyed on the expiry of three years from the date of the final decree or order of the High Court, or, in cases appealed to the Privy Council, on the receipt of the final decree or order of His Majesty in Council.

VI. The distribution of the papers to the appropriate Part (I or II) of the record shall be made by the Record Department on the receipt of the record in the record-room after the disposal of the case.

VII. These rules shall also apply, *mutatis mutandis*, to the records of all Civil Revision Cases and References.

Criminal Records.

VIII. Applications for bail and suspension of sentence and orders thereon, which are treated as Miscellaneous Cases, shall be preserved for 12 years, such period being calculated from the date of the order.

SYED MAHOMED ZAHURUL HUQ *v.* SHAH WAZIRUL HUQ.

The material facts will appear from the judgment.

Moulvi Mahomed Mustafa Khan for the Petitioner.

No one for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

We are invited in this Rule to set aside a decree by which the Court below has dismissed a suit for recovery of money due upon an agreement. There was no substantial controversy as to the circumstances under which the agreement was made or was sought to be enforced.

One Bibi Hasan Banu had a dispute with the Defendant and the Defendant asked the Plaintiff to intervene and have the dispute settled. The Plaintiff was a friend of the father-in-law of this lady and the Defendant was anxious that he should exercise his influence with the members of the family to effect a compromise of the dispute. At the same time he promised to pay the Plaintiff a sum of Rs. 300 as his remuneration, if the compromise was satisfactorily effected. The dispute has been settled and the Plaintiff now seeks to recover the promised money from the Defendant. The Defendant pleads that the agreement is opposed to public policy and is not enforceable in view of the provisions of sec. 23 of the Indian Contract Act. The learned Small Cause Court Judge has given effect to this contention and dismissed the suit although he has found that the agreement as alleged by the Plaintiff has been proved. In our opinion, the view taken by the Judge cannot be supported. That there was consideration for the agreement cannot be disputed. The only question is whether the consideration or object of the agreement was lawful.

Sec. 23 of the Indian Contract Act provides that the consideration or object of an agreement is lawful unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy. In the case before us, it is manifest that the agreement is not forbidden by law, nor is it of such a nature that, if permitted, it would defeat the provisions of any law. On the other hand, the agreement was for a purpose which is encouraged by Courts of Justice with a view to shorten litigation. If the parties to a suit come to a settlement, the Court will give effect to the compromise under ordinary circumstances. There is no suggestion that the object of the agreement in his case was fraudulent; it has not even been suggested that the Plaintiff should employ any fraudulent means with a view to effect a settlement of the dispute between the parties. Nor is it shown that the agreement involves or implies injury to the person or property of another. The sole question, therefore, is whether the Court should regard the consideration or object of the agreement as immoral or opposed to public policy. Now it has no doubt been held that agreements for stifling prosecution are opposed to public policy on the principle that no one shall make a trade of felony. But the same principle does not apply to a civil dispute. It has even been held that a compromise of proceedings which are criminal only in form and really involve private rights may be lawful. *Amir Khan* v. *Amir Jan* (1). In our opinion, upon no conceivable principle can it be maintained that an agree-

(1) 3 C. W. N. 5 (1898).

ment to remunerate a person in order that he may exercise his influence to effect a settlement between two persons one of whom enters into the agreement, is in any way immoral or opposed to public policy.

The result, therefore, is that this Rule is made absolute. The decree of the Small Cause Court Judge set aside and a decree made in favour of the Plaintiff with costs both here and in the Court below. We assess the hearing-fee in this Court at one gold mohur. The decree will be made against the Defendant described as Wazirul Huq *alias* Nazirul Huq.

Rule made absolute.

[PRIVY COUNCIL.]

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1911,
Heard, 31, October & 1, November.
1912,
Judgment, 21, February.

RAJA DURGA PRASAD SINGH, Plaintiff, Appellant,
v.
BRAJA NATH BOSE and others, Defendants, Respondents.

Digwari tenure, incidents of, and mineral rights—Minerals, right of zemindar in permanently settled estates—Zemindar's suit for declaration of right to mineral as against Digwar, Government if necessary party.

Digwari tenure which was granted originally in consideration of the performance of military service, to which police duties were attached, are hereditary and inalienable. The Digwar is appointed by Government and liable to be dismissed by Government for misconduct. On dismissal the next male heir, if fit for the office, is appointed.

In the absence of proof that the mineral rights were vested in the Digwar before or at the time of the Permanent Settlement, the zemindar with whom the estate in which the tenure was situated was permanently settled by Government would have the right to the minerals and, there being no evidence to show that the zemindar had ever parted with his mineral rights to the Digwar, the Digwar had no right to deal with the minerals.

In a suit by the zemindar asking for a declaration of his right to the minerals as against the Digwar the Government was not a necessary party as the Government never claimed the minerals or put forward any claim inconsistent with that set up in this case by the zemindar.

The rights of the Government whatever they were would not be prejudiced or affected by the result of a suit to which it is not a party.

Mineral rights of Ghatwals of Pergunnah Sarhat in the North-Western part of Birbhum zemindari distinguished.

BROJONATH BOSE *v.* DURGA PERSAD SINGH (5) *reversed.*

KUMAR HARI NARAYAN SINGH DEO BAHADUR *v.* SRIRAM CHAKRAVARTI (2) *referred to.*

This was an appeal against a judgment* and decree of the High Court of Judicature at Calcutta, dated the 18th March 1907, reversing a judgment and decree of the Court of the Subordinate Judge of Manbhum, dated the 14th June 1904.

The main questions for dertermination on this appeal are (1) Whether the Secretary of State for India in Council was not a

(2) L. R. 37 I. A. 136: s. c. 14 C. W. N. 746 (1910).
(5) I. L. R. 34 Cal. 753: s. c. 12 C. W. N. 193 (1907).

* Reported in I. L. R. 34 Cal. 753: s. c. 12 C. W. N. 193 (1907).

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necessary party to this suit, (2) Whether the Appellant's claim was not barred by limitation and (3) Whether the Appellant as the zemindar and proprietor of the permanently settled estate of Pergunnah Jharia was entitled to the coal mines situate in mouzahs Tasra and Rohrabund which mouzahs formed the ancient and permanent Digwari jaigir appertaining to the office of Digwar of which the Respondent No. 1 was the present holder.

The facts and circumstances out of which the present litigation arose were shortly as follows :—Pergunnah Jharia was permanently settled with the predecessor of the Appellant.

The mouzahs in question, Tasra and Rohrabund were within the ambit of Pergunnah Jharia.

The early official papers and documents relating to that Pergunnah were not now forthcoming and were said to have been burnt in the Government offices in which they were filed at or about the time of the Mutiny.

The *jaigir* was and had always been subject to a quit rent or cess of Rs. 64 payable in respect of both the mouzahs.

The area of these mouzahs comprising the *jaigir* was as to Tasra 897 bighas, and Rohrabund 6,025 bighas, making a total of 6,922 bighas.

On the 5th December 1887, the Respondent No. 1, Braja Nath Bose, was appointed by the Government the Digwar of Tasra.

On the 5th September 1888, a Sanad of appointment was granted to him by which he was expressly prohibited from in any way alienating the Government Chakran land, *i.e.*, the said mouzahs, to any person.

By order of Government, dated the 4th September 1888, it was directed that the police authorities should make over the said Sanad to him, and put him in possession of the said mouzahs. In due course possession thereof was made over to him, and on the 25th September 1888 a receipt was taken from him in the following terms:—

" I, Braja Nath Bose Digwar, of Ghat Tasra, do execute this receipt to the following effect :—

" I execute this receipt on receiving from the Ghatwali Inspector my Sanad by which I have been appointed (Digwar) of this Ghat, as also khas possession of the lands situate within the boundaries specified herein below and set apart for khas possession (*i.e.*, the mouzahs Tasra and Rohrabund)."

" I have also been informed of the order by which I have been authorized to sell the coal of this mouzah at my pleasure."

The said sanction to sell the coal of the said mouzahs was obtained from the Government.

From the said time, the Respondent No. 1 worked the said coal in the said mouzahs, and in connection therewith he was required and obliged to pay cesses to Government under the Cess Act in respect of the said coal mine from the year 1888.

On the 2nd January 1892, the Respondent No. 1 granted a lease to one Matthewson of, *inter alia*, his subsoil rights in the said mouzahs, including the right to mine for coal.

The said lease was granted with the sanction of the Government, and the draft thereof was signed and approved by the Deputy Commissioner of Manbhum acting on behalf of the Government on the 29th December 1891.

On the 3rd September 1894, the said Matthewson by Indenture transferred all his rights under the said lease to the

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Respondent No. 2, The Tasra Coal Company.

From the date of the said lease the coal mine was worked by the said lessee and transferee.

The Appellant instituted the present suit on the 18th December 1903, in the Court of the Subordinate Judge at Purulia, District Manbhum, against the Respondent No. 1, the said Matthewson and the Respondent No. 2, The Tasra Coal Company, alleging *inter alia* that the Respondent No. 1 and his predecessors held the mouzahs in ordinary *ijara* and not as a Digwari *jaigir* as alleged by the Respondents, and that the Appellant alone was entitled to the coal which were being wrongfully removed.

He accordingly asked for a declaration as to his rights and for damages in respect of the coal removed.

The Respondent No. 1 filed a written statement in defence on the 25th February 1904.

He pleaded that the Government was a necessary party to the suit, and that the Plaintiff's claim was barred by limitation.

He denied that the Plaintiff's predecessors had held khas possession of the said mouzahs or had made settlements of the lands thereof with the tenants, or that Digumbar Singh predecessor of Respondent No. 1 had held possession thereof under an *izara* right, or that the Respondent No. 1 had ever paid the Plaintiff any money as *izara* rent.

He alleged *inter alia* that the two mouzahs had been held from time immemorial in digwari *jaigir* right by the Digwar appointed for the time being by the Government, that the said Digwar rendered police services to Government, and that his office and possession of the said mouzahs was conferred upon him by the Government; that the digwari punchak rent of Rs. 64 per annum had always been paid therefor, and that before the time of the establishment of the English Government the same used to be paid to the Government of the day in India, but since the Decennial Settlement the same had been realized through the zemindar for the sake of convenience; that the Plaintiff had no right whatever connected with the said mouzahs beyond the said digwari punchak rent, and had never been in possession thereof on the basis of any such right; that he and his predecessors, Digwars, had exercised their rights therein, both above and below the surface, without any objection on the part of the zemindar, and he contended that the settlement which he made was within his right, and that the Plaintiff had no claim against him and that the suit should be dismissed with costs.

The Defendant, Matthewson, filed a written statement denying any liability to the Plaintiff, and stating that his name had been merely used in the transaction for the Tasra Coal Company.

The Respondent No. 2, the Tasra Coal Company, also filed a written statement raising in effect the same pleas as those raised by the Respondent No. 1.

On the 25th February 1904, the Subordinate Judge on these pleadings framed the issues following :—

1. Is the Government a necessary party? Can the suit proceed in the absence of Government?

2. Is the claim barred by limitation?

3. Has the Plaintiff any right to the minerals in the mouzahs in dispute?

4. Is the Defendant No. 1 an *izaradar* under the Plaintiff?

5. Is the Plaintiff entitled to the injunction asked for?

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6. Is the Plaintiff entitled to any damages? The amount, if any, of the same?

After recording evidence both oral and documentary the Subordinate Judge on the 14th June 1904 delivered judgment.

On the 1st and 2nd issues he held that the Government, though a proper, was not a necessary party to the suit, and that the Plaintiff's claim was not barred by limitation.

On the 3rd and 4th issues he held that mouzahs Tasra and Rohrabund were for the first time in 1845 described as digwari mouzahs, so far as the documents proved before him were concerned, that the Appellant's contention was incorrect in suggesting that the Digwars were ordinary *izaradars*; that the mouzahs were digwari mouzahs; that the Digwars of Jharia were as much servants of the zemindar as of the Government; that the zemindar of Jharia had in 1814 been invested with the charge of the police, and was divested of those powers in 1833; that there was no evidence to show that the mouzahs were constituted digwari mouzahs at the time of the Permanent Settlement; that the Digwars were not independent talukdars of the mouzahs inasmuch as they did not fall within the provisions of sec. 5, Reg. VIII of 1793; that the evidence did not carry the antiquity of the tenure further back than a few years before 1845; that the most that can be presumed in favour of the Defendants was that the tenure was in existence at the time of the Permanent Settlement; that there was nothing to show that the grant had been made by Government; that the real point for determination was whether the tenure was included in or excluded from the Permanent Settlement; that the facts showed that Tasra was included in that settlement; and that Rohrabund was an off-shoot from Tasra at a subsequent date; that consequently the Digwars could not claim to be proprietors of the soil of the mouzahs, and had no right to the minerals; that the rights possessed by Ghatwals in Birbhum in their tenures could not be applied by analogy as existing in the digwari tenures in dispute; that the tenure in this case was the grant of an office, the performance of the duties of which is remunerated by the use of the lands which did not involve an absolute grant of the soil, but only a grant of the surface; that Government had disclaimed all right to the minerals in a despatch of the 25th March 1880, and that therefore the right to the coal and all minerals must be in the zemindar.

He made a decree granting an injunction against the Defendants and for Rs. 1,854-11, the value of the coal with costs.

Against the said judgment and decree the Defendants appealed to the High Court at Calcutta.

The High Court (Brett and Sharfuddin, JJ.)* on the 18th March 1807, delivered judgment, decreeing the appeal, and dismissing the suit with costs.

It held that the digwari tenure in question placed the holder in a higher position than a Ghatwal or Chowkidar:—That the tenure was an ancient one and both office and tenure were hereditary, but with the condition that in the event of dismissal by Government, or there not being a member suitable for the office, both office and tenure would pass to a Digwar to be appointed by Government; that all orders for the appointment and dismissal of Digwars of Jharia have been made by

* Reported in I. L. R. 34 Cal. 753: s. c. 12 C. W. N. 193 (1907).

Government, the zemindar having no voice in the matter; that the Digwars have all along been responsible to Government for the due discharge of their duties, police and public; that the tenure has always passed on orders and transfers by Government; that the only profit received by the zemindar since the creation of the tenure has been a quit rent of Rs. 64 per annum; that the Digwar of the disputed mouzahs did not hold them as an *izaradar* under the landlord as alleged by the Appellants.

It held as regards Issues Nos. 1 and 2 that the Government was a necesssary party to the suit, and that the Plaintiff's claim was not barred by limitation.

It held that the evidence satisfactorily established the existence of this digwari tenure as far back as 1814, that the quit rent alone was reserved to the zemindar, that the tenure was created to enable the holder to perform certain public duties, and has all along been so regarded, and that it was not liable to resumption by the landlord that under the circumstances proved the position of the Digwar in this case is analogous to that of the Ghatwals of Birbhum, and he had been recognized throughout as possessing the same rights.

It held on the facts that the tenure in question was created as a permanent one on a fixed rent, and that the Digwar as the holder possesses all the underground, and mining rights, there being no reservation to the contrary, and that the said mineral rights in the tenure do not belong to the zemindar.

The appeal was accordingly decreed and the suit dismissed with costs. Hence this appeal.

Sir R. Finlay, K. C., Mr. Ross and *Mr. Parikh* for the Appellant.—The High Court has failed to appreciate the view of the Subordinate Judge. The Lotbandi shows that the mouzahs were included in the Permanent Settlement. It was not shown that the digwari tenures existed before the Permanent Settlement. They were given to the Digwar by way of remuneration for police services—the actual produce of the soil was their payment in kind. The inference is therefore irresistible that the digwari tenures were limited tenures and never included the minerals. The right to the minerals must belong either to the Government or to the zemindars. But the Government has expressly given up rights to the mines in favour of the zemindars in permanently settled estates. The property in the subsoil was in the zemindar, and the onus lies on the Respondents to show how and when they got the right to minerals from the zemindar. The case of *Raja Nilmoni Singh* v. *Bakronath Singh* (3) has no application. The High Court's judgment is chiefly based on their decision in *Sriram Chukrabutty* v. *Kumar Hari Narain Sinha* (1), which has been reversed by this Board in *Kumar Hari Narayan Singh* v. *Sriram Chakravarti* (2), further the Government is neither a necessary nor a proper party to the present suit.

Mr. L. DeGruyther, K. C., and *Mr. Dunne* for the Respondents.—The real question was—what is a digwari tenure? What are its incidents? Who grants it? The Digwar claims grant from the Government and not from the zemindar. Although we are not able to produce a grant the digwari tenures have existed from 1845 up to the present time. They have existed from before the Permanent Settle-

(1) 10 C. W. N. 425: s. c. I. L. R. 33 Cal. 54 (1905).

(2) L. R. 37 I. A. 136: s. c. 14 C. W. N. 746 (1910).

(3) L. R. 9 I. A. 104 (1882).

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ment. The duties of the Digwar consisted in his having the charge and management of all the police work in his allotted district but under the orders and control of the Government officers. His *jaigir* was and had always been subject to a quit rent or cess of Rs. 64. The digwar was never subordinate to or connected with the zemindar of Jharia. He was appointed by the Government and was liable to be dismissed by the same. The Government gave the mouzahs to the Digwar subject to certain conditions. The office was hereditary subject to the approval of the Government and the Digwari mouzahs were impartible and inalienable. There is evidence here that the Government once stopped the sale or mortgage of the mouzah. But no objection, claim or demand was ever raised or made by the zemindar. In 1792, the Government relieved zemindars from police duties and in 1793 the Settlement was made. But the Permanent Settlement related to *mal* lands only and not to lands that had been given for services. This view was adopted by the Sadar Court in 1816. The Lotbandi relied upon by the Appellants does not show that they were settled as *mal* lands with zemindars. The case of *Kumar Hari Narayan Singh* v. *Sriram Chakravarti* (2) has no bearing on the facts of the present case. There the zemindari was *mal*, and the zemindar being a proprietor was held entitled to the minerals. The digwari tenures of Manbhum have all the incidents of the Birbhum Ghatwali tenures: Preamble to Reg. XXIX of 1814, and Act V of 1859. They are at any rate of the nature of Ghatwali tenures which cannot be sold. *Raja Nilmoni Singh* v. *Bakronath Singh* (3). The zemindar only got Rs. 64 as quit rent for a very large area of land: it was never varied. The mouzahs not being *mal* lands the onus lay on the Appellants to show how they came to acquire the right to minerals. Reference was made to Harrington's Analysis of Bengal Regulations, Vol. 3, p. 509 and Vol. 2, p. 236.

Sir R. Finlay, K. C., in reply.—The Ghatwali lands were included in the Permanent Settlement. *Raja Lelanund Singh* v. *The Government of Bengal* (4). The presumption is that ownership vests in the zemindar and ownership of minerals is inconsistent with Digwar's office. In the absence of Government the zemindar owns the mines.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—The suit out of which the present appeal arises was brought by the zemindar of Pergunnah Jharia, a permanently settled estate, in order to establish his right to the minerals underlying mouzah Tasra and mouzah Rohrabund. The two mouzahs are within his zemindari. They are both held by the Digwar of Tasra on digwari tenure at a fixed rent of Rs. 64 per annum payable to the zemindar.

Digwari tenure is similar to Ghatwali tenure. It was granted originally in consideration of the performance of military service, to which police duties were attached. The tenure is hereditary and inalienable. The Digwar is appointed by the Government and liable to be dismissed by the Government for misconduct. On dismissal the next male heir, if fit for the office, is appointed.

(2) L. R. 37 I. A. 136: s. c. 14 C. W. N. 746 (1910).

(3) L. R. 9 I. A. 104, 109, 124 (1882).

(4) 6 Moo. I. A. 101 (1855).

RAJA DURGA PRASAD SINGH *v.* BRAJA NATH BOSE.

In 1892 the Digwar of Tasra granted a perpetual lease of the coal mines underlying the two villages. The lease became vested in the Tasra Coal Company, Limited. The Company took possession and raised and sold a large quantity of coal.

The zemindar asked for a declaration of right, an account, and an injunction.

The Subordinate Judge of Manbhum gave judgment in favour of the zemindar. On appeal to the Calcutta High Court that judgment was reversed and the suit was dismissed with costs.

The case was argued at considerable length in both the Courts below and fully discussed before this Board.

Two points, and two points only, were seriously argued. It was contended (1) that the Government ought to have been made a party to the suit, and that in the absence of the Government the suit was defective and ought to be dismissed, and (2) that the Digwar had a proprietary right in the underground minerals.

The High Court decided both points in favour of the Defendants.

In their Lordships' opinion the Government is not a necessary or a proper party to this suit. Apparently the Government does not claim the minerals under permanently settled estates. However that may be, the Government has never claimed the minerals under the two mouzahs or either of them, or put forward any claim inconsistent with the rights now asserted by the zemindar. The rights of the Government, whatever they are, will not be prejudiced or affected by the result of a suit to which it is not a party.

The second point seems equally clear. The two mouzahs are within the Plaintiff's zemindari. Both the Courts below have so held. The permanent settlement was made with the zemindar of Jharia. No separate settlement was made with the Digwar of Tasra, if there was a Digwar of Tasra at the date of the Permanent Settlement, which seems more than doubtful. No attempt was made to prove that the mineral rights now in question were vested in the Digwar before or at the time of the Permanent Settlement if the lands were then held on Digwari tenure. Nor is there the slightest evidence tending to show or to suggest that the zemindar ever parted with his mineral rights to the Digwar. Mineral rights were vested in the Ghatwals of Pergunnah Sarhat in the north-western part of the Birbhum zemindari, but those Ghatwals paid their rent direct to the Government, and in other respects they were in a very peculiar position. They were dealt with by Reg. XXIX of 1814. They obtained the right to lease the minerals by the Act No. V of 1859. With every respect to the learned Judges of the High Court no inference can be drawn from the circumstances of their case that the Digwars in Manbhum had similar rights or powers.

The learned Judges on appeal seem to have been misled by a decision of the High Court in the case of *Sriram Chukrabutty* v. *Kumar Hari Narain Sinha* (1), which was afterwards reversed by this Board in *Kumar Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti* (2). There certain persons, called Goswamis or Gossains, priests of a Hindu idol to which a certain village had been assigned on a permanent *debutter* tenure at a small annual rent granted a lease of the underlying minerals. The High Court held that the mineral rights were vested in the Gossains. But it was laid down by this tribunal that it

(1) 10 C. W. N. 425 : s. c. I. L. R. 33 Cal. 54 (1905).

(2) L. R. 37 I. A. 136 : s. c. 14 C. W. N. 746 (1910).

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must be presumed that the mineral rights remained in the zemindar in the absence of proof that he had parted with them.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, and the decision of the High Court reversed, with costs, and the decree of the learned Subordinate Judge restored.

The Respondents will pay the cos's of this appeal.

Solicitor: *Mr. Edward Dalgado* for the Appellant.

Solicitors: *Messrs. Burton, Yeates and Hart* for the Respondents.

B. D. *Appeal allowed with costs.*

[PRIVY COUNCIL.]

[APPEAL FROM MADRAS.]

LORD SHAW.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1912,
Heard, 30, January.
Judgment, 21, February.

VASUDEVA MUDALIAR and others, Appellants,
v.
SADAGOPA MUDALIAR, Respondent.

Limitation Act (IX of 1908), sec. 31—"Pending" suit, includes suits remitted for trial on questions of fact—Privy Council decision abrogated by Statute.

In VASUDEVA MUDALIAR *v.* K. S. SRINIVASA PILLAI (1), *the Privy Council reversing the decision of the High Court of Madras held that the suit, which was one to enforce a simple mortgage dated 22nd October 1883, was governed by Art. 132 and not by Art. 147 of Sch. II, Limitation Act of 1877, so that the suit was liable to dismissal as time-barred unless Plaintiff could make out certain alleged payments of interest and settling of accounts which would save limitation. The Privy Council remitted the case to the High Court for enquiry and adjudication of these matters of fact, but before the enquiry was taken up the Limitation Act of 1908 was passed which saved from the operation of Art. 132 of the Limitation Act of 1877 suits on mortgages instituted within the period of 60 years from the date when the money secured became due and pending in the Province of Madras (amongst other places).*

Held—*That the new legislation covered this suit which was still pending when it was passed.*

(1) 11 C. W. N. 1005 (1907).

This was an appeal from a final decree made by the High Court of Judicature at Madras, on the 16th December 1908.

On the 22nd September 1883, the first and second Appellants, Vasudeva Mudaliar and Aiyappa Mudaliar, executed a mortgage in favour of Krishna Mudaliar Avergal. Disputes having arisen among the members of the mortgagee's family as to the partition of their property, K. S. Srinivasa Pillai was appointed Receiver; and on the partition subsequently effected, the mortgage bond in suit was allotted to the Respondent, Sadagopa Mudaliar.

On the 23rd September 1899, the said Receiver instituted a suit in the Court of the Subordinate Judge of Negapatam, to recover the mortgage money by sale of the mortgaged property, and at a later stage of the suit the Respondent was added as a party thereto. In defence various pleas were advanced, and *inter alia* it was asserted that the suit was barred by Act XV of 1877, Sch. II, Art. 132.

On the 17th February 1902, the said Subordinate Judge delivered his judgment. He held that the suit was *primâ facie* barred by limitation, the period of limitation being twelve years from the date

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of the first default. He decided that there had been no settlement of account, no part-payment of interest, and no acknowlegment of liability sufficient to extend the said period of limitation. He was, however, of opinion that the debt being payable by instalments, the last five instalments from the 22nd September 1887 were recoverable within twelve years from the date on which each of the said instalments fell due. He held that the benefit of the clause in the said deed of mortgage, which provided that on default of payment of any instalment the whole amount should become due and recoverable, could be and had been waived by the mortgagee, and required a demand for payment by the mortgagee as a condition precedent for enforcement. He considered any personal claim against the mortgagors as barred by limitation, and made a decree in favour of the Plaintiff for payment of "the five instalments and interest on each of these instalments, with interest thereon from the time each instalment fell due as per contract, and after term at contract rate of 12 annas per cent. per mensem up to realization," to be recovered by sale of the mortgaged property.

Against the said decree both parties appealed to the High Court of Judicature at Madras, and on the 13th March 1905 the said Court delivered judgment. The said Court was of opinion that the suit was governed by Art. 147, Sch. II of Act XV of 1877, which allowed the Respondent a period of 60 years. Adopting this view it was unnecessary to consider the other questions decided by the Subordinate Judge. The said Court disallowed two items in the account, and in substitution of the decree of the lower Court made the usual decree for sale, allowing interest at the contract rate until the 3rd August 1905, and thereafter at the rate of 6 per cent. per annum on the principal money.

Against the said decree the Appellants appealed to His late Majesty in Council, the record of the said appeal being No. 82 of 1906, and on the 22nd July 1907 their Lordships of the Privy Council delivered judgment* and on the 12th August 1907 an order in Council was made in accordance therewith in terms following: "It is hereby ordered that this appeal be, and the same is hereby allowed, and that the said decree of the High Court of Judicature at Madras, dated the 13th day of March 1905, be and the same is hereby discharged. And it is hereby declared that Art. 132 of Sch. II of the Indian Limitation Act, 1877, is the article which provides the rule of limitation applicable to the present suit. And it is hereby further ordered that the case be, and the same is hereby remitted to the said High Court to be disposed of in accordance with such declaration."

On the 16th December 1908, the said High Court (Benson and Miller, JJ.) delivered final judgment, re-affirming the previous judgment delivered by the said Court on the 13th March 1905 without any further consideration, being of opinion that the said order in Council was in effect abrogated by sec. 31 of Act IX of 1908. In the course of their judgment the learned Judges said :—

"If nothing further had occurred it would now be necessary for us to re-open the appeal on the footing that the twelve years' rule of limitation in Art. 132 was primarily applicable, and we should have to consider the Plaintiff's pleas that by reason of acknowledgments and so forth his claim was not barred even under that

* Reported in 11 C. W. N. 1005 (1907).

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rule. But in the meantime the Legislature intervened. The declaration of the Privy Council was made on the 22nd July 1907, and while the case so remitted was pending in this Court, the Legislature on the 7th August 1908 passed the Indian Limitation Act, 1908.

"Sec. 1 of that Act directs that sec. 31 shall come into force at once and sec. 31 enacts :—(Section quoted).

"The Plaintiff contends that the latter part of this clause is applicable to the present case. We are of opinion that the contention is valid. The suit is one in the territories mentioned in the Second Schedule of the Act: it was instituted within sixty years from the date when the money secured by the mortgage became due: and it was pending in this Court as a Court of Appeal at the date when the Act was passed. We cannot therefore dismiss the suit (in whole or in part) on the ground that a twelve years' limitation is applicable.

"We are unable to accede to the Defendant's contention that sec. 31 of the Act does not apply to the present case. The object of the Legislature was to obviate the hardship that would otherwise have resulted to mortgagees in consequence of the period of limitation being declared to be only twelve years instead of sixty, which was the period which had previously been authoritatively declared by this Court to be applicable in suits of the kind. We find nothing in the words of the Act or in the intention of the Legislature, to justify us in excluding the Plaintiff from the benefit of sec. 31. That being so, the Plaintiff's claim must be dealt with on the footing that it is not barred by limitation."

Hence this appeal.

Mr. L. DeGruyther, *K. C.*, and *Mr. Kyffin* for the Appellants submitted that the High Court had erred in its view of the effect and operation of sec. 31 of Act IX of 1908. The decision of the Judicial Committee which was carried into effect by order in Council was final and binding on the parties to the previous appeal. The word "pending" in the section ("pending at the date of the passing of this Act") means pending determination or adjudication. Here the point had in fact been expressly decided by this Board. The remit was made for other purposes, this Board having decided "that Art. 132 of Sch. II of the Indian Limitation Act 1877 is the article which provides the rule of limitation applicable to the present suit."

Sir R. Finlay, *K. C.*, and *Mr. Brown* for the Respondent were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal against the judgment of the High Court of Judicature at Madras, dated the 16th December 1908.

On the 23rd September 1899, a suit was brought in the Court of the Subordinate Judge of Negapatam, founding upon a certain mortgage of date the 22nd September 1883, and with the object of recovering the mortgage debt by sale of the mortgaged property.

That Judge held that part of the claim was of a nature to which, under Art. 132 of the 2nd Schedule of the Indian Limitation Act of 1877, the twelve years' rule of limitation would apply. The High Court, on appeal, held, on the other hand, that the article applicable was No. 147, the sixty years' rule of limitation.

On appeal to this Board, the latter decision was reversed and the former restored. This occurred on the 22nd July 1907.

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The order itself, by His Majesty in Council, was dated the 12th August 1907.

It appears that the question is one upon which there has been much diversity of opinion in India, and conflicting decisions in the High Courts of Madras, Bombay, and Allahabad were referred to in this connection.

In view of the argument presented in this appeal, it is necessary to cite the exact terms of the former decision. They are these :—

"Their Lordships will humbly advise His Majesty that it should be declared that Art. 132 is the article which provides the rule of limitation applicable to this case, and that the case should be remitted to the High Court to be disposed of in accordance with this declaration." [*Vasudeva Mudaliar* v. *K. S. Srinivasa Pillai* (1)].

A remit took place accordingly.

The reason for a remit is obvious. While the Defendant had pleaded the limitation, the Plaintiff had alleged payments of interest and settling of accounts which avoided the limitation, and a remit was required for the purpose of having, *inter alia*, enquiry and adjudication on these matters of fact.

So standing the suit in the Court of Appeal, the Indian Limitation Act of the 7th August 1908 was passed. Its 31st section is in these terms :—

"Notwithstanding anything contained in this Act or in the Indian Limitation Act, 1877, in the territories mentioned in the second schedule a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of this Act, or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first; and no such suit in the said territories instituted within the said period of sixty years and pending at the date of the passing of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that a twelve years' rule of limitation is applicable.

"(2). Where in the aforesaid territories the claim of a mortgagee for foreclosure or for sale has been wholly or in part dismissed or withdrawn after the twenty-second day of July 1907 and before the passing of this Act, either in a Court of first instance or of appeal, on the ground that a twelve years' rule of limitation applied to such claim, the case may be restored on an application in writing to the Court by which the claim was dismissed or in which it was withdrawn, provided the application is made within six months from the date of the passing of this Act; and on such restoration, the provisions of sub-sec. (1) shall apply."

The question in the present appeal is simply, and in a word, whether this supervenient legislation applies to this suit. That it was meant so to apply is fairly obvious from the citation of the date the 22nd July 1907, which is in fact the date of delivery of the previous judgment of this Board. Whether it does in fact so apply depends, as was admitted by the learned Counsel for the Appellants, solely on whether the suit was or was not a suit pending at the passing of the Act.

Their Lordships do not entertain any doubt that it was. The former judgment of the Board did not end the suit; did not finally determine it. It was remitted to the High Court of Madras for further procedure, and for enquiry upon allegations of fact; and at the date of the Statute that procedure was not concluded and the enquiry had not indeed been entered upon. The suit in fact was neither adjudged upon nor even ready for judgment. Their Lordships express their concurrence with the opinions of the learned Judges of the High Court, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor : *Mr. Douglas Grant* for the Appellants.

Solicitors : *Messrs. Chapman, Walker and Shephard* for the Respondent.

B. D. *Appeal dismissed with costs.*

(1) 11 C. W. N. 1005 (1907).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 249 OF 1911.

CASPERSZ, J.
CHATTERJEE, J.
1912,
Heard,
9, January.
Judgment,
31, January.

CHANDRA KUMAR DHAR, Plaintiff, Appellant,
v.
RAMDIN PODDAR and anr., Defendants, Respondents.

Limitation Act (IX of 1908), sec. 19—Joint judgment-debtors—Acknowledgment by one of portion of debt—Effect.

Acknowledgment of a judgment-debt by one of several judgment-debtors keeps alive the decree against such judgment-debtor alone and not against the others.

RICHARDSON *v.* YOUNGE (1), BHOGILAL *v.* AMRITLAL (2), DHARMA *v.* BALMUKUND (3) *distinguished.*

NARAYANA *v.* VENKATA (4), VALA SUBRAMANIA PALLAI *v.* RAMANATHAN CHETTIER (5), AHSANULLAH *v.* DAKKHINI DIN (6) *relied on.*

If a part only of the debt is acknowledged it is kept alive to that extent only.

This was an appeal preferred on the 26th of May 1911 against an order of Mr. J. Phillimore, District Judge of Zillah Chittagong, dated the 19th of January 1911, affirming that of Babu R. B. Barman, Munsif of Patiya, dated the 22nd of August 1910.

The material facts will appear from the judgment.

Babus Mahendra Nath Roy and *Krishna Proshad Sarbadhikari* for the Appellant.

No one appeared for the Respondents.

(1) L. R. 6 Ch. App. 478 (1871).
(2) I. L. R. 17 Bom. 173 (1892).
(3) I. L. R. 18 All. 468 (1896).
(4) I. L. R. 25 Mad. 220 (1902).
(5) I. L. R. 32 Mad. 421 (1908).
(6) I. L. R. 27 All. 575 (1905).

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of an application for the execution of a mortgage-decree, passed on the 19th of December 1901 and made absolute for sale on the 4th of September 1906. The first application for execution was made on the 13th of December 1906, for a sum of Rs. 231-0 annas taking the interest as Rs. 12 only whereas it was in reality Rs. 661 plus Rs. 12. On the 7th of March 1907, the Appellant-Defendant No. 4, who was one of the purchasers of the mortgaged properties (from the mortgagor Defendant No. 1), made an application that the decree-holder had claimed Rs. 231 and 15 annas including costs; that this amount could be realised by the sale of property No. 11 alone, and, in any case, that he was prepared to deposit any part of the claim not satisfied by the sale, or the whole of the sale. On the 9th March the decree-holder, who was under the impression that his claim of Rs. 231 was in accordance with the decree as passed, and that the decree must be amended, withdrew the application for execution. He found out, however, that no amendment was necessary, and that he had made a mistake, and he applied for execution on the 24th January 1910 for Rs. 845 including Rs. 661 for interest which he had omitted to claim in his previous application. One of the judgment-debtors objected that the application was barred by limitation but the decree-holder contended that the application of Defendant No. 4, dated the 7th March 1907, contained an acknowledgment of liability and saved the application from the bar of limitation. The first Court held that the application was barred except against Defendant No. 4 and allowed execution to proceed against him. The lower Appellate Court has

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upheld that decision and hence this second appeal by Defendant No. 4.

It is contended by the learned Vakil for the Appellant :—(1) that the acknowledgment being made by one of several judgment-debtors in respect of a joint decree, it is of no avail to the decree-holder and the whole decree is barred ; and (2) that the acknowledgment is only in respect of the amount claimed, namely, Rs. 231 and 15 annas, and cannot be extended to the Rs. 661 interest which was not claimed. Reliance has been placed by the learned Vakil for the Appellant upon the case of *Richardson* v. *Younge* (1), and two Indian cases based upon the same, *Bhogilal* v. *Amritlal* (2), *Dharma* v. *Balmukund* (3) As regards *Richardson* v. *Younge* (1), it is sufficient to say that it has no application to the present case. It was the case of an acknowledgment by one of two trustees who were mortgagees as such and had, therefore, no several and apportionable interest in the mortgage. Sir J. Mellish, L. J., said in reference to the acknowledging mortgagee "he was simply joint tenant with his co-trustee of the land, and jointly entitled with him to the mortgage money. Had the mortgagees not been trustees, the case would have stood very differently for they must almost of necessity have been entitled to some distinct interests in the mortgage money." Sir W. M. James, L. J., said "Our decision is confined to the case of mortgagees who are trustees and are shown to be such on the face of the deed." The case of *Bhogilal* v. *Amritlal* (2) was decided upon the wording of Art. 148 of the Second Schedule to Act IX of 1871 which required an acknowledgment by the mortgagee or some person claiming under him and it was held that as the Act did not provide for an acknowledgment by an agent of the mortgagee, an acknowledgment by one of the heirs of the mortgagee would not suffice although he may have acted as the agent of his co-heirs. Sec. 20 of the Act had no application as it was not an acknowledgment in respect of a debt or legacy but in respect of the right of the mortgagor to redeem. It is true Jardine, J., referred to *Richardson* v. *Younge* (1), and to the opinion of Mr. Coote who referred to that case as an authority for the general proposition that "where there is a mortgage to two jointly there must be an acknowledgment by both," but we have shown that the facts of *Richardson* v. *Younge* (1) do not support that general proposition and that the judgments of the Lord Justice are quite plain as to the distinction. The Allahabad case, *Dharma* v. *Balmukund* (3), followed the Bombay case and was based on the wording of sub-sec. 15 of sec. 1 of Act XIV of 1859 which was similar to the wording of Art. 148 of the Second Schedule to Act IX of 1871. Mr. Justice Banerjee who tried the case as a single Judge said "the mortgage was made in favour of two mortgagees jointly and it was not a mortgage in which the interests of each mortgagee could be apportioned so as to allow of the mortgage being redeemed piecemeal. The report, however, does not disclose the nature of the mortgage and in any case the wording of the Act of 1859 must have regulated the particular decision.

The present case, however, must be decided on the Limitation Act of 1877. Sec. 19 requires the acknowledgment to

(1) L. R. 6 Ch. App. 478 (1871).
(2) I. L. R. 17 Bom. 173 (1892).
(3) I. L. R. 18 All. 458 (1896).

(1) L. R. 6 Ch. App. 478 (1871).
(3) I. L. R. 18 All. 458 (1896)

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be by the party against whom the right is claimed. Sec. 21 does not lay down an exception to sec. 19 but enumerates those cases in which the act of one member of a class is liable to be taken as the act of all: in respect of these cases it provides that an acknowledgment of one shall not by itself be taken as the acknowledgment of the others but that there must be something else such as authority express or implied. It does not say that the acknowledgment shall be ineffectual even against the party who made it; such a party if he is included in the party against whom the right is claimed must be responsible for his own act under sec. 19. If a joint claim is made against A, B and C each one of them is a party against whom the claim is made and if any one has made an acknowledgment within the meaning of sec. 19 he will start the running of a first period of limitation. In the case of *Narayana* v. *Venkata* (4), Sir Arnold White, C. J., and Bhasyham Ayyanger, J., decreed a suit on a mortgage bond against the Defendant who had made an acknowledgment and not against his co-mortgagor. It may be said however that it was a mere opinion as the matter was not argued and was in fact admitted by counsel and the ultimate decision of the Full Bench that Art. 147 applied to the case made the question of acknowledgment immaterial as the mortgage was of 1882 and the suit had been brought in 1897. It was in any case the opinion of two eminent Judges and is as such entitled to some weight. In the case of *Vala Subramania Pallai* v. *Ramanathan Chettier* (5), Sir Arnold White, C. J., and Abdur Rahim, J., set aside a decree on a handnote so far as it affected one Defendant who had not made or authorized a part-payment made by another member of the family. In the case of *Ahsanullah* v. *Dakkhini Din* (6), the Allahabad High Court (Blair and Burkitt, JJ.) said "on general principles, one debtor by acknowledging a debt or making a part-payment otherwise than as the agent of the other debtors cannot keep alive the right of the creditor against those debtors." In the result the learned Judges dismissed the application for execution in so far as it sought to enforce the decree against one of the judgment-debtors otherwise than as one of the legal representatives of the person who had made the part-payment. These cases support the view we take that the execution may proceed against Defendant No. 4 who made the acknowledgment and not against the others against whom it is barred by limitation.

Then comes the second question as to the extent of the acknowledgment. The decree-holder applied for the realisation of 231 rupees and odd as the amount of the decree and the petition of Defendant No. 4 expressly mentioned that sum and made certain prayers for realising it. If the present claim for an additional amount of 661 rupees had been made there is no knowing whether Defendant No. 4 would have made the application at all. Acknowledgment connotes knowledge or consciousness of the burden one assents to bear and it cannot be said that Defendant No. 4 made acknowledgment of liability in respect of the whole claim now made. "If however a definite sum smaller than the sum claimed is named in the acknowledgment only the sum named, it seems, is taken out of the statute" Darby and Bosanquet, p. 99.

The decree-holder cannot therefore

(4) I. L. R. 25 Mad. 220 (1902).
(5) I. L. R. 32 Mad. 421 (1908).

(6) I. L. R. 27 All. 575 (1905).

execute for more than 231 rupees and 15 annas plus interest at the rate of 6 per cent. from the date of the acknowledgment against the share of Defendant No. 4 only in the mortgaged properties. The appeal is decreed to that extent but without costs as no one appears for the Respondents.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1643 OF 1909.

MOOKERJEE, J.
CARNDUFF, J.
1911,
5, July.

BAIJNATH PROSAD SAHU, Plaintiff, Appellant,
v.
RAGHUNATH RAI, Defendant, Respondent.

Tenant, holding on after expiry of term—Amount of rent payable.

When a tenant holds on after the expiration of his lease he does so on the terms of the lease and at the same rate and on the same stipulations as are mentioned in the lease unless the parties come to a fresh settlement.

The mere fact that the rent for some years has been received at a reduced rate does not bind the lessor to accept rent at that rate.

DURGA PROSAD SINGH *v.* RAJENDRA NARAIN BAGCHI (13) *followed.*

Quære—*Whether variation of the* kabuliyat *rent when the tenant is holding over can be established by oral evidence.*

SHEIK ENAYUTOOLLAH *v.* SHEIK ELAHEE-BUKSH (2) and SAYAJI BIN HABAJI *v.* UMAJI BIN SADOJI (3) *followed.*

MUKUND CHANDRA SARMA *v.* ARPAN ALI (1) *explained.*

This was an appeal preferred on the 6th of August 1909 against the decree of Babu Lal Singh, Subordinate Judge, 2nd Court of Zillah Sahabad, dated the 17th of May 1909, reversing the decree of Babu Nagendra Nath Mitter, 1st Munsif of Buxar, dated the 13th of June 1908.

The facts of the case will appear from the judgment.

Babu Lalit Mohun Mukerjee for the Appellant.

Babu Raghunath Singh for *Babu Kulwant Sahay* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal on behalf of the Plaintiff in a suit for recovery of arrears of rent. The case for the Plaintiff is that the tenancy was created by a *kabuliyat* executed on the 4th February 1887, for a term of five years, that after the expiry of the term the tenant has held over and that the Plaintiff is entitled to realise rent at the rate of Rs. 98-2 as. for the years 1906 and 1907. The Defendant resists the claim mainly on the ground that the rent payable is Rs. 37-8 as. a year.

The Court of first instance found that the tenancy had been created under the *kabuliyat*, that the Defendant entered into occupation on the strength thereof, that he held possession of the land for the full term of five years upon payment of rent at the rate mentioned in the *kabuliyat* and since the expiry of the term, he has held over. In this view, the Court of first instance made a decree in favour of the Plaintiff at the rate claimed ; upon appeal, the Subordinate Judge has reversed that decision. He has held on the

(1) 2 C. W. N. 47 (1897).
(2) [1864] W. R. Act X Ruling 42.
(3) 3 Bom. H. C. R. A. C. J. 27 (1866).
(13) 10 C. L. J. 570 (1909).

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authority of the decision of this Court in the case of *Mukund Chandra Sarma* v. *Arpan Ali* (1), that the mere fact that the Plaintiff obtained a *kabuliyat* from the Defendant does not entitle him to claim rent at the rate mentioned therein after the expiration of the term of the tenancy. The Subordinate Judge has, at the same time, held that the Defendant has failed to prove that he has been paying rent at the rate alleged in defence; yet the Judge has modified the decree of the Court of first instance and allowed the Plaintiff rent at the rate admitted by the tenant.

On behalf of the Plaintiff, it has been contended in the present appeal that the view taken by the Subordinate Judge is erroneous and that the Plaintiff was entitled to get rent at the rate mentioned in the *kabuliyat* when the Defendant failed to prove that after the expiry of the term the rate of rent had been altered by agreement of parties. In our opinion there is no room for controversy that the view taken by the Subordinate Judge cannot be supported.

It was ruled by Sir Barnes Peacock, C. J., in the case of *Sheik Enayutoollah* v. *Sheik Elaheebuksh* (2), that when a tenant holds on after the expiration of a lease, he does so on the terms of the lease and at the same rate and on the same stipulations as are mentioned in the lease, unless the parties come to a fresh settlement. The same view was taken by Sir Richard Couch, C. J., in the case of *Sayaji bin Habaji* v. *Umaji bin Sadoji* (3), and was adopted by this Court as well-founded on principle in the case of *Administrator-General of Bengal* v. *Asraf Ali* (4), see also, *Kishore Lal* v. *Administrator-General* (5), *Jamaut Ali* v. *Chutturdharee* (6), *Sheo Sahoy* v. *Bichun* (7), *Tara Chunder* v. *Amir* (8), *Altab* v. *Jugul* (9), *Beniprosad* v. *Raj Kumar* (10). In the case before us, the tenant admits that the land of the tenancy is still in his occupation, that he first entered upon the land under the *kabuliyat* executed by him and that he was in possession for 5 years according to the terms of the contract between the parties. Consequently the inference follows that after the expiry of the term of the lease, the Defendant has held over according to the terms of the original contract. Until he establishes by evidence that the terms of the contract have been varied by mutual agreement between the parties, he must be held liable to pay rent at the original rate. The Subordinate Judge has found that the Defendant has failed to prove any new contract. In view of the decision of the Court in the cases of *Lakhatulla* v. *Bishwambhar Roy* (11) and *Beni Madhab Gorani* v. *Lalmoti Dassi* (12), there may perhaps be room for controversy whether such variation, if any, could have been established by oral evidence.* It is not necessary however to express any opinion upon this point because the Defendant has not proved by evidence that the rent has been varied. It was also laid down by this Court in the case of *Durga Prosad Singh* v. *Rajendra Narain Bagchi* (13), that the

(1) 2 C. W. N. 47 (1897).
(2) [1864] W. R. Act X Ruling 42.
(3) 3 Bom. H. C. R. A. C. J. 27 (1866).
(4) I. L. R. 28 Cal. 227 (1900).
(5) 2 C. W. N. 303 (1898).
(6) 16 W. R. 185 (1871).
(7) 22 W. R. 31 (1874).
(8) 22 W. R. 394 (1874).
(9) 25 W. R. 284 (1876).
(10) 6 C. W. N. 589 (1902).
(11) 12 C. L. J. 646 (1910).
(12) 6 C. W. N. 242 (1898).
(13) 10 C. L. J. 570 (1909).

* See the decision of the Full Bench in *Lalit Mohan Ghosh* v. *The Gopali Chuck Coal Co., Ld.*, 16 C. W. N. 55.

BAIJNATH PROSAD SAHU *v.* RAGHUNATH RAI.

mere fact that the rent for some years has been received at a reduced rate does not bind the lessor to accept rent at that rate in future. Consequently even if the Defendant established that for a year or two, the landlord had accepted from him lower rent than that mentioned in the *kabuliyat*, it would not necessarily follow that the terms of the original contract had been permanently varied. The view we take is not really opposed to the decision in *Mukund Chandra Sarma* v. *Arfan Ali* (1). In this case, the Defendant denied that he held the land of the tenancy under the contract set up by the Plaintiff; the Plaintiff failed to prove that the Defendant did so hold the land. The Defendant on the other hand proved that he had never paid rent at the contract rate but had paid at a much lower rate. Under these circumstances, the learned Judges held that the landlord could not successfully claim to recover rent at the alleged contract rate. That case therefore does not lay down any inflexible rule of law and the case before us is of an entirely different description.

The result is that this appeal is allowed, the decree of the Subordinate Judge reversed and that of the Court of first instance restored with cost throughout

Appeal allowed.

(1) 2 C. W. N. 47 (1897).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 295 OF 1910.

STEPHEN, J.
CHATTERJEE, J.
1912.
8, February.

GOL MAHOMED, Petitioner, Appellant,
v.
ABDUL JUBBAR, Opposite Party, Respondent.

Civil Procedure Code (Act V of 1908), Or. 41, r. 18—Failure of Appellant to file notice of appeal, dismissal of appeal, if proper.

Where a person preferred an appeal and at the same time deposited the fees for service of the notice of appeal on the Respondent but did not file the notice to be served as required by the Circular Order of the High Court.

Held—*That the appeal could not be properly dismissed under Or. 41, r. 18 of the Civil Procedure Code.*

This was an appeal preferred on the 22nd of June 1910, against an order of Mr. W. S. Coutts, District Judge of Chittagong, dated the 18th of March 1910.

The facts of the case will appear from the judgment.

Babu Probodh Kumar Das for the Appellant.

Babus Lalit Mohan Banerjee and *Smritish Chandra Ghosh* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

In this case the Appellant filed an appeal in the Court below on the 2nd of February 1910 and at the same time he deposited the talabana, on the 2nd March 1910, the case came on for hearing and notice was not filed and the appeal was dismissed. This presumably was a notice which the Appellant was required to file by the Circular Orders in the Court in

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order that processes might be issued. The dismissal of the appeal, apparently, was under Or. 41, r. 18, C. P. C., which does not apply to the present case as the talabana had been deposited. The result is that the dismissal of the appeal on the 2nd March was wrong; consequently when the matter came up on an application for re-admission, on the 18th March, re-admission ought to have been allowed. It was in fact refused on the ground that notice had not been filed though that was perhaps through the fault of the party. We cannot hold that the Judge in this matter exercised his discretion rightly, but as the order of the 2nd of March was wrong, the application for re-admission ought to have been granted.

It is objected that there is no appeal in this case. Taking the order to have been one under r. 18, Or. 41, the application for re-admission was one under Or. 41, r. 19, C. P. C. Consequently there is an appeal under Or. 43, r. 1, sub-sec. (*t*), C. P. C. In any case there is an application for the exercise of our revisional powers.

The result is that the orders of the 2nd March and 18th March 1910 are set aside and we direct that the appeal do proceed according to law.

We make no order as to costs in this appeal.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1378 OF 1911.

HOLMWOOD, J.
SHARFUDDIN, J.
1912,
Heard,
10, January.
Judgment,
15, January.

SATISH CHANDRA SARKAR, Petitioner;
v.
THE KING-EMPEROR, Opposite, Party.

Criminal Procedure Code (Act V of 1898), secs. 109 and 110—Security for good behaviour—Concealing—Ostensible means of subsistence—Satisfactory account.

The whole of cl. (a) *of sec. 109, Criminal Procedure Code, must be read together and the object of the concealment must be with a view to committing some offence; mere concealment with a view to avoid observation is no offence at all. A person cannot be called upon to furnish security for an alleged temporary concealment in his father's house unconnected with any intention to commit an offence nor for any previous concealment outside the jurisdiction of the Magistrate who takes the proceedings. The fact that a person had been previously connected with any criminal conspiracy or might still be in correspondence with any criminals outside the jurisdiction of the Magistrate would not be relevant in a case under sec. 109, Criminal Procedure Code.*

Where a young man out of employment is staying in his father's house and the father is a man of substance, able, if necessary, to support him he cannot be said to be without ostensible means of subsistence under the first part of cl. (b) *of sec. 109, Criminal Procedure Code.*

The whole object of the second part of cl. (b) *of sec. 109, Criminal Procedure Code, is to enable Magistrates to take action against suspicious strangers lurking within*

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their jurisdictions. A person cannot be called upon to give any account of his presence outside the jurisdiction of the Magistrate taking proceedings under sec. 109, Criminal Procedure Code.

This was a Rule granted on the 8th of November 1911 against an order of Mr. G. P. Hogg, District Magistrate of Rajshahye, dated the 26th of September 1911, directing the Petitioner in a proceeding under sec. 109, Cr. P. C., to execute a bond of Rs. 500 with two sureties of Rs. 500 each for his good behaviour for one year.

The Petitioner came to Nattore on the 9th of August 1911 at the house of his father who was a Government Pensioner and he was arrested by the Police from the said house on the 12th of August 1911, on which date proceedings under sec. 109, Cr. P. C., were instituted against him.

The Petitioner was a member of a joint Hindu family consisting, among other members, of his father and his two brothers, one of whom was a medical practitioner at Nattore and the other a Kanungo. A warrant for his arrest in connection with the Howrah Political Gang case, *Emperor* v. *Noni Gopal Gupta* (1), had been issued by the District Magistrate of Howrah and the said warrant was followed by a proclamation requiring him to appear and an order for the attachment of his properties. The said warrant along with the proclamation and attachment order was withdrawn on 15th June 1911.

Mr. J. N. Roy with him *Babu Monmatha Nath Mukherjee* contended on behalf of the Petitioner that the case was clearly beyond the scope of sec. 109, Cr. P. Code, which is chiefly intended for action being taken against vagabonds and sturdy rogues that may lurk about within the jurisdiction of a Magistrate. The Petitioner was a member of a joint Hindu family having sufficient means of subsistence and he was arrested in the family house. The fact that the Petitioner was connected with anarchical crimes which took place more than 2 or 3 years ago and that he is still in correspondence with any criminals outside the Magistrate's jurisdiction, would not be relevant evidence in the case. Assuming those facts to be true and taking for granted that the Petitioner absconded and concealed himself in an unknown place to avoid the harassment of a criminal prosecution which subsequently proved abortive and failed, these facts would not bring the case within the purview of the section. The Magistrate is not empowered to look into the actions and conduct of the Petitioner beyond his jurisdiction.

Mr. K. N. Chaudhuri with him *Babu Sirish Chandra Chowdhury* on behalf of the Crown contended that at the time when the proceeding against the Petitioner was instituted he was within the Magistrate's jurisdiction and there were reasons for suspecting that he was even then connected with anarchical movements, the Petitioner did not stir out of his house during day-time; all these facts were sufficient to bring the case within cl. (*a*) of sec. 109, Cr. P. C. Although the Petitioner was arrested at a house said to be in the occupation of his father and brothers yet none of those persons came forward to give evidence in the case to shew that the Petitioner who was doing no work was being supported by any one of them. This clearly brings the case within the first part of cl. (*b*) of sec. 109, Cr. P. C. The Petitioner refused before the learned Magistrate to give any account of what he was doing and where

(1) 15 C. W. N. 593 (1911).

he had been for the last 2 or 3 years. This fact was sufficient to bring the case within the second part of cl. (*b*) of the section. If a person be within the jurisdiction of the Magistrate taking proceedings under the section, that is enough to empower the Magistrate to proceed under the section and there is nothing in the section to prevent the Magistrate from looking into actions and conduct of the person outside the Magistrate's jurisdiction.

The JUDGMENT OF THE COURT was as follows:—

This Rule was issued calling upon the District Magistrate of Rajshahye to show cause why the order directing the Petitioner to execute a bond for Rs. 500 with two sureties of Rs. 500 each for his good behaviour for one year under sec. 109, Cr. P. Code, and on failure to give security to undergo rigorous imprisonment for one year should not be set aside on the ground that it does not appear that the Petitioner is without ostensible means of subsistence and that the account he has given of himself is satisfactory. Having given the case our most attentive consideration we are of opinion that the Rule must be made absolute.

The proceeding upon which the order complained of was based was dated the 12th August 1911 and set out that whereas it was reported that Satish Chunder Sarkar was in Nattore or its vicinity and was concealing himself in order to avoid observation and there was reason to believe that he was connected with anarchist agitation and conspiracies for the purpose of committing dacoity and other crimes and whereas he had no ostensible means of livelihood and could not give a satisfactory account of himself he was called upon to execute securities as set out above.

The proceedings were taken under sec. 109, Cr. P. C., and not under sec. 110 and the ground covered was on the face of it in respect of both cls. (a) and (b) of the section. The Officiating District Magistrate however dealt with it under three heads, the first being that the accused was concealing himself in order to avoid observation. This of course is no offence at all and the Magistrate held as he was bound to hold that the prosecution had not made out its case on this head. But he omitted to notice that what he calls the second allegation against the accused is really a substantive and necessary part of the first if there is to be any order under cl. (a) of sec. 109.

The whole clause must be read together and the object of the concealment must be with a view to committing some offence.

Now the second allegation is that the accused is connected with anarchist agitation and conspiracies for the purpose of committing dacoity and other crimes.

This standing by itself could constitute no ground for a proceeding under sec. 109 but would properly form the basis of a proceeding under sec. 110 to which the accused has had no opportunity of answering.

It being found that he only returned to his father's house on the 9th of August and merely secluded himself in the day time going out at night for exercise and that the prosecution had not made out that he was taking any particular steps to conceal himself for the purpose of committing any offence, the fact that he had previously been connected with any criminal conspiracy or might still be in correspondence with any criminals outside the jurisdiction would not be relevant in a case under sec. 109. It would have to form the basis of a substantive proceeding

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under sec. 110. The connection between the alleged concealment and the accused's history having admittedly failed the proceeding under sec. 109 (a) necessarily fails also.

The District Magistrate may of course take any proceedings he is advised under sec. 110 if he is of opinion that the accused is still a desperate and dangerous character but he cannot be called upon to furnish any security in respect of an alleged temporary concealment in his father's house unconnected with any intention to commit an offence, nor with any previous concealment which admittedly must have been outside the jurisdiction.

We come therefore to the consideration of the charge under cl. (b) which is that he has no ostensible means of livelihood any that he cannot give a satisfactory account of himself.

The learned Magistrate finds against him on both these points although he finds that the accused is a member of a joint family that he came straight to his father's house on his arrival in Nattore and that his father and brother accompanied him to Court. He appears to expect that the father and brother should go into the witness-box and take oath that he is being supported out of joint family funds. Obviously as long as a young man out of employment is staying in his father's house and that father is a man of substance, able, if necessary, to support him he cannot be said to be without ostensible means of subsistence. The use of the word "livelihood" seems to have led the learned Magistrate into error.

We have no hesitation in finding that the accused's father is a man of a very ostensible means of subsistence and that as long as he keeps his son in his house no further evidence is required.

As regards the account he is asked to give of himself it would appear that the Magistrate has exceeded his jurisdiction under sec. 109.

The account he gives of his presence in the limits of the Magistrate's jurisdiction is quite satisfactory. He has fled from fear of a warrant directed against him in a specific case. That warrant having been withdrawn 3 months ago he has ventured to return to his home though he keeps himself as is natural and we think proper in strict seclusion from curious enquirers.

He cannot be called upon to give any account of his presence in any other jurisdiction except by the Magistrate who is empowered to take proceedings in that jurisdiction.

The whole object of this part of the clause is to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction. The greatest criminal in the world is not liable to be questioned as to his presence in his own home unless there is some specific outstanding charge against him.

We therefore hold that the proceeding under cl. (*b*) of the section also fails and that the proceedings in this case must be set aside and the accused discharged from his bail subject to any action the District Magistrate may see fit to take under sec. 110 but no such proceeding we may point out should be taken unless there is evidence that the Petitioner is still connected with conspiracies to commit crime or is a desperate and dangerous character at the present time.

The Rule is made absolute and the proceedings under sec. 109 are set aside.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

Rev. No. 898 of 1911.

Stephen, J. N. R. Chatterjea, J. 1911, Heard, 28, October. Judgment, 9, November.	Tunoo Miah, Accused, Petitioner, v. The King-Emperor, Opposite Party.

Indian Evidence Act (I of 1872), sec. 132 proviso—Thumb impression, taking of, by Court —Relevancy against the person making it.

Taking a thumb impression of a witness by the Court is not equivalent to asking a question and receiving an answer within the purview of the proviso to sec. 132, Indian Evidence Act, and therefore such a thumb impression may be proved against the person giving it in a criminal trial.

Taking of a thumb impression is merely observing a characteristic feature of a man's body.

The proviso to sec. 132 of the Evidence Act does not apply unless the witness objected to answer the question.

Queen v. Gopal Doss (1) and Moher Sheikh v. Queen-Empress (2) *relied on.*

It applies again only to questions asked in the course of the trial.

This was an Rule granted on the 28th of July 1911 against an order of the Deputy Magistrate of Chittagong, dated the 28th of June 1911, convicting the Petitioner under sec. 193, I. P. C., and sentencing him to rigorous imprisonment for 3 months and to pay a fine of Rs. 50; an appeal from which order was dismissed by the Sessions Judge of Chittagong on the 15th July 1911.

The facts of the case will appear from the judgment.

Mr. K. N. Chaudhuri and *Babu Khitish Chandra Sen* for the Petitioner.

(1) I. L. R. 8 Mad. 271 (1881).
(2) I. L. R. 21 Cal. 892 (1893).

Babu Manindra Nath Banerjee for the Crown.

The Judgment of the Court was as follows :—

The Petitioner in this case is Tunoo Mia who had been convicted under sec. 193, I. P. C., of giving false evidence. A Rule has been granted calling on the District Magistrate to show cause why the conviction of and sentence on the accused should not be set aside and a retrial of his case ordered, on the grounds that the evidence of thumb impressions was admitted contrary to the provisions of sec. 132 of the Evidence Act and also that the lower Courts have not dealt with a great deal of the evidence placed before him.

On the first point the facts are that the Petitioner brought a charge of defamation against one Mohim Chandra Guha, and during his cross-examination swore that he was not convicted at Rangoon on a charge under sec. 408, I. P. C., brought by Fazal Rahaman Chowdry, and was not sentenced to imprisonment and fine, and did not appeal. During the hearing of that case the trying Magistrate took, or caused to be taken, the Petitioner's thumb impression and that impression corresponds with the impression of a man who was convicted at Rangoon in the circumstances above stated. The argument indicated by the Rule as arising on these facts is that taking a thumb impression is equivalent to asking a question and receiving an answer, and that therefore the thumb impression is equivalent to an answer within the purview of the proviso to sec. 132 of the Evidence Act, and may not therefore be proved against the Petitioner in the present proceedings. To this there are several answers. In the first place the taking of a thumb impression is merely observing a characteristic feature of a

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man's body. Whether the Magistrate had a right to take the impression is a question we are not concerned with and at present we need not consider whether the prisoner consented or not to the impression being taken. The impression was in fact taken, that is, an observation was made and recorded, and in principle the position is the same as if the Magistrate had photographed the Appellant or noticed a deformity or a scar, matters which might certainly be proved if they were relevant. The analogy between taking a thumb impression and asking a question therefore breaks down.

In the second place it was held by the majority of the Court in *Queen* v. *Gopal Doss* (1), that where an accused person has made a statement voluntarily, and without compulsion on the part of the Court, it may be used against him on his trial, if relevant; that is, the proviso to sec. 132 does not apply unless the witness objects to answer the question—and this decision has been followed by this Court in *Mohes Sheikh* v. *Queen-Empress* (2). See too the note to sec. 132 in Woodroffe's Evidence Act. In this case there is nothing to show that the Appellant made any objection to the impression of his thumb being taken and the proviso to sec. 132 does not therefore apply.

(1) I. L. R 8 Mad. 271 (1881).
(2) I. L. R. 21 Cal. 392 (1893).

In the third place, sec. 132 obviously only applies to questions asked in the course of the trial; and there is nothing to show that the thumb impression in this case was taken during the trial. It seems in fact to have been taken with a view to the possibility of this trial.

For these reasons we are of opinion that the first reason for not setting aside the conviction mentioned in the Rule must fail.

As to the second ground the only evidence placed before the Court with which it is suggested that it has not dealt, is the record of the case tried in Rangoon which it is said shows that the Fazal Rahman who was the complainant there pescribed, gave different description of his own parentage and age, and the parentage of the Tunno Mia then accused, from that given of the same matters by the Fazal Rahman who gave evidence in the present case. Fazal Rahman in the present case however was not asked to explain the descrepancy, nor were the contents of the Rangoon record, said to bear the record in this case, though it is not before us, brought to his notice. We cannot therefore hold that the matter was not sufficiently considered by the lower Courts. No reason for our interference is therefore made out on the second ground mentioned in the Rule; and it must therefore be discharged.

B. C. *Rule discharged.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. CRIMINAL REVISION No. 1601 OF 1911. CHANDPUR CO., LTD., 1st Party, Petitioners *v.* MAHARAJA MONINDRA CHANDRA NANDY, 2nd Party, Opposite Party. 8th March 1912.

Criminal Procedure Code, sec. 145, passing orders under, without hearing arguments, illegality of.

This Rule was issued calling upon the Magistrate to show cause why the order of the Magistrate under sec. 145, Cr. P. C., should not be set aside on the ground that it was made, without hearing the arguments of the Petitioners' pleader.

Their Lordships observed :—

"We are clearly of opinion that the explanation of the District Magistrate cannot mean anything else than that, as it was too late for him on that day both to hear arguments and to deliver decision he thought that it was in his competence not to allow any adjournment for the purpose of argument but to pass orders at once. No doubt the pleader did not say to him "if you cannot hear me at this late hour I must ask for adjournment." That did not justify the Magistrate in declining to hear him altogether and passing orders at once.

The case must be sent back to the learned Magistrate to hear the arguments of the 1st party's pleader and in the meantime the order passed will remain in abeyance. A fresh order will be passed after considering the arguments of the first party. It is within the discretion of the Magistrate to take any evidence that may be offered on the day of rehearing.

Mr. S. P. Sinha and *Babu Monmatha Nath Mukherjee* for the Petitioners.

Mr. J. N. Roy and *Babu Hemendra Nath Sen* for the Opposite Party.

B. C.

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. CRIMINAL REVISION No. 169 OF 1912. BEPIN BEHARY BANERJEE, Petitioner *v.* THE KING EMPEROR, Opposite party. 11th March 1912.

Statement of a co-accused, how far admissible.

One of the grounds on which this Rule was issued was that the lower Courts illegally and improperly used the statement of a co-accused against the Petitioner.

Their Lordships observed :—

. . . We do not think that the Sessions Judge should have examined the co-accused as a witness at the appellate stage, but we find that as a matter of fact he has not relied upon his evidence but decided the case on the very clear evidence on the record. It appears that the co-accused made statements in answer to the charge on which he was being jointly tried by the Magistrate implicating the present Petitioner. He then pleaded guilty and was convicted and sentenced at the same time as the present Petitioner. It was strenuously argued for the defence of the present Petitioner who alone appealed before the learned Sessions Judge that after the co-accused pleaded guilty he was no longer being jointly tried and therefore his statement could not be taken into consideration against the Appellant. The learned Sessions Judge was doubtful whether the usual practice at Sessions would apply to a trial before the Magistrate but *ex majori cautela* he thought it best to have the co-accused produced for cross-examination in his Court on the footing that he ceased to be tried with the Petitioner as soon as he pleaded guilty. But here we think he was in error. The rulings referred to only apply to Sessions trials where the plea is taken before evidence is gone into. . . . .

Babus Jogendra Nath Mukherjee, Hira Lal Chakravarty and *Purendu Sundar Banerjee* for the Petitioner.

Mr. Sultan Ahmed for the Crown.

B. C. *Rule discharged.*

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and N. R. CHATTERJEA, J. LETTERS PATENT APPEAL No. 24 OF 1910. PEARY MOHON ROY, Plaintiff, Appellant *v.* SRIMATI SARAT KUMARI DEBI AND OTHERS, Respondents. 12th March 1912.

Cess Act (IX of 1880), sec. 41—Raiyat, if tenure-holder—Annual value—Cess, ascertainment of.

The suit was for recovery of rent and cesses. So far as a decree for rent was passed in favour of the Plaintiff, no controversy arose, but the dispute was as to the decree in respect of the cesses claimed. The plaint set out in a schedule the arrears of cesses, and from that schedule it appeared that the claim was made in respect of four separate *jamas*. The decision in the Court of the Munsif, so far as it related to the cesses was adverse to the Plaintiff, inasmuch as it was not shown what was the annual value of each of those four *jamas*. The Subordinate Judge modified that decree, for it appeared to him that he was entitled to utilise the valuation roll filed on behalf of the Plaintiff, and marked Ex. I which showed the annual value of the lands as Rs. 1,290-6 as. and the total amount of rent payable by the Defendant as Rs. 463-6 as. On that basis he passed a decree in the Plaintiff's favour for the excess claimed by him over and above that which had been awarded by the Munsif. From that decree an appeal was preferred to the High

Court which came before Mr. Justice D. Chatterjee. He set aside the decree of the lower Appellate Court and restored that of the Court of first instance on the ground that upon the Plaintiff's own document it appeared that the Defendants were treated by the Plaintiff as *raiyats* of the land in respect of which the present suit was brought.

Held—That a raiyat might be a tenure-holder within the meaning of the Cess Act.

That it was incumbent upon the Plaintiff to establish and the Courts to find, what was the annual value of each of the four *jamas*; and, also whether in respect of those four *jamas* the Defendants were 'tenure-holders' or 'cultivating raiyats' within the meaning of the Act, and further, what was the profit, if any, in respect of each of the four *jamas*.

Babu Ram Chandra Majumdar for the Appellant.

Babus Baidya Nath Dutt and *Bepin Behary Ghose* for the Respondents.

A. T. M. *Appeal allowed: Case sent back.*

High Court Notification.

The following Rule passed by the High Court of Judicature at the Fort William in Bengal is published for general information.

By order of the High Court,

HIGH COURT, The 13th March 1912. R. L. ROSS, *Registrar.*

It is ordered that the following amendments be made in the Rules relating to the "Admission of Vakils in the High Court," reproduced in Part IV, Chapter XVI, page 128 *et seq.* of the "Rules of the High Court, Calcutta, Appellate Side".—

I.—In the third line of Rule I (6), at page 129, after the letters "B. A.," *insert* the word and letters "or B Sc."

II.—In the fourth and fifth lines of the said rule, for the words "Madras, Allahabad, the Punjab, or Bombay," *substitute* the following :—

"Allahabad, the Punjab, of Bombay, or the B. A. examination of the University of Madras."

The following rules having been framed by the High Court of Judicature at Fort William in Bengal in the exercise of the powers vested in it by section 2 of Act III of 1879, confirmed by the Local Governments of Bengal and Eastern Bengal and Assam and sanctioned by the Governor-General in Council, are published for general information.

Rules framed by the High Court of Judicature at Fort William in Bengal under section 2 of Act III of 1879 for the preservation and destruction of the Civil and Criminal records of the Court on its Appellate Side, to take effect from the 1st of April 1912, and to apply to all cases instituted on and after that date.

Civil Records.

I. The records of every Civil Appeal shall consist of two parts to be styled respectively Part I and Part II. To Part I there shall be prefixed a Title page coloured white and to Part II a Title page coloured blue, forms of which are annexed.

II. Part I shall contain the following papers which shall be preserved for ever :—

(1) The Memorandum of Appeal.
(2) The copies of the judgment and decree filed with the Memorandum of Appeal and not inserted in the paper-book of the case.
(3) The Memorandum of cross-objections.
(4) Vakalatnamas.
(5) Applications for substitution, addition, or removal of parties, the affidavits filed therewith, and the orders of the Court thereon.
(6) Award of arbitrators, or petitions of compromise, if given effect to in the decree; also in the case of minors or lunatics, the order of the Court sanctioning the compromise.
(7) Judgment.
(8) Decree.
(9) Applications for return of documents and orders thereon.
(10) Paper-books; two copies when printed; one copy when not printed.
(11) Any paper whose preservation may be directed by the presiding Judge or Judges.

III. Part II shall contain the following papers which shall be destroyed at the end of 12 years :—

(1) All processes and returns thereto.
(2) All requisitions for records, whether addressed to this Court, or to another Court.
(3) All petitions, affidavits and correspondence relating to the two subjects above-mentioned or to adjournments of the hearing.
(4) Bonds for security for costs.
(5) Petitions to stay proceedings pending appeal and orders thereon.
(6) Petitions for the admission of documents and orders thereon.
(7) Petitions for security for costs of the Respondent and orders thereon.
(8) Applications for translating and printing and for copies and orders thereon.
(9) Copies of documents printed in the paper-book.
(10) Any paper whose destruction may be directed by the presiding Judge or Judges.

IV. The period of 12 years mentioned in the preceding Rule III shall be calculated from the date of the final decree or order which, in cases appealed to the Privy Council, will be that of the decree or order of His Majesty in Council.

V. All copies of paper-books in excess of the number to be permanently preserved as directed in Rule II (item 10) of these rules shall be kept separate from the records to which they relate and be destroyed on the expiry of three years from the date of the final decree or order of the High Court, or, in cases appealed to the Privy Council, on the receipt of the final decree or order of His Majesty in Council.

VI. The distribution of the papers to the appropriate Part (I or II) of the record shall be made by the Record Department on the receipt of the record in the record-room after the disposal of the case.

VII. These rules shall also apply, *mutatis mutandis*, to the records of all Civil Revision Cases and References.

Criminal Records.

VIII. Applications for bail and suspension of sentence and orders thereon, which are treated as Miscellaneous Cases, shall be preserved for 12 years, such period being calculated from the date of the order.

THE

Calcutta Weekly Notes.

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Contents.

NOTES.

The constitution of Benches and the distribution of business amongst them which is to take effect from Wednesday the 10th April 1912 will be as follows :—

DUMRAON APPEALS AND THE PRIVY COUNCIL DEPARTMENT.—The Hon'ble the Chief Justice, the Hon'ble Mr. Justice Mookerjee and the Hon'ble Mr. Justice Carnduff.

PATNA GROUP.—The Hon'ble Mr. Justice Harington and the Hon'ble Mr. Justice Caspersz.

PRESIDENCY & BURDWAN GROUPS.—The Hon'ble Mr. Justice Brett and the Hon'ble Mr. Justice Sharfuddin.

RAJSHAHI GROUP.—The Hon'ble Mr. Justice Stephen and the Hon'ble Mr. Justice Richardson.

REGULAR APPEALS OF ALL THE GROUPS.—The Hon'ble Mr. Justice Chitty and the Hon'ble Mr. Justice Teunon.

CRIMINAL BUSINESS (OTHER THAN THE UNDEFENDED CASES).—The Hon'ble Mr. Justice Coxe and the Hon'ble Mr. Justice Imam.

SPECIAL APPEALS OF THE VALUE OF Rs. 1,000 AND UNDER.—The Hon'ble Mr. Justice N. R. Chatterjea.

ORIGINAL SIDE.—The Hon'ble Mr. Justice Fletcher and the Hon'ble Mr. Justice Chaudhuri sitting singly.

MIDNAPOR DAMAGE APPEAL.—The Hon'ble Mr. Justice Woodroffe, the Hon'ble Mr. Justice Holmwood and the Hon'ble Mr. Justice D. Chatterjee.

WE ACCORD A MOST HEARTY WELCOME TO THE Right Hon'ble Thomas Lord Carmichael, the first Governor of the Presidency of Fort William in Bengal. It will be remembered that soon after Lord Curzon's proposal for the partitioning of Bengal was put forward we were the first to advocate the statutory claims of the Presidency of Fort William in Bengal to be raised into a Governorship by quoting chapter and verse from Parliamentary Statutes (see our issue of the 14th of March 1904). We have since then steadily advocated the scheme and it now gives us very great pleasure indeed to find the Governorship of Bengal an accomplished fact. It has pleased the King-Emperor to select as our first Governor an English statesman of excellent records behind him and who has already by his wide sympathy and keen concern for the people of a sister Presidency given every promise of proving himself a wise, devoted and dutiful ruler of this premier Presidency, now placed under his charge. His Excellency will, however, be quite new to the position of responsibility in which he has been placed and it behoves every one, be he an official or non-official, to co-operate with him in the difficult work of organising the new administration. His Excellency's tribute to the Calcutta High Court, describing it as a tribunal "whose independence has won the admiration of the whole world" is really well-merited and will be greatly appreciated by all and further, may be considered to convey an assurance to the people that he shares their confidence in the Court and that there will be no interference with the independence of the judiciary and the

impartial administration of justice in this Presidency during his regime.

There appears to be in some quarters an inclination to make a grievance of His Excellency the Governor-General withholding his assent to the Orissa Tenancy Bill. It is difficult to see the point of much of the aimless criticism that has been directed against this act of His Excellency which is not only strictly constitutional but one which was in the circumstances of the case eminently just and proper.

There could never be any doubt of the Governor-General's constitutional power of vetoing any law passed by the Lieutenant-Governor's Council. Sec. 40 of the Indian Councils Act (24 and 25 Vict., c. 67) enacts that no law passed by a Governor's Council (and this provision applies, by sec. 48 to a Lieutenant-Governor's Council) shall become law unless the Governor-General shall have assented thereto and such assent shall have been signified by him to and published by the Governor. It is to be noted that this right belongs to the Governor-General and not to the Governor-General in Council or to the Government of India. There is therefore no foundation for the suggestion that the Governor-General acted unconstitutionally in refusing assent without consulting his Council, if that is a fact. He might in most cases think fit to consult such members as he chose for informing himself, but it is neither a matter of constitutional law nor necessarily one of courtesy.

No doubt we admit that the Viceroy's power of Veto should be exercised only on special occasions and under exceptional circumstances. The circumstances that would justify him in exercising his power of Veto would be like those under which the Punjab Canal Colony Act was vetoed by Lord Minto, that is, when people affected by it are against it. We have reasons to believe that the people of Orissa do not look upon the Bill with favour and the manner in which it was rushed through the last days of the Bengal Council has also created a good deal of public feeling against it. We have little hesitation in saying, therefore, that the veto if it has been given was given entirely in accordance with the wishes of the people and it was certainly a very proper exercise of the Governor-General's powers.

But we presume the Governor General has not vetoed the Bill but only withheld his consent for the time being, though the effect of the act is to prevent the Bill from becoming law. But if that is so we feel that the step taken was in the circumstances of the case, the only one which the Viceroy could adopt. It has to be considered that it was only on the day of the Governor-General's departure from Calcutta that the Bill was placed before him for his assent after hurriedly rushing it through Council on the same day. The Hon'ble Mr. Das and the Hon'ble the Raja of Kanika claimed that the Orissa people were against the Bill being passed by the Bengal Council. There was no time left for the Viceroy to make enquiries and ascertain whether the Orissa people were really against the measure as their only true representatives in the Council said they were. What could Lord Hardinge do under these circumstances? If the Orissa people really felt as Mr. Das said they did, his signification of the assent would have been refusing an undoubtedly rightful claim of theirs. By refusing assent on the other hand no harm would be done. For the Council of Behar and Orissa as soon as it is constituted might pass the same measure, if it was as beneficent as it was claimed to be, after maturer consideration.

In much of the criticism that is levelled against the action of the Governor-General, it is forgotten that unless the Governor-General chose to signify his assent without any consideration whatsoever the Bill could not possibly become law. The Bill was passed by the Bengal Council on the 27th March. The Governor-General left in the afternoon of the same date. Unless he gave his assent on the same date, that is so soon as the Bill was brought before him, he would have to take it with him and in no case could the assent have been communicated to the Lieutenant-Governor before the 31st March. Under sec. 40 of the Indian Councils Act a law could have no validity until his "assent shall have been signified by him to and published by" the Lieutenant-Governor. On the 1st of April the Lieutenant-Governor of Bengal, Behar and Orissa ceased to exist and there was no authority which could publish the Bill and make it law. So unless the Viceroy assented on the 27th just when he was leaving, without any consideration and without any enquiry as to whether the people of Orissa liked the Bill to be passed by their new Council rather than the Bengal Council, the Bill could not have become law. We feel that in the case of a far-reaching and controversial measure like the Orissa Tenancy Bill the Governor-General was perfectly justified in refusing to be hurried into giving his assent. That is evidently what the Governor-General did and if his assent was not to be a mere sham he could do very little else.

It must be remembered that the act of the Governor-General does not amount to vetoing the

Bill on the merits. The only effect of it is that the Bill must be placed before the Behar and Orissa Council when it is constituted. It is absurd to contend that the Bill was of any such urgency that it must immediately be passed into law. There was no supreme public reasons why the Government of Bengal on possibly the very last day of its existence should place on the Statute Book a law, which they would not have to administer. Such procedure was wrong in principle and Lord Hardinge's act is at most merely a refusal to countenance such procedure. It does not touch the substance of the Bill which he may possibly approve of as much as Mr. Mcpherson himself.

Correspondence.

[TO THE EDITOR OF THE "CALCUTTA WEEKLY NOTES."]

SIR,—Now that the Cadastral Survey and Settlement operations are being carried on in many districts under the provisions of Chap. X of the Bengal Tenancy Act, it is necessary to draw the attention of the Hon'ble High Court to the procedure that is followed in this connection. Settlement operation may be classed under two main heads *viz.* :—

(1) The Executive work.
(2) The Judicial work.

The first deals with Traverse Survey, Kistwar, Khanapuri, for the purpose of preparing the draft record of rights and the publication of such records. The second stage begins with the objections put in under sec. 103A of the Bengal Tenancy Act, which have to be tried on the basis of present possession, and includes decision of cases under secs. 105, 105A and 106 of the Act which relate to questions of title and all other disputes of civil nature, not even the difficult questions of easements &c. being excepted. The orders passed under secs. 105, 105A and 106 have the effect of Civil Court decrees, and the principles of *res judicata* are also applicable to them. Ordinarily the Civil Courts are authorised to deal with these classes of cases. Possessory suits under sec. 9 of the Specific Relief Act, title and other suits of civil nature are cognizable exclusively by Civil Courts. It is a great anomaly that the same work in connection with settlement operations should be done by Deputy Magistrates, under the designation of Assistant Settlement Officer, although they have no regular training in civil work, much less the qualification for such duties. The country and the public are the best judges to say whether this arrangement is satisfactory. If it is said that the work done by the executive officers is as good as that of the Civil Courts, then there is no necessity for maintaining a double agency for the same kind of work nor any justification for the continuance of the judicial service for the civil administration of the country. If on the other hand it is admitted that the officers of the judicial service are better qualified and more competent to decide civil disputes and that in this respect they command greater confidence of the public then it is but just that the judicial work of the settlement operations should be done by the Munsif. Originally Chap. X of the Bengal Tenancy Act did not contemplate the decision of such vital question of title as under the present law. The successive amendments of the law have gradually transferred the consideration of all questions of title to the settlement authorities under the chapter. It has therefore become all the more urgent that Munsifs should be deputed in larger numbers to the settlement department and entrusted with the cases under secs. 103A, 105, 105A and 106. This will not only make the settlement operations more popular, but the Munsifs, whose promotions are extremely slow, will be too glad to participate in the generous allowances (deputation allowance Rs. 100 and halting allowance to Rs. 135 @ Rs. 4-8 per diem ordinarily) now so largely enjoyed by the executive officers.

DACCA, FAIR PLAY.
23rd March 1912.

Reviews.

THE INDIAN DECISIONS (New Series) Compiled at the Lawyers' Companion Office, Trichinopoly and Madras, Allahabad, Vol. II. (June 1880 to 1882). *Published by T. A. Venkasawmy Row and T. S. Krishnasawmy Row. 1912.*

This volume contains reprints of judgments from the Indian Law Reports, Allahabad Series, the Allahabad Weekly Notes and other sources, passed between the dates mentioned, in cases from Allahabad, including Privy Council judgments. The arrangement of the cases and the general get up of this volume are quite on par with those of its predecessor.

ALL INDIA DECENNIAL DIGEST. (Civil 1901—1910). Vols. I and II. *By B. R. Desai, High Court Pleader, Baroda. Baroda. 1911.*

Mr. Desai whose Criminal Digest for the years 1901—1910 we noticed some time ago is giving as good an account of himself in preparing this Civil Digest, which the two parts under notice bring up to the heading Gujrat Talukdar's Act. He expects to complete the series in another volume. The arrangement of the subject-matter is as satisfactory as may be expected in a compilation of this kind. The collection of materials is exhaustive. We have no doubt that these volumes will prove useful to the profession.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL.—*Rex* v. *Wann.* Before the LORD CHIEF JUSTICE OF ENGLAND AND JUSTICES HAMILTON AND LUSH. 12th February 1912.

Misdirection of the jury—Miscarriage of justice.

This was an appeal from a conviction and sentence for indecent assault. It was contended on the Appellant's behalf that there was misdirection of the jury and consequent miscarriage of justice. The Court allowed the appeal. In the course of his judgment the LORD CHIEF JUSTICE said :—

The words as to a miscarriage of justice were obviously intended to give the Court a wide jurisdiction within the recognized principles of our criminal jurisprudence, and the question had arisen as to whether they applied where a summing up, though not wrong in law, had insufficiently or incorrectly stated the facts to the jury. As to this, it was clear that a mere omission or misstatement in the summing up was not in itself a misdirection when the case had been fully heard by the jury. The law to be gathered from a summary of the decisions was well stated in Mr. Ross's book on the Criminal Appeal Act, p. 113, and the rule was that there could only be a miscarriage of justice in such a case where in the opinion of the Court the omission or misstatement was such that the jury might probably have been misled by it.

His Lordship pointed out the importance of a certain date in the story told by the prosecution. The Court felt, he said, that if there had been a fuller direction in the summing up as to this matter it could not be certain that the jury would in all reasonable probability have found the Appellant guilty. There was only this one point in doubt, for they were satisfied that the jury had otherwise fully considered the case. The Court expressed no opinion as to whether the Appellant was or was not innocent ; it was better in any case that a guilty man should escape punishment rather than that an innocent man should suffer ; and though they had come to their decision with very great doubt and hesitation they felt it wiser to be on the safe side, and so would order the conviction to be quashed.

Mr. Raikes for the Appellant.

Mr. North for the Crown.

B. D. *Appeal allowed.*

COURT OF APPEAL.—*Cuff* v. *London and County Land and Building Company.* Before LORDS JUSTICES FARWELL AND KENNEDY. 5th February 1912.

Injunction—Auditors, their powers and duties, their right of access to the books of the Company, employing them—Charge of negligence against auditors—Shareholders' right to dismiss auditors—Court if will enforce auditors right of access by mandatory injunction.

This was an appeal from an order made by Mr. Justice Eve and shortly noted in 16 C. W. N. cxxi where facts are stated.

The Court allowed the appeal. In the course of his judgment LORD JUSTICE FARWELL said :—

The argument put forward on the part of the Plaintiffs went to the extent, that an auditor of a company, even if he were a convicted felon, had a statutory right to have access to the books of the Company of which he could not be deprived. Even if that were so, it was one thing to affirm such a statutory right and it was another thing to say that the Court would grant a mandatory injunction to give effect to such a right. He thought that the usual practice of the Court when such a case arose was to direct that a general meeting of the shareholders should be held in order that their wishes might be ascertained. If the shareholders expressed the wish that a particular person should not act as auditor, the Court certainly would not force that person upon them.

Sec. 112 of the Companies Act, 1908, conferred the power of appointing an auditor or auditors on the company. An auditor so appointed had a *primâ facie* right to rely on such appointment, and if he were discharged without cause the remedy of bringing an action for wrongful dismissal was open to him. But to say that he could force his services on a company which did not wish for them appeared to be extravagant. They now knew, though the learned Judge when he took off the stay did not know, that a general meeting of this company was going to be held next Thursday. He did not see any real difficulty with regard to sec. 113 of the Companies Act. That section said that every auditor of a company should have a right of access at all times to the books and accounts and vouchers of the company. But if an auditor were excluded *vi et armis* from the offices of the company, he could not be blamed for not performing a duty which he was manifestly unable to perform. At any rate there seemed to him to be no reason for interfering in this case in a summary manner, or for making an order which appeared to be asked not in the interests of the company, but in the interests of the Plaintiffs themselves.

Mr. Kerly for the Appellants.

Messrs. Lawrence, K. C., and Rolt for the Respondents.

B. D. *Appeal allowed.*

KING'S BENCH DIVISION.—*James* v. *The Rockwood Colliery Company*, "*Ld.*" Before JUSTICES HAMILTON AND LUSH. 31st January 1912.

Company—Director—Meaning of "insolvent" in the article of association.

The Plaintiff who was a director of the Defendant Company sued to recover his fees. One of the articles of the association provided that "the office of a director shall *ipso facto* be vacated if he became bankrupt, lunatic or insolvent." It was shown that the Plaintiff became financially involved but he was not declared by Court as insolvent. The Defendant contended that he did become insolvent within the meaning of the article. But the Plaintiff's argument was that the word meant a change of *status*, *i.e.*, public insolvency. The Court affirmed the view of the Defendant and dismissed the appeal. In the course of his judgment MR. JUSTICE HAMILTON said:—

What was the necessity for using the word insolvent at all if it was to mean the *status* of bankruptcy? The case of bankruptcy was already provided for, and what necessity was there to add the word insolvent if it was to mean that the director must have done something analogous to an adjudication, as, for example, calling all his creditors together or executing a deed of assignment? The cases which had been cited were of small, if of any, assistance. In the *Queen* v. *Saddlers' Company*, 10 H. L. C. 402, the context in which the word insolvent was used was different in two respects from that in which it was used in Art. 15. The question there turned upon the construction of a by-law passed in 1799, and it was held that it must be construed with reference to the state of the law as it then existed, and in addition the by-law was one which alluded to a period of time to be measured from the insolvency, and weight was attached to that fact because it was pointed out that it was directed to some such insolvency as was capable of having a definite fixed date as the commencement of the term.

In the case before them there was nothing to suggest that the word insolvent must be treated as being *ejusdem generis* with lunatic and bankrupt and they were not troubled with words relating to insolvency which would denote the commencement of a term,

Messrs. Sankey, K. C., and Bowen for the Appellant.

Messrs. Gore-Browne, K. C., and Reed for the Respondent.

B. D. *Appeal dismissed.*

CHANCERY DIVISION.—*Pink* v. *Pink*. Before MR. JUSTICE EVE. 30th January 1902.

Debt—Release, cancellation as bad in account book if.

This was the trial of a summons. The testator lent moneys to Mr. R. and Mr. M. By his will he made a settlement upon Mrs. R. (his daughter) and her children and directed that the debt due from Mr. R. should not be called in for five years if interest was duly paid. Similar settlement was made upon his other daughter Mrs. M. After the date of the will the testator made entries in his ledger. With reference to Mr. R. it stated that "the debt is cancelled as altogether bad, the debtor being bankrupt" and with reference to Mr. M. that the debt was absolutely cancelled. The question now raised was whether the said debts still existed and ought to be set off against the settled legacies. The learned Judge decided as follows:—

With regard to Mr. R.'s debt nothing had been repaid nor any security given, and in February 1908 he became bankrupt and was still undischarged. No interest had been paid on the debt, and the residuary legatees argued that it had become immediately payable and ought to be deducted from the settled legacy. There seemed to be no answer to that contention. The entry in the ledger could not be a release, and there was nothing in the argument that bankruptcy put an end to the indebtedness. *Flower* v. *Marten* (2 My. and C. 459) and other cases cited were no authority for the proposition that bankruptcy put an end to a debt. The trustees therefore ought to treat the debt as still existing and as a loss to be set off against the settled legacy.

With regard to Mr. M.'s debt the case was somewhat different. There were several re-payments and subsequent advances, and in February 1907 the testator made a memorandum in his ledger that £5,000 was given off this debt for a definite object and the balance carried forward uncancelled. The memorandum was communicated to Mrs. R. but not to Mr. R. In these circumstances it was difficult to treat the entry as an intention to give £5,000 to Mr. R. By his will the testator appointed Mr. M. one of his executors, and in 1909 made an entry in the ledger that the debt was absolutely cancelled. It was argued that the entry and the communication to Mrs. R. amounted to a release of the debt, that the appointment of Mr. M. as executor released the debt at law, and equity following the law would treat the release as perfected, and *Strong* v. *Bird* (L. R. 18 Eq., 315) and other cases were cited.

His Lordship could not treat the entry as evidence of a gift and could not hold that the gift was perfected by the appointment as executor. He thought the evidence of a gift was very slight and doubted whether any gift was intended. Assuming that there was evidence of an intention to give, his Lordship did not think it had been perfected by the appointment as executor. The

trustees must, therefore, treat the loss as falling upon the settled legacy.

Messrs. Lawrence, K. C., and Green for the residuary Legatees.

Messrs. Jessel, K. C., Methold, Clayton, K. C., and Thompson for the Debtors.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. CRIMINAL REVISION NO. 207 OF 1912. CHUNNI MAHTO AND OTHERS, Petitioners *v.* THE KING-EMPEROR, Opposite Party. 8th March 1912.

Remand—Power of the Sessions Judge to pass a different order and sentence on.

It appears that the case of the Petitioners was remanded to the Sessions Judge for re-hearing and the Sessions Judge after re-hearing passed a different order and sentence from those passed by his predecessor.

Their Lordships observed :—

"We can have no doubt looking into the matter as *res integra* that the Sessions Judge on remand has jurisdiction to pass a different order and sentence to that passed by his learned predecessor, even though it has the effect of imposing a more severe sentence on any of the previous Appellants."

Babus Dasarathi Sanyal and *Harihar Prosad Sinha* for the Petitioners.

Mr. Orr for the Crown.

B. C. *Rule discharged.*

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and IMAM, JJ. REVISION NO. 263 OF 1912. IN THE MATTER OF MOTIULLA MOLLAH, Petitioner. 15th March 1912.

Criminal Procedure Code, sec. 198—Indian Penal Code, sec. 500, order for prosecution under—Illegality of.

The Magistrate made the following order :—

Whereas Motiulla Mollah in his petition has stated that Sub-Inspector of Police, Syed Ashraf Ali, accepted an illegal gratification as consideration for releasing him from custody . . . . . and "whereas the said Syed Asraf Ali denies the allegation and states it to be false, the said Syed Asraf Ali is hereby directed to institute within 7 days and prove a case of defamation under sec. 500, I. P. C., against the said Motiulla Mollah."

On a subsequent date the Magistrate took cognizance of the aforesaid alleged offence under sec. 190 (c), though Ashraf Ali did not lodge any complaint and summoned Ashraf Ali to give evidence for the prosecution.

The Petitioner obtained a Rule to set aside the proceeding on the ground that the Petitioner could not be prosecuted under sec. 500, I. P. C., without the complaint of the aggrieved party.

Their Lordships observed :—

The aggrieved persons did not complain and the proceedings are therefore entirely without jurisdiction. It is impossible to take proceedings under sec. 500, I. P. C, when the prosecutor declines to complain. The rule must be made absolute and the order of the lower Court discharged.

Babu Satya Charan Sinha for the Petitioner.

B. C. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before BRETT and CARNDUFF, JJ. APPEAL FROM APPELLATE DECREE NO. 1015 OF 1909. KRISHNA DAS LAHA AND OTHERS, Defendants, Appellants *v.* JOTINDRA NATH BASU AND OTHERS, Plaintiffs, Respondents. Heard, 1st March 1912. Judgment, 5th March 1912.

Bengal Tenancy Act (VIII of 1885), sec. 160, cl. (g)—Protected interest—Mortgage by putnidar if protected interest—Sale under the Bengal Tenancy Act—Putni Regulation, sec. 11.

This appeal arose out of a suit brought by the Plaintiffs-Respondents to enforce a registered mortgage bond for Rs. 2,675, dated 20th November 1896, said to have been executed by Defendant No. 1, who is a putnidar. In the putni *kabuliyat* given by Defendant No. 1 to Defendants Nos. 2 to 5, the landlords, dated the 2nd Jaist 1299, it was stated "I in succession to my sons, grandsons, etc., heirs and representatives shall, with felicity, hold and enjoy the aforesaid share, with right to make gift, sale, mortgage, etc., and durputni mourasi mokurari, gantidari, etc., settlements at a proper jama, and in every way make alienations and create encumbrances." Defendant No. 1 the putnidar defaulted in paying the rent due on the putni tenure and in consequence Defendants Nos. 2 to 5, the landlords, in execution of the rent decree purchased the tenure themselves. Thereupon the Plaintiffs as mortgagees brought the present suit against Defendants Nos. 1 to 5 to recover the sum advanced on the mortgage by sale of the putni tenure which then passed to the hands of Defendants Nos. 2 to 5, the landlords. Defendant No. 1 did not appear and Defendants Nos. 2 to 5 contested the suit. The Plaintiffs pleaded that the mortgage in question came within the description of "protected interests" under sec. 160, cl. (g) of the Bengal Tenancy Act and the *kabu-*

liyat empowered Defendant No. 1 the putnidar to execute mortgage, etc., and the landlords expressly and in writing gave him permission to create the incumbrance. But the Defendants contended that written permission of the landlords to create the mortgage in question was necessary and it was to be given after the *kabuliyat*. Both the lower Courts found for the Plaintiffs and held that the mortgage in suit was "protected interest" under sec. 160, Bengal Tenancy Act, and it could not be annulled. The Defendants appealed.

Held—That the mortgage created in favour of the Plaintiffs was not a protected interest within the meaning sec. 160, cl. (g) of the Bengal Tenancy Act. The recitals in the putni *kabuliyat* merely set out the ordinary incidents of a putni grant as laid down in sec. 3 of the Putni Regulation and these recitals gave the putnidar no right which he had not under the Regulation. Even if the recitals could be regarded as an express authority within the meaning of sec. 160, cl. (g) of the Bengal Tenancy Act, the effect of that section would certainly be subject to the saving provisions of cl. (e) of sec. 195 of the same Act.

Held also—That the right of the putnidar to mortgage the putni tenure was subject to the conditions imposed by sec. 11 of the Putni Regulation.

Dr. Rash Behari Ghose, *Babus Golap Chandra Sarkar* and *Debendra Nath Ghose* for the Appellants.

Babus Basanta Kumar Bose, *Surendra Chandra Sen* and *Sarat Chandra Ghose* for the Respondents.

H. C. S. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before COXE and IMAM, JJ. APPEALS FROM ORDERS Nos. 606 and 647 OF 1911. BAIJ NATH GOENKA, Decree-holder, Appellant *v.* PUDMANUND SINGH, Judgment-debtor, Respondent. Heard, 4th March 1912. Judgment, 11th March 1912.

Res judicata—*Execution proceeding—Attachment of allowance—Erroneous decision on a point of law, if can have the force of* res judicata—*Cause of action—Civil Procedure Code (Act V of 1908), secs. 11 and 100.*

The Appellant in this case in a former execution proceeding attached an allowance payable to the Respondent. The attachment was contested but it was decided against the Respondent and the decision was not appealed against. What was sought to be attached in that case was not any particular instalments but the whole allowance as it fell due. Subsequently it was held in a case between the Respondent and another creditor, to which the Appellant was not made a party, that this allowance could not be attached in that general way and that instalments could not be attached before they respectively fell due. The Appellant again took out execution and the Respondent pleaded that this attachment could not be made. This plea was accepted by the Subordinate Judge and the decree-holder appealed.

The point that arose in the appeal was whether the liability of the allowance to attachment was or was not *res judicata* between the parties.

Held—That an erroneous decision on a point of pure law cannot have the force of *res judicata* in a subsequent proceeding for a different relief. *Aghore Nath Mukerji* v. *Kamini Debi*, 11 C. L. J. 461, and *Purna Chandra* v. *Rasik Chandra*, 13 C. L. J. 119, followed.

A decision cannot alter the law of the land, *Rai Charan Ghosh* v. *Kumud Mohan Dutt*, 1 C. W. N. 687, and *Bishnu Priya* v. *Bhabasundari*, 28 Cal. 218, referred to.

Dr. Rash Behari Ghose and *Babu Kshetra Mohun Sen* for the Appellant.

Mr. B. Chuckerbutty and *Babus Ram Charn Mitter*, *Bepin Behary Ghosh* and *D. N. Bagchi* for the Respondent.

H. C. S. *Appeals dismissed.*

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and N. R. CHATTERJEA, J. LETTERS PATENT APPEAL NO. 35 OF 1910. GOPAL KRISHNA JANA, Appellant *v.* LAKHIRAM SARDAR, Respondent. 14th March 1912.

Encroachment by tenant—Adverse possession of limited interest—Limitation Act (IX of 1908), Sch. I, Art. 144.

The suit was one for *khas* possession of lands, and the lands in respect of which the relief was sought were treated as so situate and circumstanced as to come within the doctrine of encroachment. The Defendant was a tenant of the Plaintiff in respect of the other property, and the question was whether the Plaintiff, the landlord, could recover *khas* possession of the land in suit which was not included originally in the lease but was treated as the subject of an encroachment by the Defendant as a tenant of the Plaintiff. The Plaintiff's claim was upheld in both the lower Courts, on the ground that the Defendant was not entitled to assert his position as a tenant of the Plaintiff. Mr. Justice D. Chatterjee dissented from the view. He thought that the facts were such that it might be a reasonable view that the Defendant had by virtue of the statute of limitation, acquired a right which entitled him to claim to hold the land as a tenant of the Plaintiff, and so entitled him to resist the claim for *khas* possession.

It was observed: "The law as to encroachments is well settled, while a tenant is bound to treat that which is an encroachment, as held by him under his landlord, the landlord is not bound to treat the land on which his tenant encroaches as held under a tenancy. In appropriate circumstances, a land-

lord can recover against his tenant the land on which the tenant has encroached. There is a limit to that right, for if the tenant has been in possession of the land, for what for brevity may be called the statutory period, and the landlord repudiates the encroachment, it becomes a question whether or not the tenant has gained an interest that would be a bar to his landlord's claim for possession."

The Defendant was in possession of the land in question for a period of 12 years and upwards. The Defendant asserted that he acquired by adverse possession a tenancy right in the property.

Held—That under Art. 144, Sch. I of the Limitation Act there might be adverse possession not only of immovable proper y but of any interest therein; that in the circumstances of the case there might be an adverse possession of the limited interest which the Defendant claimed.

Babus Joges Chandra Roy and *Rajendra Chandra Guha* for the Appellant.

Babu Dwarka Nath Mitter for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and N. R. CHATTERJEA, J. LETTERS PATENT APPEAL No. 33 OF 1910. TIRTHABASI SINGH RAI AND ANOTHER, Plaintiffs, Appellants *v.* PURNA CHANDRA NAG AND OTHERS, Defendants, Respondents. 15th March 1912.

Bengal Tenancy Act (VIII of 1885), sec. 149 sub-sec. (3), 153—Appeal.

The appeal arose out of a suit which was discribed as one under sec. 149, sub-sec. (3) of the Bengal Tenancy Act.

Held—That sec. 149 of the Bengal Tenancy Act was introduced for the purpose of protecting a tenant against the harassment of litigation consequent on rival claims of title to the reversion on the tenant's interest. The section affords a very simple and expeditious machinery.

Sub-sec. (3) of sec. 149 of the Bengal Tenancy Act contemplates a suit which culminates not in a decree but in an order of a limited kind, an order restraining payment out of the money. Hence it is an order not finally decisive of the substantial rights of the parties, but providing a machinery for the purpose of carrying out the scheme whereby it is sought to relieve a tenant from harassment.

Semble—An appeal did not lie under sec. 153 against an order under sec. 149, sub-sec. (3).

Babus Dwarka Nath Chuckerbutty and *Sarat Chandra Mitter* for the Appellants.

Babus Asita Ranjan Chatterjee, *Asoka Nath Roy*, *Gour Chandra Pal* and *Bepin Behary Ghose* for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before COXE and IMAM, JJ. APPEAL FROM ORDER No. 645 OF 1911. RANI KESHOBATI, Appellant *v.* MOHAN CHAND MONDAL, Respondent. Heard, 5th March. Judgment, 27th March 1912.

Ghatwali tenure—Receiver, appointment of—Attachment, validity of.

The appeal was against an order of the Subordinate Judge of Dumka allowing an attachment of the estate of the judgment debtor and appointing a Receiver.

By a compromise between the parties in Appeal from Original Decree No. 467 of 1907 it was decreed that the decretal amount was to be paid to the decree-holder in three instalments and failure to pay two consecutive instalments was to entitle the Plaintiff decree holder to realise the entire amount at the time of such default by executing the entire decree, it being further stated in the petition of compromise that the decretal amount was realisable from the estate of the late Raja Udit Narayan Sing (the deceased husband of the judgment-debtor) as well as from the Defendant judgment-debtor personally.

There being default in the payment of two consecutive instalments the decree-holder applied for execution of his entire decree and prayed for realisation of the decretal amount by the appointment of a Receiver for 13 taluks mentioned in the Schedule to the application. The 13 taluks were decreed *ghatwali* in another suit. The whole of the judgment-debtor's estate with some exceptions was attached and the Deputy Commissioner was appointed Receiver, the Court issuing directions to the Mustagirs and raiyats not to pay rents to anybody other than the Deputy Commissioner or his duly constituted agents. The judgment-debtor was forbidden to make any collection during the continuance of the attachment.

Held—That the appointment of a Receiver to receive the rents and profits was valid. The order for attachment of the estate might be erroneous but as the practical effect of the appointment of the Receiver was merely to ensure that the rents and profits were properly dealt with, the order was not interfered with.

Dr. Rash Behari Ghose and *Babu Gunada Churn Sen* for the Appellant.

Babus Mahendra Nath Roy and *Peari Mohun Sikdar* for the Respondent.

A. T. M. *Appeal dismissed.*

[PRIVY COUNCIL.]

*[APPEAL FROM BENGAL.]

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1911,
Heard, 3, 7 and 8, November.
1912,
Judgment, 16, January.

SYED MAHOMED IBRAHIM HOSSEIN KHAN and another, Appellants,
v.
AMBIKA PERSHAD SINGH, and others, Respondents.

*Mortgages, successive—Subsequent mortgage effected to pay off first mortgage—Charge, keeping alive of, as against intermediate mortgagee—Suits by intermediate mortgagees, last mortgagee not setting up prior charge kept alive though made party, not made party in others—Suit by last mortgagee more than 12 years after due date of prior charge—Subrogation—*Res judicata—*Civil Procedure Code (Act XIV of 1882), sec. 13, Expl. II—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 132—Mortgage-suit—Puisne mortgagee if necessary party—Notice—Transfer of Property Act (IV of 1882), sec. 85.*

A zarpeshgi *deed executed in 1874 in favour of one G provided* inter alia *for payment by G to the executants of a* zarpeshgi *rent of Rs. 500 odd every year. The principal amount was made payable in September 1887, In February 1888 Rs. 12,000 was borrowed by the mortgagor from A and in accordance with the agreement between them was applied in paying the* zarpeshgi *debt and the* zarpeshgi *deed upon such payment was taken back and handed over to A in whose favour a simple mortgage was executed to secure the loan of Rs. 12,000, given by her :*

Held—*That so far as it operated as a lease, the* zarpeshgi *deed came to an end but the charge created by the* zarpeshgi *was kept alive for the benefit of A.*

MOHESH LAL *v.* MOHUNT BAWAN DAS (1), GOKULDOSS *v.* RAMBUX SEOCHAND (2), DINOBUNDHU SHAW CHOWDHRY *v.* JOGMAYA DASI (4) *referred to.*

That in suits for sale instituted after the date of A's mortgage of 1888 by persons who had obtained mortgages between the dates of the zarpeshgi *of G and the simple mortgage of A, A, as puisne mortgagee, was a necessary party under sec. 85 of the Transfer of Property Act.*

Where in such suits A was made a party but did not set up her prior title under the zarpeshgi *of 1874 and some of the properties covered by the* zarpeshgi *were sold :*

Held—*That A's right to proceed against the said properties by a suit for sale on the basis of the* zarpeshgi *deed was barred by Expl. II of sec. 13 of the Civil Procedure Code of 1882.*

In one such suit instituted by M within 12 years of the due date of payment under the zarpeshgi *of 1874, A not having been joined as a party, the sales held did not affect or take away A's right as puisne mortgagee under the mortgage of 1888 or her claim of priority under the* zarpeshgi *of 1874. But A's claim to priority under the* zarpeshgi *of 1874 became barred in 1900 when a suit was first instituted by A's assignee to enforce A's mortgage, and the only decree Plaintiff in this suit would get as against the purchasers in M's suit was to be allowed to redeem the mortgage of M on payment to the purchaser of the amount of principal and interest in respect of which the property purchased by him was sold in M's suit.*

In a mortgage suit a puisne mortgagee of whose interest in the mortgaged property, the Plaintiffs has notice is a necessary party under sec. 85 of the Transfer of Property Act, and a sale of the property had in such a suit does not take away the puisne mortgagee's right to redeem.

(1) L. R. 10 I. A. 62 (1883).
(2) L. R. 11 I. A. 126 (1884).
(4) L. R. 29 I. A. 9 : s. c. 6 C. W. N. 209 (1901).

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This was an appeal against the decree of the High Court of Judicature at Fort William in Bengal, dated the 3rd March 1905, which reversed the decree of the Subordinate Judge of Patna, dated the 9th July 1902.

The said suit was a suit for sale on a simple mortgage, dated 7th January 1888. The Plaintiffs were the assignees of the mortgage. The chief Defendants were purchasers of portions of the mortgaged property under decrees obtained on prior mortgages. The Plaintiffs claimed that under the circumstances of the case they were entitled to priority over these Defendants. The main questions for determination on the present appeal were :— (1) whether the suit was barred by *res judicata* ; and (2) whether by discharging a prior encumbrance the subsequent mortgagee kept alive the discharged mortgage for his benefit.

The present appeal was preferred by the Plaintiffs.

The lands c mprised in the mortgage upon which the suit was based, consisted of eight parcels of land, of which it is only necessary to name mouzah Ghowspur and mouzah Fatehpur.

In 1874 all eight parcels were hypothecated by the parents of Kishan Kumar Singh to Girwar Singh under a *zarpeshgi* lease. The period of the lease was 12 years and such further period as the *zarpeshgi* money remained unpaid. On the 15th December 1879 the said Kishan Kumar Singh, hereinafter referred to as the said mortgagor, his father having died, mortgaged part of mouzah Ghowspur for Rs. 700 to a person represented in the suit by Defendant No. 7. On the 31st December 1880, and on the 20th December 1883, the mortgagor and his mother jointly mortgaged part of mouzah Ghowspur for the respective sums of Rs. 3,200 and Rs. 2,000 to two persons represented in this suit by Defendants Nos. 8 to 13. On the 7th January 1888, the mortgagor mortgaged part of mouzah Fatehpur for Rs. 2,500 to the fifth Defendant in this suit. Finally, on the 17th February 1888, the mortgagor borrowed Rs. 12,000 from Mussammat Alfan, and to secure the loan executed the mortgage now in suit, comprising the whole of the said mortgage premises. The mortgage recited that the said mortgagor had "repaid the *zarpeshgi* of Girwar Singh and had "obtained release of the said mouzah from the *zarpeshgi* charge." The mortgage contained a covenant to repay in two years the principal sum thereby secured, together with interest at 15 per cent. Nothing was paid by the said mortgagor on account of principal and interest under this mortgage, and at the time of the institution of the present suit Rs. 35,100 was claimed to be due on the footing thereof. It appears that possession of the said mortgage premises remained with Girwar Singh and his heirs until July 1888, when their claim was satisfied and the deed was returned to the said mortgagor, who thereupon resumed possession of the land.

In 1888 a suit was brought by the fifth Defendant on the mortgage of the 7th January 1888 against the mortgagor, and a decree for sale was passed under which the property comprised therein or part thereof was brought to sale and purchased by Lalji Mahto. But Mussammat Alfan was not made a Defendant to that suit. In 1890 a suit was brought by the seventh Defendant on the mortgage of 1879 against the mortgagor and the holders of the subsequent mortgages, including the heirs of the said Mussammat

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Alfan, who had died. The then Plaintiff obtained a decree under which the land was sold and ultimately passed into the hands of Jhumok Mahto for Rs. 3,400. On the 15th July 1890, suits were brought on the mortgages of 1880 and 1883 respectively, by the Defendants Nos. 8-13, against the mortgagor and the other encumbrances, including the heirs of Mussammat Alfan. Mortgage decrees were passed in the usual form under which the property was brought to sale and purchased by the decree-holders. The properties sold and placed in the possession of the purchasers under the decrees mentioned in this paragraph were Nos. 364 and 362 Ghowspur and No. 360 Fatehpur.

On the 16th June 1891, pending the execution of the decrees in the three last-mentioned suits, the mortgage now in suit was assigned by the heirs of Mussammat Alfan above-mentioned to the present Appellants, who, on the 22nd September 1900, instituted the present suit in the Court of the said Subordinate Judge. The Defendants were, first, the sister-in-law of the mortgagor who was said to represent his estate, he having died; Defendants Nos. 2—4 were the heirs of Mussammat Alfan; Defendants Nos. 5 and 6 were respectively the decree-holder and the purchaser under the decree in the suit on the mortgage of 7th January 1888; Defendants Nos. 7 and 15 were respectively the decree-holder and purchaser under the decree in the suit on the mortgage of 15th December 1879; Defendants Nos. 8—13 were the decree-holders and purchasers under the decrees in the two suits on the mortgages of 31st December 1880 and 20th December 1883, respectively.

The Plaintiffs alleged that by virtue of the *zarpeshgi* deed of 20th November 1874 which was paid off out of moneys advanced by Mussammat Alfan they were entitled to priority over the other mortgage and the latter were bound to redeem them. They also alleged that summons had been served on Mussammat Alfan in the suits in which her name appeared as a Defendant and that therefore her rights were unaffected by the decrees in those suits and by the sales held therein; they accordingly prayed for the usual mortgage-decree against all the Defendants.

Written statements of defence were filed by certain of the Defendants Nos. 5—15 who pleaded that the decrees and Court sales above-mentioned were conclusive against the Plaintiffs' assignors and also against the Plaintiffs, whose purchase was subject to the ultimate result of these suits, and that the titles acquired thereunder were absolute and could not now be impeached. They denied the Plaintiffs' alleged right of priority based on the *zarpeshgi* lease, on the grounds, among others, that there was in 1888 no intention to keep it alive for the benefit of the Plaintiffs' assignors, that it did not amount to a mortgage or charge, that the creditor-lessee thereunder had no right to sue for foreclosure or sale, and that if he had such right it had been lost. They further relied on the rule of *res judicata*.

On the 9th July 1902, the Subordinate Judge delivered his judgment. He held that the first Defendant was not the representative of the mortgagor, but since she was in possession of such of the properties as had not been sold she represented his family to all intents and purposes that he was not satisfied that notice of the summons in the suits referred to had been served on the heirs of Mussammat Alfan, and held that the decision in those suits did not operate as a bar to the present suit. With regard

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to the several mortgage bonds and the *zarpeshgi* lease, the Subordinate Judge found that they had all been executed for good consideration; that it was the clear intention of the parties that the incumbrance created by the *zarpeshgi* deed should subsist to Mussammat Alfan and be kept alive for her benefit. That the Plaintiffs were entitled to no interest on the footing that the *zarpeshgi* lease had been kept alive, and that the contesting Defendants were respectively entitled to redeem the properties purchased under the decrees on the payment of one-third of the *zarpeshgi* money in respect of each. In the result, he passed a decree for the sale of the said mortgage premises making provision for the right of redemption which those Defendants were thus held to possess.

Against this decree appeals and a memorandum of objections were preferred to the High Court.

They were heard by Rampini and Mitra, JJ. The learned Judges found *inter alia* that the notice of summons had been duly served upon the Plaintiffs' assignors in the previous suits. On the remaining points their Lordships in that view and for other reasons stated in their judgment varied the decree of the Subordinate Judge in certain particulars.

Sir E. Richards, K. C., and *Mr. Dunne* for the Appellants.—The Appellants were entitled to the benefit of the charge under the *zarpeshgi* deed, dated the 20th November 1874. Mussammat Alfan lent money to Kishan Kumar Singh to pay off the *zarpeshgi* debt and it was paid off. She must be presumed to have intended to do so for her benefit. There is also evidence of her intention. The doctrine of *Toulmin* v. *Steere* (3) does not apply to the circumstances of this case. Reliance was placed on *Gokuldoss* v. *Rambux Seochand* (2), *Adams* v. *Angell* (5), *Thorne* v. *Cann* (6), *Chetwynd* v. *Allen* (7), *Dinobundhu Shaw* v. *Jogmaya Dasi* (4).

Messrs. L. DeGruyther, K. C., and *Browne* for the Respondents.—With reference to the mortgage, dated the 20th November 1874, the assignor could not convey more than what she possessed. She had only usufructuary mortgage rights, *i.e.*, a right to remain in possession until the debt was discharged. Secs. 59, 62, and 67 of the Transfer of Property Act, 1882. But he has no right to bring it to sale. Further no mortgage subsequent to the second can affect our rights. No transaction between the mortgagor and a third person can confer higher rights on the third person than those possessed by the mortgagor. The view taken by this Board in a similar case is to be found in *Mohesh Lal* v. *Mohunt Bawan Das* (1). The claim is now barred by *res judicata*. There was express finding of the Court in the previous suits that the summons was served on the representatives of Mussammat Alfan and the decree passed *ex parte* is binding unless and until it is set aside. It is impossible to go into the question as to whether the summons was in fact served or not after the lapse of so many years. The *ex parte* decree is conclusive and the remedy is not by another suit but by recognised processes of law in the same suit, namely, (1) proceeding under § 108, C. P. C., (2) review of judgment, (3) by appeal. *Nidha Sah* v. *Murli Dhar* (8),

(3) 3 Merivale 210 (1817).

(1) L. R. 10 I. A. 62 (1883).
(2) L. R. 11 I. A. 126, 133 (1884).
(4) L. R. 29 I. A 9: s. c. 6 C. W. N. 209 (1901).
(5) 5 Ch. D. 634 (1877).
(6) [1895] L. R. A. C. 11, 16, 18 (1894).
(7) [1899] L. R. 1 Ch. 353 (1898).
(8) L. R. 30 I. A. 54: s. c. 7 C. W. N. 289 (1902).

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Malkarjun v. *Narhari* (9), *Sri Gopal* v. *Pirthi Singh* (10). There could be no decree for sale except for a charge which also is barred by limitation under Art. 143, Limitation Act, 1877, as the Appellants were never in possession. *Ponnusami Mudaliar* v. *Srinivasa Naickan* (11), *Imam Ali* v. *Baijnath* (12).

Sir E. Richards in reply.—Sec. 98 of the Transfer of Property Act, 1882, clearly provides for a mixed simple and usufructuary mortgage. When a usufructuary mortgage provides for a charge there can be a sale. *Kashi Ram* v. *Sardar Singh* (13), *Jafar Husen* v. *Ranjit Singh* (14), *Musahib Yaman Khan* v. *Inayatullah* (15), *Parbati Charan* v. *Gobinda Chandra* (16). Art. 143 does not apply. Limitation can only apply to documents we sue on. Here *zarpeshgi* was paid off in 1888 and the suit was instituted in 1900. We are seeking to enforce the payment of Rs. 12,000, and the suit is within time from due date under Art. 132. *Dinobundhu* v. *Jogmaya* (4), *Vasudeva Mudaliar* v. *Srinivasa Pillai* (17), *Bolton* v. *Buckenham* (18) In fact no summons was served on the representatives of Mussammat Alfan. This is proved by the evidence upon the record. The suit is not barred by *res judicata*.

(4) L. R. 29 I. A. 9 : s. c. 6 C. W. N. 209 (1901).
(9) L. R. 27 I. A. 216, 224 : s. c. 5 C. W. N. 10 (1900).
(10) L. R. 29 I. A. 118 : s. c. 6 C. W. N. 889 (1902).
(11) I. L. R. 31 Mad. 333, 334 (1908).
(12) 10 C. W. N. 551 : s. c. I. L. R. 33 Cal. 613, 621 (1906).
(13) I. L. R. 28 All. 157, 160 (1905).
(14) I. L. R. 21 All. 4 (1898).
(15) I. L. R. 14 All. 513, 519 (1892).
(16) 4 C. L. J. 246 (1906).
(17) L. R. 34 I. A. 186 : s. c. 11 C. W. N. 1005 (1907).
(18) [1891] Q. B. 278.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal by the Plaintiffs against the decree of the High Court of Judicature at Fort William in Bengal, dated the 3rd of March 1905, which varied the decree of the Subordinate Judge of Patna of the 9th of July 1902.

The suit was brought on the 22nd of September 1900, in the Court of the Subordinate Judge on a simple mortgage of the 17th of February 1888, to recover Rs. 12,000 as principal, Rs. 23,150 as interest to the date of suit, and future interest until realization. That mortgage, as will later appear, was executed in favour of Mussammat Alfan, whose heirs assigned it to the Plaintiffs on the 16th of June 1891. The Plaintiffs also claimed to have it declared that the properties covered by the mortgage of the 17th of February 1888, and by a *zarpeshgi* deed of the 20th of November 1874, were liable for the entire decretal amount; that certain of the Defendants should be directed to pay the decretal amount to the Plaintiffs within a time to be fixed by the Court, and that in default of payment the decretal amount should be realized by the sale by auction of the mortgaged properties included in the mortgage of the 17th of February 1888, and the *zarpeshgi* deed of the 20th of November 1874. Various issues were raised by the Defendants, and much more or less conflicting evidence was recorded, but the facts so far as they are material in the view taken by their Lordships may be briefly stated.

On the 20th of November 1874, Nanda Kumar Singh on his own behalf, and as the husband and agent of his wife, Mussammat Lalpeari Dasi, executed a *zarpeshgi* deed in favour of Girwar Singh

for the sum of Rs. 12,000, which was acknowledged to have been received from Girwar Singh, and by that deed mortgaged and hypothecated as security for the *zarpeshgi* Rs. 12,000 certain properties which included the entire 16 annas of the milkiat and the malguzari right of Mouzah Ghowspur-Dopahra No. 364, 2 annas out of 16 annas of Mouzah Ghowspur-Dopahra No. 362, and 5 annas 4 pies out of 16 annas of Mouzah Fatehpur-Lawaech. With the properties which are named above this appeal is alone concerned. By that deed Girwar Singh was entitled to hold possession of the properties hypothecated until the amount of the *zarpeshgi* Rs. 12,000 was repaid to him, and it was by the deed amongst other things agreed that Girwar Singh should pay certain expenses, and the Government revenue, should keep out of the usufruct Rs. 900 every year as interest on the *zarpeshgi* Rs. 12,000, and should pay Rs. 501, 13 annas, 6 pies, on account of the rent every year by regular instalments to Nanda Kumar Singh and Lalpeari Dasi, and that all the increase in the produce in consequence of proper cultivation should be enjoyed and appropriated by Girwar Singh. It was also by the deed agreed that when Nanda Kumar Singh and Lalpeari Dasi should repay to the *ticadar*, Girwar Singh, the *zarpeshgi* Rs. 12,000 in one lump sum at the end of Jeth 1294 Fasli (September 1887) the *ticca* transaction should be cancelled and Nanda Kumar Singh and Lalpeari Dasi should bring the leased properties into their direct possession, but in the case of the non-payment of the *zarpeshgi* Rs. 12,000 at the end of Jeth 1294 Fasli, the *ticca* transaction should stand good with all its conditions until the payment of the *zarpeshgi*. Girwar Singh was put in possession under the deed.

On the 15th of December 1879, Nanda Kumar Singh being then dead, his son and heir Kishan Kumar Singh executed in favour of Mussammat Jagattarini Debi a simple mortgage of the 2 annas share in No. 362 Ghowspur-Dopahra. On the 3rd May 1890 Dwarkanath Roy, who was the son and heir of Mussammat Jagattarini, then dead, brought a suit for sale on the mortgage of the 15th of December 1879, and made the mortgagor and the puisne mortgagees, including the heirs of Mussammat Alfan, who was then dead, Defendants to his suit. Their Lordships, concurring with the High Court, find as a fact that the summonses and notices in that suit were duly served upon the heirs of Mussammat Alfan. The heirs of Mussammat Alfan did not appear, and did not defend that suit. On the 20th of November 1890, Dwarkanath Roy obtained in his suit a decree for sale, and under that decree the two annas share in No. 362 Ghowspur-Dopahra was sold.

On the 31st of December 1880, Kishan Kumar Singh and his mother Lalpeari Dasi executed a simple mortgage in favour of Raghunath Singh and Ganpat Singh of, amongst other properties, the 2 annas share in No. 362 Ghowspur-Dopahra and the 16 annas share in No. 364 Ghowspur-Dopahra. On the 20th December 1883, Kishan Kumar Singh and Lalpeari Dasi executed in favour of Raghunath Singh and Jagarnath Singh a simple mortgage of, amongst other properties, the 2 annas share in No. 362 Ghowspur-Dopahra and the 16 annas share in No. 364 Ghowspur-Dopahra. On the 15th July 1890, two suits for sale were brought, one on the mortgage of the 31st of December 1880 and the other on the mortgage of the 20th of December 1883. Their Lordships, concurring with the High Court, find as

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a fact that the heirs of Mussammat Alfan were duly made Defendants to these suits. The heirs of Mussammat Alfan did not defend either of these suits. Decrees for sale were made in these suits.

On the 7th of January 1888, Kishan Kumar Singh executed in favour of Gajadhur Mahto a simple mortgage of the 5 annas 4 pies share in Fatehpur-Lawaech. On the 6th September 1888, Gajadhar Mahto brought a suit for sale on his mortgage of the 7th of January 1888 against Kishan Kumar Singh, but did not make Mussammat Alfan a Defendant. Gajadhur Mahto obtained a decree for sale; under that decree the 5 annas 4 pies share in Fatehpur-Lawaech was sold on the 16th December 1889 to Lalji Mahto. The sale was confirmed on the 22nd of March 1890, and shortly afterwards Lalji Mahto was put in possession. Lalji Mahto died since this suit was brought.

In February 1888 Kishan Kumar Singh borrowed Rs. 12,000 at interest of Re. 1 and 4 annas per mensem from Mussammat Alfan. Their Lordships find as a fact that the Rs. 12,000 was borrowed by Kishan Kumar Singh and was lent by Mussammat Alfan for the express purpose of paying off the *zarpeshgi* debt of Rs. 12,000 as security for which the property mentioned in the *zarpeshgi* deed of the 20th November 1874 was mortgaged and hypothecated by that deed. In consideration of that loan of Rs. 12,000 Kishan Kumar Singh executed on the 17th of February 1888 in favour of Mussammat Alfan a simple mortgage of the properties included in the *zarpeshgi* deed of the 20th of November 1874. The principal sum of Rs. 12,000 was under that mortgage repayable in two years. The money lent by Mussammat Alfan was in accordance with the agreement between her and Kishan Kumar Singh applied in discharging the *zarpeshgi* debt of Rs. 1,2000, and on the 15th of July 1888 the then holders of the *zarpeshgi* deed of the 20th November 1874 quitted possession and gave up the *zarpeshgi* deed, which was delivered to Mussammat Alfan. Mussammat Alfan died on the 10th of December 1889, and on the 16th of June 1891 her heirs assigned the mortgage of the 17th of February 1888 to the Plaintiffs, who are the Appellants here. On that assignment such rights as Mussammat Alfan had acquired and were then existing passed to the Plaintiffs.

On the 22nd of September 1900, the Plaintiffs in whom was then vested Mussammat Alfan's right as mortgagee under the mortgage of the 17th of February 1888 filed their plaint in this suit, making then, or by subsequent amendment of their plaint, the representatives of Kishan Kumar Singh, who was then dead, and others who were interested in the mortgage properties or in some of them, Defendants. The titles of the Defendants, other than the representatives of Kishan Kumar Singh, arose under the mortgages which were made subsequently to the 20th of November 1874 and prior to the 17th of February 1888.

The Subordinate Judge decreed the suit for sale with costs, giving the Defendant No. 1, a right to redeem the mortgage so far as it affected the properties other than No. 362 Ghowspur-Dopahra, No. 364 Ghowspur-Dopahra, and Fatehpur-Lawaech by payment within 90 days of the decretal amount with costs. The Defendants Nos. 8 to 13 were given a right to redeem the mortgage, so far as it affected No. 364 Ghowspur-Dopahra, by payment within 90 days of Rs. 4,000 with proportionate costs; the Defendant No. 15 was

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given a right to redeem the mortgage, so far as it affected No. 362 Ghowspur-Dopahra, on payment of Rs. 4,000 with proportionate costs; and any of the Defendants Nos. 5, 6, and 14 were given a right to redeem the mortgage, so far as it affected Fatehpur-Lawaech, on payment within 90 days of Rs. 4,000 with proportionate costs. The High Court on appeal dismissed the suit with costs so far as it applied to Nos. 364 and 362 Ghowspur-Dopahra and Fatehpur-Lawaech.

The High Court held that the Plaintiffs' suit, so far as it applied to No. 364 Ghowspur-Dopahra and No. 362 Ghowspur-Dopahra, was barred by sec. 13, Expl. II of the Code of Civil Procedure by reason of the heirs of Mussammat Alfan not having set up in the suits of the 3rd of May 1890 and 15th of July 1890, "their title as prior mortgagees on the basis of the *zarpeshgi* of 1874, the ground of relief in the present action." Mussammat Alfan's mortgage of the 17th of February 1888 was not prior to the mortgages of the 15th of December 1879, the 30th of December 1880, and the 20th of December 1883, but the Plaintiffs, Appellants here, claimed priority as the Rs. 12,000 which Mussammat Alfan had lent in 1874 were applied to discharge the debt secured by the *zarpeshgi* deed of 1874. The heirs of Mussammat Alfan were persons having an interest in the properties comprised in the mortgages of the 15th of December 1879, the 31st of December 1880, and the 20th of December 1883, and consequently were under sec. 85 of the Transfer of Property Act, 1882, necessary parties to the suits for sale on those mortgages and were made Defendants to those suits and not having set up in those suits such rights as they had under the mortgage of the 17th of February 1888 and the *zarpeshgi* deed of 1874, sec. 13, Expl. II of the Code of the Civil Procedure applied and the claims of the Plaintiffs-Appellants as against No. 364 Ghowspur-Dopahra, and No. 362 Ghowspur-Dopahra, and those of the Defendants who are alone concerned with those mouzahs are barred. The High Court rightly dismissed the suit with costs so far as it related to No. 364 Ghowspur-Dopahra and No. 362 Ghowspur-Dopahra.

It remains to be considered whether the Plaintiffs had, and could have enforced in this suit, any and what rights against the 5 annas 4 pies share in Fatehpur-Lawaech, and against Gajadhur Mahto and Lalji Mahto, Defendants Nos. 5 and 6, or either of them. It is not quite obvious on what grounds the High Court dismissed the suit so far as it related to the 5 annas 4 pies share in Fatehpur-Lawaech, and to the Defendants Gajadhur Mahto and Lalji Mahto.

Gajadhur Mahto did not make Mussammat Alfan a Defendant to the suit for sale which he brought on the 6th of September 1888 on his mortgage of the 7th of January 1888. That suit was brought to obtain a decree for sale of the 5 annas 4 pies share in Fatehpur-Lawaech which had been mortgaged on the 7th of January 1888 to Gajadhur Mahto, and subsequently on the 17th of February 1888 to Mussammat Alfan, and had been mortgaged and hypothecated to Girwar Singh by the deed of the 20th of November 1874 as security for the *zarpeshgi* debt of Rs. 12,000. Under the deed of the 20th November 1874 the Rs. 12,000 was not repayable to Girwar Singh until Jeth 1294 Fasli (September 1887); and consequently the 12 years allowed by Art. 132 of the Second Schedule of the Indian Limitation Act, 1877, within which a suit to enforce payment of that debt was allowed, had not expired when

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Girwar Singh brought his suit. It has been contended that as Mussammat Alfan when she lent her Rs. 12,000 to Kishan Kumar Singh in February 1888 to pay off the *zarpeshgi* debt of Rs. 12,000 did not obtain a formal assignment in writing of the *zarpeshgi* deed of the 20th November 1874, and as the *zarpeshgi* debt of Rs. 12,000 was discharged by payment to the representatives of Girwar Singh on the 15th of July 1888, and they quitted possession, Mussammat Alfan did not in equity obtain the benefit of the charge which Girwar Singh had under the *zarpeshgi* deed of the 20th of November 1874. It is true that so far as the *zarpeshgi* deed of the 20th of November 1874 operated as a lease of the mortgaged properties, it came to an end on the payment of the *zarpeshgi* debt of Rs. 12,000 to the representatives of Girwar Singh on the 15th July 1888, but their Lordships have found as a fact that the Rs. 12,000 were lent by Mussammat Alfan and were borrowed by Kishan Kumar Singh for the express purpose of paying off the *zarpeshgi* debt of Rs. 12,000 which was secured by the deed of the 20th of November 1874; that the Rs. 12,000 lent by Mussammat Alfan were in accordance with the agreement between Mussammat Alfan and Kishan Kumar Singh applied in paying off the *zarpeshgi* debt; that on payment of that debt the *zarpeshgi* deed of the 20th November 1874 was handed over to Mussammat Alfan; and that Mussammat Alfan when she lent her Rs. 12,000 intended to keep alive for her benefit and protection the charge which had been created by the *zarpeshgi* deed of the 20th of November 1874. It has been held by this Board, in *Mahesh Lal* v. *Mohunt Bawan Das* (1), that whether a mortgage paid off is extinguished or kept alive depends upon the intention of the parties. It has also been held by this Board in *Gokuldoss* v. *Rambux Seochand* (2), that the ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interests. In the last-mentioned case it was held by this Board that the purchaser of an equity of redemption in immoveable property situated in India, who, having notice of a second mortgage, paid off a first mortgage upon the property without an assignment of the first mortgage to him must be assumed, according to the rule of justice, equity, and good conscience, to have intended to keep the first mortgage alive, and consequently was entitled to stand in the place of the first mortgagee and to retain possession against the second mortgagee until repayment. In that case this Board was pressed to apply the doctrine of *Toulmin* v. *Steere* (3), but this Board observed that :—

"In India the art of conveyancing has been and is of a very simple character Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin* v. *Steere* (3) seems to them likely, not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation."

And their Lordships in that case held that the obvious question to ask in the interests of justice, equity, and good conscience, is, what was the intention of the party paying off the charge? What this Board said in 1884 as to the art of conveyancing in India, and the practice in such cases, is true as to the art of conveyancing and the practice in such cases at the present day. The law on these

(1) I. R. 10 I. A. 62 (1883).

(2) L. R. 11 I. A. 126 (1884).

(3) 3 Merivale 210 (1817).

points applied in the judgments of this Board in *Mohesh Lal* v. *Mohunt Bawan Das* (1) and *Gokuldoss* v. *Rambux Seochand* (2) was subsequently applied by this Board in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (4). Applying the rule of justice, equity, and good conscience their Lordships in this appeal hold that the charge created by the *zarpeshgi* deed of the 20th of November 1874 was kept alive for the benefit of Mussammat Alfan. Nothing to bar a claim in respect of that charge, so far as the 5 annas 4 pies share in Fatehpur-Lawaech was concerned, had occurred when Gajadhur Mahto brought his suit on the 6th of September 1888.

As their Lordships have said, Gajadhur Mahto did not make Mussammat Alfan a Defendant to his suit of the 6th of September 1888. Under sec. 85 of the Transfer of Property Act, 1882, Mussammat Alfan was a necessary party to that suit. It is not alleged that Gajadhur Mahto when he brought his suit had not notice that Mussammat Alfan was a person having an interest in the property comprised in the mortgage upon which he was suing. If Gajadhur Mahto had taken the ordinary precaution of inspecting the register of the district in which Fatehpur-Lawaech is situate, before he took his mortgage of the 7th of January 1888, he would have found that the 5 annas 4 pies share in Fatehpur-Lawaech had been charged by the *zarpeshgi* deed of the 20th of November 1874. It is to be presumed that Gajadhur Mahto took the ordinary precautions before parting with his money which a prudent intending mortgagee would take. If Gajadhur Mahto had before bringing his suit of the 16th of September 1888, and in order to ascertain who would be under sec. 85 of the Transfer of Property Act, 1882, the necessary parties to his suit, taken the ordinary precaution of searching that register, he would also have found that the 5 annas 4 pies share in Fatehpur-Lawaech was included in Mussammat Alfan's mortgage of the 17th February 1888. It has been contended that sec. 85 of the Transfer of Property Act, 1882, did not apply to the suit which Gajadhur Mahto brought, the contention being that that section does not apply to a suit for sale of an equity of redemption and that a puisne mortgagee is not a person "having an interest in the property comprised in a mortgage" of a first or any prior mortgagee who brings a suit for sale on his prior mortgage. That contention, if correct, would, as it appears to their Lordships, lead to the conclusion that neither a prior nor a subsequent mortgagee need be made a Defendant to a suit for sale by a mortgagee of the specific lands included in his mortgage. The fact is that in suits for sale in India to which other mortgagees are not made parties, what a puisne mortgagee seeks to sell by means of a decree for sale, is not the equity of redemption so described, but the actual property, lands or houses, mortgaged. It is not obvious why a puisne mortgagee who desires to sell a mere equity of redemption, and not the actual property, lands or houses, described in his mortgage as the property mortgaged to him, should not dispose of his interests by private contract by an assignment of his mortgage to a purchaser, instead of by bringing a suit for sale of the property, land or houses, mortgaged, unless he hopes by concealing what his real interests are to obtain a larger price from an unwary purchaser at an auction sale under a

(1) L. R. 10 I. A. 62 (1883).
(2) L. R. 11 I. A. 126 (1884).
(4) L. R. 29 I. A. 9: s. c. 6 C. W. N. 209 (1901).

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decree for sale, than he could otherwise expect to obtain.

Gajadhur Mahto, in his suit for sale, sought for and obtained a decree for sale of the specific 5 annas 4 pies share in Mouzah Fatehpur-Lawaech which had been mortgaged by the *zarpeshgi* deed of the 20th of November 1874, and Mussammat Alfan's mortgage of the 17th of February 1888, and under his decree for sale that 5 annas 4 pies share was sold, and it was sold free of all charges and incumbrances so far as the decree or any documents relating to the decree would show. Had sec. 85 of the Transfer of Property Act, 1882, been complied with by making Mussammat Alfan a party to the suit, the decree for sale in Gajadhur Mahto's suit would have dealt with the rights and claims of Mussammat Alfan in relation to the charge under the *zarpeshgi* deed of the 20th of November 1874, and her mortgage of the 17th of February 1888, if put forward by her in the suit, and Gajadhur Mahto would have been allowed to redeem the charge of 1874 by payment of Rs. 12,000, and Mussammat Alfan would in her turn have been allowed to redeem Gajadhur Mahto's mortgage. If Mussammat Alfan had been made a Defendant to Gajadhur Mahto's suit and had neglected to put forward her claims, those claims would have been barred under sec. 13 of the Code of Civil Procedure. In either event all intending purchasers at a sale under the decree would have known what rights were to be sold, and in either event the necessity for the bringing of this present suit, so far as the 5 annas 4 pies share in Fatehpur-Lawaech is concerned, would not have arisen.

As Mussammat Alfan was not made a Defendant to Gajadhur Mahto's suit, her rights were not affected by the decree in that suit, and sec. 13 of the Code of Civil Procedure did not bar this suit of the Plaintiff so far as the 5 annas 4 pies share in Fatehpur-Lawaech, and the Defendants Gajadhur Mahto, and Lalji Mahto were concerned. But as the Rs. 12,000 were under the *zarpeshgi* deed of the 20th of November 1874, repayable in Jeth 1294 Fasli (September 1887), and this suit was not brought until the 22nd of September 1900, the claim of the Plaintiffs to priority is barred by Art. 132 of the Second Schedule of the Indian Limitation Act, 1877, and all that they are entitled to so far as the 5 annas 4 pies share in Fatehpur-Lawaech is concerned is a decree entitling them to redeem the mortgage of the 7th of January 1888, on payment to the legal representatives of Lalji Mahto of the amount of the principal and interest in respect of which the 5 annas 4 pies share in Fatehpur-Lawaech was sold to him under the decree for sale in Gajadhur Mahto's suit of the 6th of September 1888.

Their Lordships will humbly advise His Majesty that the decree of the High Court so far as it operated as a dismissal of the Plaintiffs' suit for sale of the 5 annas and 4 pies share in Fatehpur-Lawaech, and dismissed with costs in the High Court and in the Court of the Subordinate Judge the Plaintiffs' suit as against Gajadhur Mahto and Lalji Mahto, should be varied by decreeing that the Plaintiffs, Appellants here, by payment to the legal representatives of Lalji Mahto, or into the High Court to their credit, within 90 days from the filing of His Majesty's order in the High Court, of the amount of principal and interest in respect of which the 5 annas 4 pies share in Fatehpur-Lawaech was sold to Lalji Mahto under the decree of Gajadhur

Mahto in the suit of the 6th of September 1888, may redeem the mortgage of the 7th of January 1888, and may bring the 5 annas 4 pies share to sale for the balance then remaining due of the amount of principal and interest decreed by the Subordinate Judge in this suit; by decreeing that the Plaintiffs shall have their proportionate costs of the suit in the Court of the Subordinate Judge and the appeal to the High Court in respect of their claim against the 5 annas 4 pies share in Fatehpur-Lawaech and the Defendants Gajadhur Mahto and Lalji Mahto, the amount of such costs to be ascertained by the High Court, and any costs paid by the Appellants to Gajadhur Mahto and Lalji Mahto for his legal representatives or any of them shall be repaid to the Plaintiffs; and that in all other respects the decree of the High Court be affirmed, but that there shall be no costs of this appeal.

Solicitor: *The Solicitor, India Office*, for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

B. D. *Decree varied.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 39 OF 1911.

JENKINS, C. J. WOODROFFE, J. 1912, 14, February.

KSHITISH CHANDRA ACHARYA CHOUDHURI *v.* OSMOND BEEBY.

Administrator pendente lite—*Passing of his accounts by testamentary Court and discharge, whether a bar to a suit for accounts—Code of Civil Procedure (Act V of 1908), Or. XIV, r. 6—Parties asking Court to decide whether plaint discloses cause of action—Allegations in plaint only to be considered.*

The mere fact that an administrator pendente lite *has been discharged from further acting as such and that his accounts have been passed in the testamentary jurisdiction does not operate as a discharge so as to constitute a bar to a suit for accounts brought in the general jurisdiction.*

The Court cannot, where there is no agreement as is indicated in Or. XIV, r. 6 of the Civil Procedure Code, go outside the allegations in the plaint in order to decide an issue as to whether the plaint discloses a cause of action.

Shortly stated the facts of the case are as follows:—In July 1901, the Defendant was appointed administrator *pendente lite* in the goods of one Dakshina Mohan Roy. The suit had prior thereto been set down as a contentious cause and to which one of the Plaintiffs, *viz*, Sreemuty Sindhubala Debi as the sole widow and heiress of Dakshina Mohan Roy was a party. On the termination of the probate proceedings and in August 1905 the Plaintiff, Sreemuty Sindhubala Debi, released her interest in the estate in favour of the other Plaintiff, Kshitish Chandra Acharya Choudhuri. The Defendant filed several sets of accounts in the said testamentary proceedings at different times between July 1901 and December 1903. On 8th December 1903, it was ordered by the said testamentary Court that the Defendant be discharged from further acting as such administrator upon passing his accounts in the testamentary Court. On the 9th January 1904, the Defendant's accounts were passed by the testamentary Court—and thereafter the Defendant who was a practising Advocate of the Calcutta High Court retired and went over to England. On 6th December 1906, this suit was instituted by the two Plaintiffs against the Defendant in the Original Side of the

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High Court and in its general jurisdiction for an investigation of the accounts of the Defendant so filed and passed as aforesaid on the ground that certain charges made by the Defendant in those accounts were improper charges. The Defendant in his written statement took the point that the plaint disclosed no cause of action inasmuch as the accounts had already been passed. Thereupon the case was set down for settlement of issues and was dismissed by Harington, J., on the ground that the Court would not allow accounts passed in the presence of parties to be re-opened in the absence of omission, fraud or mistake. The Plaintiffs appealed.

Mr. B. Chakravarti (with him *Mr. B. K. Lahiri*) for the Appellants.—The administrator *pendente lite* is a creature of statute. His rights and liabilities are to be ascertained from the provisions of the Probate and the Administration Act (*Vide* secs. 34, 98 and 146). There is no provision in the Probate and Administration Act entitling the testamentary Court to call for a series of accounts from him. [See *Mohesh Chandra* v. *Biswa Nath* (1)]. Nor is what goes by the name of "passing of accounts" of executors or administrators by the probate Courts sanctioned by the Rules of the High Court (*Vide* rr. 19 and 725 of Belchambers' Rules and Orders). The passing of such accounts by the testamentary Court is without jurisdiction and cannot be binding on the parties. In the next place, the administrator *pendente lite* is an officer of the Court and occupies a fiduciary position and as such liable to account. (Secs. 34 and 142 of the Probate and Administration Act. See also *Brinklow* v. *Singleton* (2). *Thirdly*, his liability to account before the proper tribunal is not determined either by the termination of the proceedings in which he had been appointed or by the order of his discharge. Compare the analogous decisions as to Receivers. Vide *Seagram* v. *Tuck* (3), *Gent-Davis* v. *Harris* (4) and *Re Edwards* (5). *Lastly*, it cannot be contended that the certificate of the Judge at foot of the account is either an order or a decree which ought to have been or can be the subject of appeal. *Re Browne* (6). For the purposes of the present argument, the allegations in the plaint must be accepted to be true. See Daniel's Ch. Pr., p. 455.

Mr. W. H. Knight (with him *Mr. S. K. Mullick*) for the Respondent.—There is no agreement of parties here as is contemplated by the Code of Civil Procedure, Or. XIV, r. 6. This suit is not maintainable until and unless the order discharging the Defendant is set aside. It can only be set aside for fraud and there is no such allegation in this case. This is really a claim for money had and received and this suit is barred by limitation. I rely on the practice of the Court to have a series of accounts passed. There is no analogy between the administrator and the executor of ecclesiastical Courts and the administrator *pendente lite* under sec. 34 of the Probate and the Administration Act. A Court of Chancery will not interfere unless fraud is shown in the ecclesiastical side. See *Fowler* v. *Wyatt* (7), *Patch* v. *Ward* (8), *Flower* v. *Lloyd* (9).

Appellants were not called upon to reply.

(1) I. L. R. 25 Cal. 250 (1897).
(2) [1904] 1 Ch. 648.
(3) 18 Ch. D. 296 (1881).
(4) 40 Ch. D. 190 (194) 1888).
(5) L. R. 31 Ir. 242.
(6) L. R. 19 Ir. 423.
(7) 24 Beav. 232 (1857).
(8) L. R. 3 Ch. App. 203 (1867).
(9) 10 Ch. D. 327 (1879).

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The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The suit out of which this appeal arises is one brought against Mr. Osmond Beeby, at one time the administrator *pendente lite* of the estate of one Dakshina Mohan Roy. The purpose of the suit is to recover from him five sums mentioned in the plaint with interest, on the ground that they have been wrongfully retained by him and that the retainer is wrongful inasmuch as it is, according to the Plaintiffs, in excess of the remuneration to which he was entitled under the order appointing him administrator *pendente lite.*

The facts on which the Plaintiffs base their claim are set out clearly and minutely in the plaint. A written statement has been filed which puts in issue these facts and suggests a complexion of the case, that would (it is contended), if established, constitute an answer to this claim. Now it so happens that the Defendant, who was practising here as an advocate at the time that he was appointed administrator *pendente lite*, has since retired from India and now lives in England. In view of this fact the attorneys on both sides seem to have come to an agreement—a very proper agreement in view of the circumstances of the case—that the opinion of the Court should be sought, as to whether the plaint was one on which a decree could be passed in favour of the Plaintiffs, having regard to the circumstances either there set out or there indicated.

The case was accordingly put down as it is termed in this Court, for settlement of issues, but there was no such agreement as is contemplated in Or. XIV, r. 6, and it is therefore difficult to see how the case, as it came before the Court, could be dealt with otherwise than on the lines that there should be a consideration and determination as to whether the plaint disclosed a cause of action. It was suggested to us by Mr. Knight who pressed the case of his client, the Defendant, with some insistence, that there was a wider investigation open to the Court, but I must confess my inability to follow it, because in the absence of such an agreement as is indicated in r. 6, I do not see how the Court can properly deal with a matter of this kind except on the allegations in the plaint. This is the view apparently that commended itself to the learned counsel, a very experienced counsel who appeared for Mr. Beeby in the Court of first instance, for I find, from the Court notes of the proceedings, that Mr. Mitter "on this proceeding raises the issue whether the plaint discloses any cause of action: If that fails the other issues may be tried on the trial of the case on facts." Then Mr. Mitter submitted that the plaint disclosed no cause of action. That I think is the only legitimate matter for our consideration on the present application. The learned Judge, Mr. Jusice Harington, decided adversely to the Plaintiffs, and it is from that judgment that the present appeal has been preferred.

The position of Mr. Beeby as administrator *pendente lite* is not disputed. It is further the Plaintiffs' case and I do not know that it is contested that funds came into his hands as administrator *pendente lite.* If that be so, it is clear that he is responsible for the application of those funds. What then is the ground on which it can be said that the plaint discloses no cause of action? It is because the plaint either states or indicates that the accounts of the administrator *pendente lite* were passed by the Court in accordance with

the procedure which is commonly adopted on the Original Side of this Court, and on the performance of that condition the preceding order discharging him, whatever that may mean, from further acting as administrator *pendente lite* became absolute and operative. The contention, therefore, must be that this passing of the accounts as disclosed by the plaint constitutes a complete bar to the suit. In the view that I take of the case I think it desirable that I should not enter into a general discussion of this case so as to in any way prejudge its merits or the various questions which will arise before it can be finally determined. I would, therefore, limit myself to saying that the mere fact that the administrator *pendente lite* may have been discharged from further acting as administrator *pendente lite* on passing the accounts in the testamentary jurisdiction, does not, in the circumstances of this case, operate as a discharge so as to constitute a bar to this suit which is brought in the general jurisdiction of the Court. There may be other excellent defences to this suit but with that we have nothing to do at this stage.

We must, therefore, allow this appeal, set aside the decree of Mr. Justice Harington and remand the case to the Court of first instance for a further rehearing.

We think in the circumstances the costs of this appeal and the suit must be costs in the cause.

WOODROFFE, J.—I agree.

Babu H. N. Dutt, Attorney for the Appellant.

Mr. W. J. Simmons, Attorney for the Respondent.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER No. 121 OF 1911.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard, 31, May.
Judgment, 21, August.

CHAKOWRI MAHTON and others, Appellants,
v.
GANGA PROSAD and others, Respondents.

Hindu Law—Mitakshara—Debts, son's liability for—Immoral or illegal debt, what is—Decree, if a debt—Decretal debt, if may be impugned as immoral—Damages for obstruction of a water channel, if an immoral debt—Attachment during father's life-time, effect of.

A decree was passed against S for damages for injury done to the decree-holder by the obstruction of a water-course under circumstances in which it could not be deemed a wanton interference with another's right but only as an answer to the exaggerated claim of the decree-holder in respect of the water-course,

Held—*That the liability of S could not be regarded as an immoral and illegal debt and that the decree was therefore binding on his sons.*

There is no substantial difference in principle between the obligation of a person to repay money borrowed and his obligation to discharge a liability created by a judgment of the Court; and it cannot be laid down that the rule of son's liability for father's debts is inapplicable to cases where the liability is created by a judicial decision.

PERIMAN DAS *v.* BHATTU MAHTON (9) *referred to.*

Semble—*It cannot be broadly laid down that in a case where the liability of the father has been embodied in a decree no question can be raised as to the nature*

(9) I. L. R. 24 Cal. 672 (1897).

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of the debt which was sought to be enforced by the decree so as to exempt sons from liability for it.

SHA WAJID HOSSAIN *v.* NANKOO SINGH (23), LACHMI DAI *v.* ASMAN SINGH (24), NANOMI BABUASIN *v.* MODHUN MOHUN (25), KHALILUR RAHAMAN *v.* GOBIND PRASAD (26), BENI PROSAD *v.* PURAN CHAND (27), DURBAR *v.* KHACHAR (1), SITARAM *v.* ZAHIN SINGH (28), NARAYAN SWAMI *v.* SAMIDAS (29) *referred to.*

The liability of sons for their father's debt under the Mitakshara generally considered.

A judgment-debt cannot be regarded as illegal within the meaning of the texts merely because the decision of the Court shows that the act for which the judgment-debtor was held liable in damages was in contravention of the rights of the successful Plaintiff.

The son is not bound to do anything to relieve his father from the consequence of his own vicious indulgences, but a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation such as the son would be bound to discharge.

This was an appeal preferred on the 6th of March 1911 against the decree of Babu Sasi Bhusan Sen, Subordinate Judge, 2nd Court of Zillah Gaya, dated the 11th of February 1911.

The facts of the case will appear from the judgment.

(1) I. L. R. 32 Bom. 348 (1908).
(23) 25 W. R. 311 (1876).
(24) I. L. R. 2 Cal. 211 (1876).
(25) I. L. R. 13 Cal. 21: s. c. L. R. 13 I. A. 1 (1885).
(26) I. L. R. 20 Cal. 328 (1892).
(27) I. L. R. 23 Cal. 262 (1895).
(28) I. L. R. 8 All. 281 (1886).
(29) I. L. R. 6 Mad. 293 (1883).

Babus Golap Chandra Sarkar, Jogesh Chandra Roy and *Surendra Nath Guha* for the Appellants.

Dr. Rash Behari Ghose, Babus Mohendra Nath Roy, Biraj Mohan Majumdar and *Harihar Prosad Singh* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This appeal is directed against an order by which the Court below has refused an application for execution of a decree for money. The circumstances, under which the order in question was made, have not formed the subject of controversy in this Court. On the 23rd March 1908, the Appellants before us obtained a decree for money against one Shankar Lal and various other persons as Defendants. On appeal to this Court by Shankar Lal and some of the other Defendants, the decree was confirmed on the 27th May 1910. On the 5th August following, the decree-holders made an application for execution of the decree, whereupon an order was made for issue of a writ of attachment of the immoveable properties of the judgment-debtors. On the 22nd September the return of the service of the writ of attachment was filed, but it is disputed whether the return gave an accurate version of the facts, and whether the writ was, as a matter of fact, properly served. Shankar Lal, however, entered appearance and took objection to the execution on grounds which are not material for our present purpose. On the 3rd December 1910, it was reported to the Court that Shankar Lal had died on the 13th November. The decree-holders then applied to bring on the record the legal representatives of the deceased judgment-debtor. Notice of the application

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was served upon them, whereupon they appeared and objected that the decree could not be executed against the properties in their hands, which they had obtained by survivorship. The decree-holders answered, *first*, that the legal representatives of Shankar Lal as his sons were liable to satisfy the decree, as the debt was neither illegal nor immoral, and, *secondly*, that, as the property had been validly attached during the life-time of the deceased judgment-debtor, his right, title, and interest, at any rate, could be seized in execution by the decree-holders. The Subordinate Judge overruled both these contentions and dismissed the application for execution upon the authority of the decision in *Durbar* v. *Khachar* (1), at the same time he distinguished the cases of *Erasala* v. *Addepally* (2), *Pryag Sahu* v. *Kashi Sahu* (3) and *Peary Lal Singh* v. *Chandi Charan Singh* (4). The decree-holders have now appealed to this Court, and on their behalf the decision of the Subordinate Judge has been challenged on the ground that the debt was not tainted with illegality or immorality, nor with any such impropriety or infirmity as would remove it from the category of debts incurred by a Hindu father which a son is under an obligation to pay. It has been contended further that, in any view, as the attachment had been effected during the life-time of the deceased judgment-debtor, it was competent to the decree-holders to proceed at least against his right, title and interest in the hands of his sons. In answer to these contentions, it had been argued by the Respondents that the sum sought to be recovered was not a debt, as the deceased judgment-debtor was under no contractual obligation to pay it, and that, even if it could be treated as a debt, it was of a character which the sons of the deceased were under no obligation to discharge. Reference has been made by the Appellants as well as the Respondents to a number of judicial decisions, which, it has been suggested, cannot be easily reconciled. The answer to the questions raised must depend upon the texts as interpreted in the judicial decisions to which I shall presently refer.

According to the Institutes of Manu (VIII, 159), "money due by a surety, or idly promised, or lost at play, or due for spirituous liquor, or what remains unpaid of a fine and a tax or duty, the son (of the party owing it), shall not be obliged to pay." (Sacred Book of the East, Vol. XXV, p. 282.)

To the same effect is the text in the Institutes of Yajnavalkya (II, 47). "The son shall not pay the paternal (debts) contracted for wines, lust, and gambling, or due on account of the unpaid (portion) of a fine or a toll, or (on account of) an idle promise (Mandlik, p. 205.)

According to Brihaspati, if the father is no longer alive, the debt must be paid by his son ; the father's debt must be paid first of all, and after that, a man's own debt ; but a debt contracted by the paternal grandfather must always be paid before these two even, the father's debt on being proved, must be paid by the sons as if it were their own, the grandfather's debt must be paid by his son's sons without interest, but the sons of a grandson need not pay it at all, sons shall not be made to pay a debt incurred by their father for spirituous liquor, for losses at play, for idle gifts, for promises made under the

(1) I. L. R. 32 Bom. 348 (1908).
(2) I. L. R. 31 Mad. 472 (1908).
(3) 11 C. L. J. 599 : s. c. 14 C. W. N. 659 (1910).
(4) 5 C. L. J. 80 : s. c. 11 C. W. N. 163 (1906).

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influence of love or wrath, or for suretyship nor the balance of a fine or toll liquidated in part by their father (Brihaspati, Ch. XI, 47, 48, 49 and 51, Sacred Book of the East, Vol. XXXIII, p. 328, Jagannath Digest, 1, 5, 166, 167 and 201, Mayukha by Mandlik, pp. 112 and 113).

Again, the text of Ushanas cited in the Mitakshara, (Commentary of Yajnavalkya, Book II, Verse 47), as also in the Mayukha, p. 113) runs as follows :—" A fine or the balance of a fine, likewise a bribe or a toll, or the balance of it are not to be paid by the son, neither shall he discharge a debt which is not lawful." The original word which is rendered "lawful" is *vyavaharika.* There has been some divergence of opinion as to the precise import of this expression. The learned Judges of the Bombay High Court in *Durbar* v. *Khachar* (1) treat the expression "not *vyavaharika*" as equivalent to "unusual" or "not sanctioned by law or custom," and they suggest that this word has crept into our text-books and judicial decisions under the guise or disguise of illegal or immoral. I am not satisfied that the interpretation adopted is quite accurate ; on the other hand, I am not prepared to accept the version given by Girish Chandra Tarlankar who renders the term "*vyavaharika*" by "necessary for life." I find that Bohtlingh and Roth, Wilson and Monier Williams all take the expression as equivalent to "connected with or relating to an action at law or legal process, customary, usual." Mandlik (p. 113) renders it as "proper." Jogendra Nath Bhattacharyya also renders it as "proper (that is, sanctioned by law or custom)." In my opinion, the term Vyavaharika may be accurately rendered as equivalent to "lawful, usual or customary."

(1) I. L. R. 32 Bom. 348 (1908).

Again we have the text of Gautama (Chap. XII, 41) : " Money due by a surety, a commercial debt, a fee due to the parents of a bride, debts contracted for spirituous liquor or in gambling, and a fine shall not involve the sons of the debtor" (Sacred Book of the East, Vol. II, p. 244, where also an extract from the commentary of Haradatta is quoted).

The text of Vyasa quoted in the Vivada Ratnakar (p. 58) and by Jagannath (1, 5, 203) is substantially to the same effect : " Neither a fine nor a toll nor the balance due for either shall be necesssarily paid by the son of a debtor, nor any debt which is not *vyavaharika* (which is rendered by Colebrooke as equivalent to "for a cause repugnant to good morals").

The text of Katyayana quoted by Jagannath is of similar import : "A debt of the paternal grandfather, which is proved or which is partly liquidated must be discharged (by the grandson) but never shall a debt contracted for immoral uses or which was contested by his father (be paid by the grandson). Bhrigu ordains that a debt devolving from the grandfather, which was proved and acknowledged by the father must be discharged by grandsons, if it were not contracted for immoral uses nor already paid by the sons" (Colebrooke Digest, Vol. I, p. 307). See also Viramitrodaya (Calcutta Ed., 1815), p. 100, pl. 2, 105, pl. 2, 106, pl. 1, 109. pl. 2, 165, pl. 2, 166, pl. 1.

If the provisions of all these texts are summarised, the result appears to be that the debts which a son is not under any obligation to pay, may be grouped as follows :—(1) Debts due for spirituous liquor, (2) debts due for lust, (3) debts due for gambling, (4) unpaid fines, (5) unpaid tolls, (6) useless gifts or promises without consideration or made under the influence

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of lust or wrath, (7) suretyship debts, (8) commercial debts and (9) debts that are not *vyavaharika*, *i.e.*, debts that are not lawful, usual, or customary, or, if we accept the version of Colebrooke, debt for a cause repugnant to good morals. This list, it must be conceded, is comprehensive, and, as the terms used are not accurately defined, there is considerable room for divergence of opinion, as is indicated by the extracts from the commentaries quoted by Jagannath in his Digest. This divergence is faithfully reflected in the judicial decisions to which reference was made in the course of argument, and which I shall now proceed to examine.

In one of the most recent cases in this Court, *Pryag Sahu* v. *Kashi Sahu* (3), the question arose, whether the cost awarded by a Court against a defeated litigant was "danda" within the meaning of the text of Yajnavalkya "nor is he bound to pay any unpaid fine or toll or idle gifts" (Mitakshara, Ch. VI, sec. 3, p. 47) or whether it was not *vyavaharika* within the meaning of the text of Ushanas to which we have already referred. Mr. Justice Chatterjee answered the question in the negative, and he relied upon the text of Manu (Ch. VIII, Verse 59) which makes the unsuccessful Defendant liable, not only to satisfy the claim of the Plaintiff, but also to pay a penalty to the king. On the other hand, the decision in *Ramaiengear* v. *Secretary of State* (5) supports the contrary view. There a Hindu father had brought a suit *in forma pauperis* as next friend of one of his infant sons to establish his adoption, but the suit was dismissed on the ground that the alleged adoption had never taken place. The father was ordered to pay the Court-fees due to Government under sec. 440 of the Code of 1882. The learned Judges held that such costs could not be recovered from the sons, because the liability to pay the costs was imposed as a penalty on the father for his misconduct, namely, the institution of a suit which he must have known to be false, in other words, the liability might be regarded as in the nature of a fine, and the debt so incurred be deemed as tainted with immorality. It must be conceded that this decision rests on its own special circumstances, and it cannot be regarded as an authority for the general proposition that costs awarded against a father in litigation constitutes an immoral debt. This view, indeed, was repudiated in *Sumer Singh* v. *Liladhar* (6), where the learned Judge of the Allahabad High Court held that money borrowed by a Mitakshara father to defend a suit for defamation constitutes a debt for which his son and grandson are liable.

The decision in *Sitaram* v. *Harihar* (7) furnishes an illustration of a somewhat different class of cases. There money had been borrowed by the father of a boy about to be given in adoption to a Hindu lady. The money was paid as a bribe to the adoptive mother to induce her to take the boy in adoption. It was ruled that the debt so contracted by the father would not bind his son and the decision was based on the intelligible ground that the debt had been contracted for an illegal purpose, because money paid to an adoptive mother as a bribe to secure her consent to an adoption not on the ground of fitness of the boy, but on motives of pecuniary

(3) 11 C. L. J. 599: s. c. 14 C. W. N. 659 (1910).

(5) 20 Mad. L. J. 89: s. c. 6 Mad. L. T. 308 (1909)

(6) I. L. R. 33 All. 472: s. c. 8 All. L. J. 306 (1911).

(7) 12 Bom. L. R. 910 (1910).

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benefit to herself, must be condemned as an illegal payment.

There has been a well marked divergence of judicial opinion upon the question, how far a Hindu son is under a pious obligation to discharge a debt of his father when such debt consists of money misappropriated by the latter. The cases of *Mahabir Prasad* v. *Basdeo Singh* (8), *Pariman Das* v. *Bhattu Mahton* (9) and *Mcdowell* v. *Raghavachetti* (10) seem to negative the liability of the son under such circumstances, while the cases of *Natasayyar* v. *Ponnusami* (11), *Kanemar* v. *Krishna* (12) and *Erasala* v. *Addepally* (2) apparently support the liability of the son. These cases, however, may possibly be reconciled, if we recognise the distinction between a criminal offence and a breach of civil duty. In the first three cases, the father was guilty of criminal misappropriation as regards sums of money for which he was accountable: while in the second set of three cases, the father merely failed to account for the money received by him and his failure to do so constituted nothing more than a breach of civil duty. The distinction is real though refined, and was recognised in *Tirumalayappa* v. *Veeravadra* (13), where it was ruled that if a debt was incurred by an agent, his son was liable to pay the debt, and the liability of the son was not affected by the circumstance that the father subsequently misappropriated the sum or made himself criminally liable. The case last mentioned consequently supports the view that, where the taking of the money itself is not a criminal offence, a subsequent misappropriation by the father cannot discharge the son from his liability to satisfy the debt; but the position is different if the money has been taken by the father and misappropriated under circumstances which render the taking itself a criminal offence.

In *Joykumar* v. *Gowrinath* (14), a question was raised as to the nature of a debt contracted by a Mitakshara father who had given a promissory note to satisfy a *bonâ fide* decree which another had against him; it was ruled that the debt was neither immoral nor illegal, because the promissory note had not been given to stifle a prosecution against him. In an earlier case in the Punjab, *Kartar Sing* v. *Harjhimul* (15), Lindsay and Plowden, JJ., ruled that it was impossible to hold that a debt created by a decree is a debt contracted for an illegal or immoral purpose, merely because the act from which the obligation to make compensation arose was an illegal or immoral act, or both illegal and immoral. There the father had stolen and converted to his own use certain property belonging to a third person, who sued and obtained a decree against him for the value of the property. The decree was sought to be executed by attachment of ancestral property in which the son was jointly interested with his father. The son objected to the attachment but his objection was overruled. The learned Judges observed that if the father had voluntarily contracted a debt to compensate the person whom he had, by a criminal offence, deprived of property, the debt could not, without an utter perversion of language, be styled a debt contracted for an illegal or immoral purpose.

(2) I. L. R. 31 Mad 472 (1908).
(8) I. L. R. 6 All. 234 (1884).
(9) I. L. R. 24 Cal. 672 (1897).
(10) I. L. R. 27 Mad 71 (1903).
(11) I. L. R. 16 Mad. 99 (1892).
(12) I. L. R. 31 Mad 161 (1907).
(13) 19 Mad. L. J. 769 (1909).

(14) I. L. R. 28 All 718 (1906).
(15) P. R. 874, No. 128 (1879).

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pose; they added that, on the contrary, the debt might be deemed to have been incurred for a highly moral as well as lawful purpose, and that the liability imposed by the decree created an obligation unwillingly contracted by the father under a lawful compulsion, as indicated in *Achhru Ram* v. *Meher Chand* 16), where a similar view was taken of the liability of the ancestral estate to satisfy a judgment-debt founded upon a just cause.

In the case of *Durbar* v. *Khachar* (1), the learned Judges of the Bombay High Court appear to have ruled that, under Hindu law, the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred; he is answerable for the debt legitimately incurred by his father, and not for those attributable to his failings, his follies, or caprice. As already stated, the learned Judges appear to have deduced this rule from the text of Ushanas in which they interpreted the expression "not *vyavaharika*" as equivalent to "unusual" or not sanctioned by law or "custom"; this word, they suggested, had crept into text-book as "illegal or immoral." This clearly is not well-founded. Text-writers, as well as judicial decisions, apply the well-known expression illegal or immoral debt to include, not merely debts which are not *vyavaharika*, but all the debts which are deemed as not payable by the son according to the texts of Manu, Yajnavalkya, Ushanas, Brihaspati, Gautama and Vyasa. The decision of the Bombay High Court, in my opinion, places too restricted a construction upon the term "*vyavaharika*," and excludes debts for which the son may be held legitimately liable. In the particular case before the learned Judges, the father had erected a dam which obstructed the passage of water to the land of the Plaintiff; the Plaintiff obtained a decree for damages against the father, and, on the death of the latter, sought to execute the decree against his son to the extent of the ancestral property in his hand. It was held that as the result of the suit showed that the act was wrongful, the son could not be held answerable for a liability so incurred. The learned Judges appear to have found that the estate taken by the son had derived no benefit from the wrongful act, but it may be observed, that this last reason may possibly be open to the criticism that if the liability of the son depends upon the nature of the act, the test of benefit to the estate becomes immaterial. I am not prepared, however, to hold that, because the decision of the suit showed that the act for which the father was held liable in damages was in contravention of the rights of the successful Plaintiff, the judgment-debt was illegal within the meaning of the texts to which I have referred. I am rather inclined to adopt the view that the liability imposed by the Court upon the father to indemnify the person, with whose property he had improperly interfered, created a debt which might justly be recovered from the ancestral property in the hands of the son. This view may be maintained even if we adopt the distinction suggested by the learned Judges of the Madras High Court between a debt which follows as the result of an offence under the Crimimal law and a debt for which one is made liable on the ground of a breach of civil duty. The view we take is supported by the observations of this Court in *Peary Lal Singh* v. *Chandi Charan Singh* (4). In that case

(1) I. L. R. 32 Bom. 348 (1908).
(16) Unreported.

(4) 5 C. L. J. 89: s. c. 11 C. W. N. 168 (1906).

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the son was held answerable to satisfy a decree against his father for mesne profits, and, although it was incidentally suggested that the judgment-debtor had, by unlawful receipt of profits, enriched his own estate which subsequently passed by survivorship into the hands of the son the decision was based substantially on the ground mentioned in *Natasayyar* v. *Ponnusami* (11). The son is not bound to do any thing to relieve his father from the consequence of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, namely, to restore to those lawfully entitled, money he had unlawfully retained. Upon any intelligible principle of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation, and for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any.

Reference was made at the bar to decisions upon the question of the liability of a son to satisfy a suretyship debt of his father, and mention was made particularly of the cases of *Tukaram* v. *Gangaram* (17), *Narayan* v. *Venkatacharyya* (18), *Maharaja of Benares* v. *Ram Kumar* (19), *Sitaramaya* v. *Venkartaramana* (20) and *Chetti Kulum* v. *Chetti Kulum* (21). It is not necessary, however, to discuss for our present purpose the question of the liability of a Mitakshara son for the suretyship debt of his father, because the determination of that question depends upon the interpretation of special texts, specially the text of Vishnu which defines the different kinds of sureties, namely, for appearance, for honesty, for debt and for delivery of the debtor's effect (Jaggannath Digest, Vol. 1, p. 246). But we may observe that the latest decision in this Court, *Hiralal* v. *Chandrabali* (22), may be difficult to reconcile with the cases in Bombay, Allahabad and Madras which we have already mentioned; for the reason already stated, however, it is not necessary to examine further this class of cases.

Reference was also made to the cases of *Sha Wajid Hossain* v. *Nankoo Singh* (23), *Lachmi Dai* v. *Asman Singh* (24), *Nanomi Babuasin* v. *Modhun Mohun* (25), *Khalilur Rahaman* v. *Gobind Prasad* (26) and *Beni Prosad* v. *Puran Chand* (27) to show that when a decree has been made against the father no question arises as to the nature of the debt for the enforcement of which the decree might have been obtained. The decisions relied upon, however, cannot be treated as authorities for any such sweeping proposition, but they do indicate that debts incurred in transaction, the character of which, as Mr. Justice Pigot puts it in *Khalilur Rahaman* v. *Gobind Prasad* (26), is no more than imprudent or unconscientiously imprudent or unreasonable are debts to which a pious duty attaches under the Mitakshara Law. This view can hardly be reconciled with the decision of the learned Judges of the Bombay High Court in *Durbar* v. *Khachar* (1): see also

(11) I. L. R. 16 Mad. 99 at p. 104 (1892).
(17) I. L. R. 23 Bom. 454 (1898).
(18) I. L. R. 28 Bom. 408 (1904).
(19) I. L. R. 26 All. 611 (1904).
(20) I. L. R. 11 Mad. 373 (1888).
(21) I. L. R 28 Mad. 377 (1905).

(1) I. L. R 32 Bom. 348 (1908).
(22) 13 C. W. N. 9 (1908).
(23) 25 W. R. 311 (1876).
(24) I. L R. 2 Cal. 211 (1876).
(25) I. L. R. 13 Cal. 21 : s. c. L. R. 13 I. A. 1 (1885)
(26) I. L. R. 20 Cal. 328 (1892).
(27) I. L. R. 23 Cal. 262 (1895).

Sitaram v. *Zalim Singh* (28) and *Narayan Swami* v. *Samidas* (29).

It has finally been argued that the liability of a Hindu son to pay a debt incurred by his father is restricted to cases in which the debt is the result of a contractual obligation, and in support of this view reference has been made to the observations of the learned Judges who decided the case of *Puriman Das* v. *Bhattu Mahton* (9). It may be conceded that the term "*rina*" literally understood implies a debt or loan (See Mitakshara on the Institutes of Yajnavalkya II, 45, 47, 50, 54); but the judicial decisions to which reference has been made indicate that the rule has a much wider application. At any rate we are not prepared to hold that the rule is inapplicable to cases where, as here, the liability was created by a judicial decision. There is no substantial difference in principle between a case in which a person is under an obligation to repay money which he has actually borrowed and a case in which he is bound to discharge an obligation created by a judgment of Court. It is worthy of note that the dictum in *Puriman Das* v. *Bhattu Mahton* (9) is of a very qualified character, and fully recognises that a right to damages might be deemed to create a debt even before the suit is brought for its enforcement. In any event after a decree has been passed in favour of the successful Plaintiffs, he is entitled to realise from his defeated opponent a sum of money precisely in the same manner as if he had actually advanced to the latter a sum of money by way of loan.

The question finally arises what is the position of the Respondent when tested in the light of the principles deducible from the judicial decisions which interpret the ancient texts. The Subordinate Judge has not reviewed the circumstances of the litigation which ultimately determined the liability of the Defendants-Appellants. The facts, however, are beyond controversy and are set out in the judgment of this Court in the suit of 1904. It appears that on the 16th May 1904 the present Respondents commenced an action against Shankar Lal and thirty-one other persons for establishment of their right of irrigation by means of a certain water-course. The case for the Plaintiffs was that there were two villages, Rusulpura, and Dhangaon: that the maliks of Rusulpura had a right to store water on a certain portion of the village Dhangaon in a reservoir lying to the north of the village and that the maliks of Dhangaon claimed a right to irrigate their village by a water-course coming from the south and running with various diversions through their village up to the north-east. The maliks of Dhangaon alleged that this water-course was an artificial channel constructed for the purpose of irrigating the lands of Dhangaon. The substantial dispute between the parties was with regard to the area in Dhangaon over which the maliks of Rusulpura were entitled to store water, and with regard to the manner in which the surplus water of the water-course was to be discharged. There was an elaborate enquiry by the Court of first instance, and a decree was made in favour of the Plaintiffs to the effect that the particular water passage which has been obstructed by the Defendants might be opened, so that the excess water of Dhangaon might pass off from its grounds. Upon appeal, the Subordinate Judge sub-

(9) I. L. R. 24 Cal. 672 at p. 676 (1897).
(28) I. L. R. 8 All. 231 (1886).
(29) I. L. R. 6 Mad. 293 (1883).

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stantially affirmed this decree with a slight variation, so as to entitle the Plaintiffs to put up earth work at a specified point of the channel and thus prevent the flow of the water towards the reservoir. Upon second appeal to this Court, the matter was re-examined in detail, and although the decree was affirmed it was held that it was incomplete; a direction was consequently given that an expert Engineer should be employed to ascertain the breadth and level of the opening which the Plaintiffs claimed should remain unobstructed. After the Plaintiffs had been thus successful in this litigation, by which their right of irrigation was established, they commenced an action on the 4th January 1907 against Shankar Lal and the other Defendants of the first suit, for recovery of damages on account of injury done to their crops by the obstruction of the channel. The proceedings in the original suit including the pleadings and the judgments of all the Courts were produced at the trial, and the Court made a partial decree for damages. On appeal to this Court, the decree was affirmed on the 27th May 1910. This is the decree of which the Plaintiffs have taken out execution, and as already explained they seek to realise the sum decreed from the sons of Shankar Lal who died during the pendency of the proceedings. It is difficult to appreciate how these latter can successfully resist execution on the ground that the debt is illegal or immoral. Their father, as one of the proprietors of Rusulpura, repudiated the claim of the Plaintiffs as proprietors of Dhangaon, to exercise the right of irrigation claimed by them. There was a substantial matter in controversy between the parties, as is amply indicated by the fact of the protracted investigation in the original Court, and even when the litigation terminated after four or five years, an expert was needed to determine the breadth and depth of the channel, so that each of the parties might exercise their right without needless detriment to the other. In no sense could it be said that the act of Shankar Lal was a wanton interference with the property rights of another. The successful Plaintiffs undoubtedly claimed too much, even if it be conceded that Shankar Lal went to the opposite extreme and entirely denied their rights. I am clearly of opinion that a liability imposed upon Shankar Lal by an act of this character cannot appropriately be deemed an illegal or immoral debt. Even if I were to adopt the view of the learned Judges of the Bombay High Court in *Durbar* v. *Khachar* (1). I could not say that Shankar Lal ought not to have incurred this liability "as a decent and respectable man," nor could this liability be attributed to "his failings, follies, or caprices." In fact what Shankar Lal did would have been done by any ordinary prudent owner of property with a view to prevent the exercise of what was an exaggerated though not an unfounded claim by his neighbours. Upon the merits, therefore, I feel no doubt that the debt which the heirs of Shankar Lal are now called upon to satisfy from the ancestral property in their hands cannot be regarded as an illegal or immoral debt.

In this view of the matter, it is unnecessary to consider whether the attachment was properly effected during the life-time of Shankar Lal, because that would enable the Appellants to proceed only against the right, title and interest of Shankar Lal in the hands of his sons

(1) I. L. R. 32 Bom. 348 (1908).

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NOTES.

LORD MACNAGHTEN'S JUDGMENT IN THE BURMESE matrimonial case of *Mi Me* v. *Mi Shwe Ma* reported in this issue shows how English Judges are reluctant to declare any reputed marriage between parties, especially when they have lived as husband and wife, invalid. His Lordship very rightly, however, remarks that when the proof of marriage depends wholly or mainly on reputation the circumstances of the case ought to be scrutinized with some caution specially in cases like the present where the same term is used to signify a wife and also a woman living with a man on less honourable terms. It seems that a great deal of loose practice prevails in Burma in respect of matrimonial relationship and it is no doubt quite laudable on the part of the educated Burmans to discourage such practices amongst lower classes of the community. But we are quite at one with his Lordship in his view that in interpreting the law one must look to the law as it prevails amongst the community and not to the law as it should be. His Lordship's appreciation of the scruples of the Burman District Judge as also of the faithful interpretation of the law by the English Judicial Commissioner is both instructive and interesting.

THIS IS WHAT HIS LORDSHIP SAYS IN THIS LAST connection :—

The lax notions prevalent among the lower classes on the subject seem to be generally deplored and condemned by their betters, and it may be that the difference of opinion between the two Courts is due in some measure to the fact that the District Judge was a native gentleman, an educated Burman, who naturally regarded with little favour if not with positive repugnance practices tolerated by the law of his country, but not in accordance with the standard of a higher civilisation On the other hand, the Judicial Commissioner was an Englishman of great experience, without any prejudice in favour of Western notions, whose only object seems to have been to administer the law truly and indifferently as he found it laid down in the Dhammathats and the rulings of his predecessors, and in Sir John Jardine's "Notes on Buddhist Law" which seems to be the principal authority on the subject.

His Lordship's judgment is not only full of human interest but is occasionally relieved by subdued touches of humour. For instance, His Lordship's judicial finding as to why there was no entertainment given after the marriage in question of which the "chief delicacy" was the "pickled tea" and also as to the significance of the husband and wife eating out of the same pot will be found particularly interesting.

THAT THE LAW COURTS ARE MOST RELUCTANT to disturb the relationship between husband and wife on the ground of the non-observance of any formality or any defect in its celebration would also appear from some recent English decisions. For instance in the recent case of *Swift* v. *Swift* the question was whether a marriage between an Irish Protestant and an Austrian lady which took place in 1833 was valid. Some early Irish Statutes prohibited such mixed marriages. But the House of Lords held that such Statutes could not interfere with a foreign priest celebrating a marriage in his own country according to the rites of his own church. In another case, also recently decided, known as the *Galway* marriage case, the Petitioner sought a declaration of nullity of marriage. The Petitioner stated that it had been agreed between him and the Respondent that the marriage should be solemnised according to the rites and ceremonies of the Catholic Church. The marriage took place in the house of the Petitioner about 10 P.M., where only the priest and a servant were present and the latter was the only witness to the marriage. The Petitioner maintained that the marriage was null and void as the law of the Church requires two witnesses. Mr. Justice Kenny refused the petition for the reason amongst others that the parties had lived together as husband and wife, and that it

would be against public policy to declare the marriage a nullity and would invalidate a number of marriages.

In the case of *Radha Kant Chuckerbutty* v. *Ramananda Shaha*, reported at 16 C. W. N. 476, it has been ruled that a purchaser of a non-transferable occupancy holding who has obtained the landlord's consent to the transfer and obtained a fresh settlement from him is estopped from questioning the validity of a mortgage of the holding by the transferor on the ground of non-transferability of the holding. If the view be correct, then the title of the auction-purchaser at the mortgage sale would prevail against the private purchaser who has obtained recognition of his purchase from the landlord. But it has been repeatedly laid down and it is now the settled law that the purchaser of a non-transferable occupancy holding acquires no title by his purchase no matter whether it is private or public. The title of such a purchaser is perfected only by the recognition of the purchase by the landlord, *Agarjan Bibi* v. *Panaulla*, 14 C. W. N. 779. In this case their Lordships, Chitty and Chatterjee, JJ., held that the purchaser was a representative of the mortgagor within the meaning of sec. 115 of the Evidence Act as he derived his title from the mortgagor and the landlord could not give him any title independently of the mortgagor. Coxe, J, on the other hand was of opinion that the purchaser who had subsequently got his title perfected by recognition from the landlord was entitled to raise the plea that the holding was not transferable without the landlord's consent. The view taken by Coxe, J., is certainly more in consonance with the current of legal decisions than the view which prevailed with the majority of the judges. See *Bhiram Ali* v. *Gopi Kanta*, 1 C. W. N. 396, and also *Krisna Lal* v. *Bhairab Chandra*, 9 C. W. N. ccxlviii. There is no doubt however that the existing law as to non-transferability of raiyati holdings—which does not restore the holding alienated to the transferor but virtually decrees forfeiture thereof in favour of the landlord—frequently leads to hardship and injustice, and of this the present case is a clear instance.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Solomon* v. *Attenborough*. Before the Master of the Rolls and Lords Justices Moulton and Buckley. 5th February 1912.

Pawnee or mortgagee's title to goods pledged by an executor for his own use without informing the pawnee that he was executor.

This was an appeal from a decision of Joyce, J. The facts were that the testator died in 1878. He appointed two executors. He was possessed of valuable plate. Probate was granted to the two executors named in the Will in October of the same year. The estate was amply sufficient for the payment of his debts. It appeared from the residuary account that the estate was perfectly clear in March 1879, when the residuary account was passed. Fourteen years after the testator's death one of the executors who had the legal possession of the plate went to Messrs. Attenborough, who were perfectly unconscious of any fraud, and must not be taken to be open to any imputation on the transaction, and pawned some of the plate, and with the money thus obtained paid a private debt of his own. It was proved that the pledge was not required for the purposes of administration, but for the purpose of discharging a debt due from the pledgor to his co-executor.

The present action was brought by the trustees of the testator to recover the pledged articles. The Defendants pleaded that the executor was entitled to pledge the articles and that they were *bonâ fide* purchasers for value without notice. The Court below dismissed the action. Hence this appeal which was allowed. In the course of his judgment the Master of the Rolls said :—

It was said that Messrs. Attenborough had a good title, and that an executor could deal by way of sale or mortgage with any part of his testator's personal estate, and that the purchaser or mortgagee was not required to consider whether the sale or mortgage was for the purposes of administration. He (the Master of the Rolls) hoped that no word that had fallen from him could be considered to impeach that proposition. He did not know a better or more concise statement of the law than that of Sir John Leach in *Watkins* v. *Cheek* (2 S. and S., 199), where he said :—"So a mortgagee or purchaser from the executor of a part of the personal property of the testator has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies." But what did that imply ? It implied that it was a case in which an executor came as executor and dealt as executor with a third person. Then the third person was entitled to assume that the executor was entitled to perform the duties of the position which he claimed as executor. But what had that to do with a case in which the pledgor gave no information that he was an executor and did not purport to act as executor ? In his Lordship's opinion that would be to strain beyond all authority and beyond principle the doctrine stated by Sir John Leach which had been followed for many years.

The attention of the Court had been called to three cases :—*Re Tanqueray Willaume and Landau's Contract* (20 Ch. D., 465) ; *Re Whistler* (35 Ch. D., 561) ; and *Re Venn and Furze's Contract* ([1894] 2 Ch., 113). None of those cases

touched the present point. In every one of them the vendor acted and purported to act as executor. In such cases the Court assumed that the executor would do his duty and declined to give licence to the suggestion that any purchaser or mortgagee could require an executor to administer, so to speak, the estate in public. Those cases had no application to a case like the present, and although he (the MASTER OF THE ROLLS) did not differ from the statement of Mr. JUSTICE JOYCE as to what an executor could do after a lapse of years, he thought that the learned Judge had overlooked the fact that the present case was not one in which the executor had purported to deal as executor. He came into the shop as a private individual, and Messrs. Attenborough were in no better position than if a private individual who had no title had pawned the plate.

Mr. Cozens-Hardy for the Appellants.

Messrs. Hughes, K. C., and Cann for the Respondents.

B. D. *Appeal allowed.*

COURT OF APPEAL.—*Wanthier* v. *Wilson and anr.* Before LORDS JUSTICES FARWELL, KENNEDY AND WARRINGTON. 9th February 1912.

Promissory note by a minor and his father—Father's liability as guarantor or principal.

This was an appeal from a decision of Pickford J. The action was brought on a promissory note which was executed by the Defendants, father and son. On the face of the note their liability was joint and several, but the loan was made to the son. It appeared that the son was a minor. The father's defence was that the transaction was really entered into with his son, and that he was simply a guarantor. He pleaded that the contract with the son being void it was of no force against him. The Court below found that the father was only a guarantor, but it allowed the claim against him. On appeal the judgment was affirmed but on a different ground. In the course of his judgment LORD JUSTICE FARWELL said :—

The father had no defence at common law, but since the Common Law Procedure Act an equitable plea might be raised in such a case on the ground that the circumstances were such that the Court of Chancery would have restrained the action as being against conscience. *In the Mutual Loan Fund Association* v. *Sudlow* (5 C. B. N. S. at p. 453), Mr. Justice Byles said :—"As between the makers and the payees of the note, at law both the makers are principals, and evidence would not be admissible to show that one of them signed the instrument as surety. But in equity, if it be made to appear that the lender was cognisant of the circumstances, you may show what the fact is. They become joint principals, or principal and surety, according to the facts."

It was perfectly true, as Mr. Newbolt had contended, that there could be no surety without a principal, and the son, being an infant, could not enter into a contract so as to make himself liable as principal ; but if Mr. Newbolt's contention that this was a case of a guarantee were to prevail it would follow that these three parties deliberately sat down to enter into an arrangement under which money was to be advanced on a promissory note on which no one was liable at all, there being no one liable as principal and therefore no one liable as surety. To argue that that could give rise to an equity seemed to him to be a gross libel on equity. If the nature of the transaction were as suggested the father could not, in his opinion, have maintained a bill in Chancery to restrain the action, and his equitable plea would come to nothing at all. But in his (the Lord Justice's) view the money was advanced by the Plaintiff to the son at the father's request. The father desired that money should be advanced to his son for some purpose of which he approved, and, being without money himself, he requested the Plaintiff to make an advance. That seemed to him to be the plain meaning of the transaction, on the assumption that the Plaintiff knew that the son was under age ; and it followed that, in his opinion, the father acted as principal and incurred liability as principal.

The case would be plainer still if the Plaintiff did not know that the son was under age ; for if he did not know it, and the father knew that he did not know it, the transaction would look like fraud. It was not necessary to consider the authority of the case of *Yorkshire Railway Wagon Company* v. *Maclure* (19 Ch. D. 478), on which Mr. Justice Pickford based his judgment, because this Court thought that this was not a case of a guarantee. The learned Judge said that, in his opinion, the father joined in the promissory note as a guarantor. In a colloquial sense, no doubt, this was a case of a guarantee. But in his judgment the true meaning of the transaction was that the father acted as principal borrower and made himself liable as principal.

Mr. Newbolt for the Appellant.

Mr. Macnaghten for the Respondents.

B. D. *Appeal dismissed.*

KING'S BENCH.—*The King* v. *Bottomley and anr.* Before JUSTICES DARLING, BUCKNILL AND HAMILTON. 26th February 1912.

Contempt of Court.

The Defendants were called upon in this case to show cause why they should not be committed for contempt of Court. The Defendants were alleged to have written threatening letters to one of their creditors with a view to coerce them to join a scheme of arrangement for payment of Defendants' debts. It was submitted in support of the rule that the Defendants attempted to prejudice the course of justice in connection with Mr. Bottomley's public examin-

in bankruptcy. The learned Judges found the Defendants guilty and imposed fines of £100 each. In the course of his judgment Mr. JUSTICE DARLING remarked something had been said about the jurisdiction of the Court in these matters. It was a jurisdiction always carefully kept and guarded by the Court, and always exercised with the greatest reluctance and care. It was valued by the Court because it was not mainly a power to be used for the protection of Judges and juries, of which, of course, there was no question in this case. The reason for guarding jealously this jurisdiction was best given in the words of Lord Justice Bowen in the case of *Helmore* v. *Smith* (35 Ch. D., at p. 455):—"The object of the discipline enforced by the Court . . . is not to vindicate the dignity of the Court or the person of the Judge, but to prevent undue interference with the satisfaction of justice."

Here it was said that the applicants, being creditors, and having the right to appear at Mr. Bottomley's public examination, had had it proposed to them by threats that if they did not come in with the other creditors and agree to the scheme the attacks made on them by Mr. Bottomley would continue. The question they had to consider was one of fact—namely, whether those threats were made. He had no doubt whatever that, if it was proved that they were made, and made for the purpose alleged, a contempt of Court had been committed. No doubt this procedure was of a *quasi*-criminal character; but that fact must not prevent the Court, if it thought the charge proved, from doing its duty. They had often to say this to juries, and they must not shrink from it themselves.

Messrs. Astbury, K. C., and McCardie for the Rule.

Messrs. Hemmerde, K. C, and Newbolt for the Defendants.

Mr. Bottomley in person.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CRIMINAL APPELLATE JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. CRIMINAL APPEAL No. 1029 OF 1911. SURESH CHANDRA SANYAL, Accused, Appellant *v.* THE EMPEROR. 1st April 1912.

Handwriting, proof of, by an expert.

The Appellant was convicted and sentenced to two years' rigorous imprisonment under sec. 124A by the District Magistrate of Pubna for forwarding a cer[illegible]n seditious leaflet called *Matripuja* to the Capt[illegible] [illegible] the Rungpore School. One important [illegible] raised in the appeal was whether the evi[illegible] [illegible] expert as to the handwriting of certain incriminating documents was admissible. It appears the expert did not compare in Court before the accused, the handwriting in question with handwriting which was proved or admitted to be his, but he (the expert) gave his opinion as to the handwriting on the comparison he had made out of Court.

Their Lordships observed:—

"The Statute 28 and 29 Vict., c. 18, sec. 18 lays down in express terms that the comparison by a witness of the disputed writing for the purpose of giving an expert opinion must be with any writing proved to the satisfaction of a Judge to be genuine . . . . and though this condition is not expressly laid down in sec. 45 of the Evidence Act, which is only a general section as to the admissibility of expert evidence yet it is clearly indicated in the Ills. (c) to the section. . . ."

Their Lordships then referred to 22 W. R. 272 and held that as there was no comparison in open Court before the accused with documents proved or admitted to be in the handwriting of the accused, the evidence of the expert was inadmissible.

Their Lordships set aside the conviction but having regard to the fact that the accused was a young man and he was 8½ months in jail as an undertrial prisoner and as a convict combined, they did not think it necessary to order a retrial.

Mr. J. N. Roy with *Babu Purna Chandra Ray* for the Accused.

Mr. Caspersz for the Crown.

B. C.

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and N. R. CHATTERJEA, J. LETTERS PATENT APPEAL No. 3 OF 1911. NARENDRA BHUSAN ROY AND OTHERS, Defendants Nos. 1 and 2, Appellants *v.* BANKU BEHARI GHOSE AND ANOTHER, Plaintiffs, Respondents. 22nd March 1912.

Covenant for re-entry—Transfer in invitum—*Voluntary act.*

The suit was to establish title. The point involved in the case was as to the real meaning and effect of what was termed a covenant against transfer and a clause for re-entry contained in the *kabuliyat* of 1882. There was a simple mortgage and a sale in execution of a decree obtained on that mortgage.

Held—That though a transfer *in invitum* did not come within the operation of such a clause, the practical result was that the voluntary act of the lessees in executing the simple mortgage which, by reason of their default resulted in the transfer, brought the transaction within the operation of that clause.

Babu Provas Chandra Mitra for the Appellants.

Babu Joyti Prosad Sarbadhikari for the Respondents.

A. T. M. *Appeal dismissed.*

CHAKOWRI MAHTON *v.* GANGA PROSAD.

[See the authorities reviewed in *Peari Lal Singh* v. *Chandi Charan Singh* (4)].

The result, therefore, is that this appeal must be allowed, the order of the Subordinate Judge discharged and execution directed to proceed against the ancestral property in the hands of the legal representatives of Shankar Lal. The Appellants are entitled to their costs in this Court. The hearing-fee is assessed at two gold mohurs.

CARNDUFF, J.—I agree, and may add that a similar view of what constitutes an "illegal or immoral debt" was taken in an unreported case recently decided by Mr. Justice Woodroffe and myself.

Appeal allowed.

[PRIVY COUNCIL.]

[APPEAL FROM JUDICIAL COMMISSIONER, UPPER BURMA.]

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1911,
Heard, 16, 17 and 21, November.
1912,
Judgment, 25, January.

MI ME and others, Appellants,
v.
MI SHWE MA, Respondent.

Burmese Law—Marriage—Special ceremonies, if essential—Mutual consent—Conduct—Reputation—Marriage with wife's sister—Polygamy.

In Burma polygamy is undoubtedly lawful and it is not unlawful to marry the sister of a living wife, though such a marriage is not considered quite respectable, while marriage with a deceased wife's sister is looked upon as proper and even laudable.

The law relating to marriage in Burma is extremely lax. No ceremony of any kind is essential. Mutual consent is all that is required. In the absence of direct proof, consent may be inferred from the conduct of the parties or established by reputation. But when proof of marriage depends wholly or mainly on reputation the circumstances of the case must be scrutinised with some caution because the same word which is used to describe a woman lawfully married is applied by the Burmese to a woman living with a man on less honourable terms.

This was an appeal from a judgment and decree of the Court of Judicial Commissioner, Upper Burma, dated the 11th October 1909, which reversed a judgment and decree of the District Court, Magwe, dated the 9th February 1909.

The District Judge dismissed the suit brought by the Respondent, as Plaintiff, against the Appellants, as Defendants, for, *inter alia*, the recovery of such a share of the estate of one Maung Aung Myat, deceased, as the Respondent might be held entitled to. On appeal the Court of the Judicial Commissioner set aside the decree of the lower Court and made a decree in lieu thereof declaring that the Respondent was entitled to inherit the said estate "on an equal footing with" Mi Me, the first Appellant in this appeal.

On the 13th May 1908, the Respondent instituted the present suit. The plaint alleged, *inter alia*, that the Respondent was married to the said Maung Aung Myat in 1244, B. E., about 20 years before his death which occurred on or about the 2nd December 1902; that her sister Mi Me, the first Appellant, was also his wife; and that she, the Respondent, was entitled to a half share of the estate of the deceased specified in the schedules attached thereto. The Respondent prayed *inter alia* "(*c*) that the estate of the said Maung Aung Myat (deceased) may

(4) 5 C. L. J. 80: s c. 11 C. W. N. 163 (1906).

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be partitioned, and (*d*) such share may be given to Plaintiff as she may be entitled to together with her share of the income of the said estate."

The Appellants filed a written statement denying that the Respondent was a wife of the said Maung Aung Myat, and alleging the "Defendants were informed and believe that Plaintiff was Maung Aung Mayt's concubine and is therefore not entitled to any share of the estate of the deceased Maung Aung Myat."

On the pleadings the District Judge framed eight issues, of which only the following are now material:—

(1) Was Ma Shawe Ma a wife or a concubine of Maung Aung Myat, and as such entitled to inherit?

(2) If so, to what share of the inheritance of Maung Aung Myat is she entitled?

After recording oral and documentary evidence adduced by the parties the District Judge delivered his judgment on the 9th February 1908. He was of opinion that the Respondent "had failed to prove satisfactorily that she had a status superior to that of a mistress or a concubine, receiving the visits of the late Maung Aung Myat who had given her three oil-wells and two to her sons by her previous marriage, apparently to compensate her for the absence of her right to inherit his estate on his death." He, therefore, held that the Respondent was only a mistress and not a lawful wife of the late Maung Aung Myat, and that even if she were held to be a lawful wife of the deceased, she would not be entitled to inherit his property because she was accommodated in a separate house, and also because she had "failed to sufficiently prove that she had attended upon Maung Aung Myat during his illness, and also that she had performed his funeral rites as a wife." In the result a decree was made on the same date dismissing the suit with costs.

Against the said decree of the District Judge the Respondent filed her appeal in the Court of the Judicial Commissioner of Upper Burma. On the 11th October 1909, the Judicial Commissioner (Mr. G. W. Shaw) who heard the appeal, delivered his judgment reversing the decision of the lower Court and setting aside its decree. He found that like many other Twingas the late Maung Aung Myat had two wives, the first Appellant, Mi Me, and the Respondent, Mi Shwe Ma; that the former was already married to him when he took to wife the latter, who was her younger sister, about 1244 or 1245, B. E. (two or three years before the annexation of Upper Burma); that from that time onwards the Respondent was publicly known as his wife, as well as the first Appellant, who during a long course of years accepted the relations between the Respondent and Maung Aung Myat without any sign of dissatisfaction; that the fact that Maung Aung Myat gave the Respondent three wells might have been a convenient method of arranging for her maintenance during his life-time and was not sufficient to negative the inference suggested by all the circumstances in the case which tended to show that the Respondent had the status of a wife entitled to inherit; that at times the late Maung Aung Myat stayed with the Respondent and occasionally had his meals with her; that as far as there was anything for a wife to do in Maung Aung Myat's business connected with oil-wells the Respondent did as much as the first Appellant; that as to the Respondent's attendance on Maung Aung Myat in his illness she did her duty in that matter; that the Res-

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pondent did take part in the management of the funeral of Maung Aung Myat; and that the Respondent was satisfactorily proved to be a wife entitled to inherit on an equal footing with the first Appellant.

Hence this appeal.

Messrs. DeGruyther, *K. C.*, and *E. U. Eddis* for the Appellants.—The suit was instituted on 13th May 1906 by the Respondent who claimed one-half share of the property left by Maung Aung Myat. This shows that for nearly six years the Respondent recognised her position as one who was not entitled to any share of the property of Maung Aung Myat. The first Appellant, Mi Me, had absolute possession of the property and on the death of her husband she handed over to the Respondent two oil-wells. The Respondents received those wells and for six years did not put forward her claim, if any. This is consistent with the fact that she considered herself not entitled to a share of the property.

A wife, under the Burmese Buddhist law, acquires on her marriage a community of interest in the property acquired during coverture, and succeeds to property so acquired on the death of her husband.

Witnesses on both sides say that the Respondent was the *maya* of the deceased. But as the District Judge has observed in his judgment the word *maya* is equivalent to the word wife as well as a permanent concubine. The Burmans use the word wife indifferently for a lawful wife and a permanent concubine and the presumption is that a Burman having married once would not marry again: *Ma Wun Di* v. *Ma Kin* (1).

Marriage is a contract according to the Burmese Buddhist law and it is usual to have some ceremony such as the distribution of pickled tea when a marriage takes place. The Respondent herself says that persons previously married distributed pickled tea, when they married again. But here it is admitted that there was no such ceremony.

The District Judge is right in holding that the evidence is insufficient to establish a direct marriage.

He is right in also holding that the evidence is insufficient to establish marriage by habit and repute. The Respondent never lived together in the same house with the deceased and the first Appellant except on two occasions when they all went away during disturbance at the time of the annexation and a fire in the town. The Respondent had a separate establishment and she never helped the deceased in his business. Under these circumstances it is submitted that she had no community of interest in the property acquired by the deceased and that she is entitled to nothing on his death. Reference was made Sir George Sculp's Burma, p. 149.

Sir Robert Finlay, *K. C.*, and *Messrs. J. M. Parikh* and *C. G. S. Pillay* for the Respondent.—No ceremony of marriage is required under the Burmese Buddhist law, which recognises polygamy: All wives are entitled to equal shares of their husband's property. Marriage can be proved by actual words constituting the contract or by habit and repute. Reference was made to *Mi Kin Gale* v. *Mi Kin Gyi* (2); Jardine's Notes on Buddhist Law, Note 1, paras. 3, 13, 15, 19 and 23; The Principles of Buddhist Law by Chan-toon (1903), pp. 23, 25, 26; *Mi Ka* v.

(1) L. R. 35 I. A. 41: s. c. 12 C. W. N. 220 (1907).

(2) Upper Burma Rulings, 42 (1910).

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Maung Thet (3) and *Ma Wun Di* v. *Ma Kin* (1).

Polygamy is allowed and the presumption is in favour of marriage. It is not necessary that the second wife should live in the same house with the first wife and the husband. There may be separate establishments for both wives for convenience: Jardine's Notes on Buddhist Law, Note 1, para. 37. Wives are called greater or lesser wives according to the priority of marriage, but it is only a name, and there is nothing in the mere fact of separate establishments to prevent a woman from being a wife: Jardine's Notes on Buddhist Law, Note 1, paras. 49, 50, 55 and 56. Here the evidence shows that the deceased had two establishments and lived sometimes with the first Appellant and sometimes with the Respondent.

Whether the property left by Maung Aung Myat was his separate property or joint property is the subject of the third issue which is not yet tried. The question for determination now is whether the Respondent was or was not the wife of deceased entitled to one-half share of the property left by him. When the question is settled, there will be an inquiry under the third issue as to what property was left by the deceased. With regard to what is joint and what is separate property reference was made to Jardine's Notes on Buddhist Law, Note 1, paras. 37, 38 and 39.

Where witnesses say that the deceased had two wives, there is nothing to show that one was of one kind and the other of another kind. These witnesses were not asked whether they made any distinction as regards the positions of the two wives, and the question is not now open to the Appellant.

Mr. DeGruyther, *K. C.*, in reply referred to *Mi Ka* v. *Maung Thet* (3), *Mi Kin Gale* v. *Mi Kin Gyi* (2); Jardine's Circular Memorandum No. 30 of 1882; and the Principles of Buddhist Law by Chantoon (1903), pp. 42 and 110; and submitted that eating from the same dish with her husband was essential to show that the Respondent was the wife of the deceased. But the evidence does not show that the Respondent ever ate from the same dish with the deceased.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—This is an appeal from a judgment of the Judicial Commissioner of Upper Burma reversing a decree of the District Court of Magwe.

The question on which the Courts differed relates to the status of the Plaintiff Mi Shwe Ma. She claims to have been lawfully married to one Maung Aung Myat, deceased, and as his widow to be entitled to share equally in his estate with her elder sister, Mi Me, who had been married to him for many years before his connection with the younger sister.

In Burma polygamy is undoubtedly lawful, and it is not unlawful to marry the sister of a living wife, though such a marriage is not considered quite respectable, while marriage with a deceased wife's sister is looked upon as proper and even laudable.

The law relating to marriage in Burma is extremely lax. No ceremony of any kind is essential. Mutual consent is all that is required. In the absence of direct

(1) L. R. 35 I. A. 41: s. c. 12 C. W. N. 220 (1907).

(3) Selected Judgments and Rulings, Lower Burma, 1872—1892, p. 6 (1873).

(2) Upper Burma Rulings, 42 (1910).

(3) Selected Judgments and Rulings, Lower Burma, 1872-1892, p. 6 (1873).

proof consent may be inferred from the conduct of the parties or established by reputation. But when proof of marriage depends wholly or mainly on reputation the circumstances of the case must be scrutinised with some caution because the same word which is used to describe a woman lawfully married is applied by the Burmese to a woman living with a man on less honourable terms. The lax notions prevalent among the lower classes on the subject seem to be generally deplored and condemned by their betters, and it may be that the difference of opinion between the two Courts is due in some measure to the fact that the District Judge was a native gentleman, an educated Burman, who naturally regarded with little favour if not with positive repugnance practices tolerated by the law of his country, but not in accordance with the standard of a higher civilisation. On the other hand, the Judicial Commissioner was an Englishman of great experience, without any prejudice in favour of Western notions, whose only object seems to have been to administer the law truly and indifferently as he found it laid down in the Dhammathats and the rulings of his predecessors, and in Sir John Jardine's "Notes on Buddhist Law" which seems to be the principal authority on the subject.

Both the learned Judges analyse the evidence with great care, though they regard it from different standpoints. The District Judge puts aside the testimony of some witnesses as unworthy of belief while the Judicial Commissioner thinks there was no reason for discrediting them. Whether that particular testimony is accepted or not there is very little contradiction in the evidence. There is abundance of evidence to the effect that Mi Shwe Ma was recognised as the wife of Maung Aung Myat. Mi Me herself says, "Plaintiff was known notoriously as Maung Aung Myat's wife." No one says that she occupied a dishonourable or an inferior position. Maung Aung Myat was a Twinzayo, that is an hereditary oil-well owner, and as such entitled to receive every year a certain number of oil-well sites in the oil-bearing district of Yenangyaung in Upper Burma. Twinzayo after Twinzayo comes forward on both sides to say that Twinzayos generally have two wives, and that Mi Shwe Ma was Maung Aung Myat's wife. Some of the witnesses may have used the word translated "wife" in a loose sense, but at least one witness on each side says that Maung Aung Myat and Mi Shwe Ma were "husband and wife," an expression which seems to convey the meaning that she was his wedded wife. Then it may be observed that one of the witnesses who says that Mi Shwe Ma was Maung Aung Myat's wife was not a Burman but Mahomedan of some position, being the head clerk in the Burma Oil Company.

The points on which most reliance was placed on behalf of the Appellant seems capable of explanation. One point was that there was no entertainment given on Mi Shwe Ma's alleged marriage. When there is a marriage between persons who have not been married before, it seems to be usual to give an entertainment at which "pickled tea" is the principal feature, or at least the chief delicacy. There was no pickled tea at Mi Shwe Ma's wedding. But then it seems that, in the case of persons who have been married before, it is not usual to have these entertainments. Maung Aung Myat had five or six children grown up living with him, and Mi Shwe Ma was a widow with two children living. Then something was

made of the fact that Mi Shwe Ma continued to live with her mother in her own house. But there is authority for saying that such an arrangement is a mere matter of convenience, and probably necessary for the sake of peace and quietness, when each wife has a family of her own. Great stress was laid on the fact that it was not clearly proved that Maung Aung Myat and Mi Shwe Ma messed together, or used to "eat out of the same pot." "Eating out of the same pot" seems rather to be an outward and visible sign of social equality than a proof of matrimony. A man united to a woman of lower degree raises her to his own social position by "eating out of the same pot." Here there is evidence that Maung Aung Myat took his meals with Mi Shwe Ma and her family when he visited her. It is difficult to see how there can be any question of social inferiority in the present case. Mi Me was Mi Shwe Ma's sister, and on perfectly good terms with her and the mother during Maung Aung Myat's life. As to Maung Aung Myat's business, he seems to have managed it himself. Sometimes one sister and sometimes the other, sometimes both, were seen with him when he visited his oil-wells, but apparently he kept the business in his own hands.

On the whole their Lordships are of opinion that the Appellants have not made out a sufficient case for disturbing the judgment of the Judicial Commissioner, and their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors: *Messrs. Sanderson, Adkin, Lee and Eddis* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondent.

B. D. *Appeal dismissed.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 227 OF 1912.

FLETCHER, J. 1912, 11, March. } E. M. D. COHEN *v.* ALLAN WILKIE.

Contract to play for a term and not to perform anywhere else until return to England, if enforceable by injunction—Indian Contract Act (IV of 1872), sec. 27—Agreement in restraint of profession—Specific Relief Act (I of 1877), sec. 57.

Where W, having contracted with C to play for C and not to play in any other theatre on his own or on someone else's behalf until after the expiration of the period contracted for and until after his return to England, performed in another theatre after the expiration of the period for which he was under contract with C but before his return to England, it was held that under sec. 27 of the Indian Contract Act, the agreement being in restraint of a lawful profession, trade or business is void and as such would not be enforced by injunction. Sec. 57 of the Specific Relief Act is not applicable to this case.

This is an application upon which a Rule was obtained by Mr. E. M. D. Cohen, proprietor of the Grand Opera House, Calcutta, calling upon Mr. Allan Wilkie of the Empire Theatre, actor and proprietor of the Allan Wilkie and Co., to show cause why he should not be restrained by an injunction from playing in any theatre in Caloutta and why there should not be any attachment before judgment.

The facts of the case are these:

Mr. Allan Wilkie with his company came out to the East under a contract with Mr. Cohen to play for him. Cl. 9 of the said deed of contract which really summarises their relations and under which Mr. Cohen came before the Court

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ran thus: "'That the said Allan Wilkie undertakes not to play in any other theatre in Calcutta or in any town under his own or under any other management until after the termination of the tour and the return of himself and the company to England in pursuance of the agreement."

The contract was for six weeks in Calcutta and six weeks elsewhere with the option for Mr. Cohen to extend it to the period of eighteen weeks, the option to be exercised before the company left for England, and notice of such option had to be given by the 1st September 1911. But no such option was exercised and no notice was given. The agreement was expressly broken on the 17th February 1912 and Mr. Wilkie made other arrangements for himself and his company to take effect after that date. Hence Mr. Cohen made this application.

Mr. S. P. Sinha and *Mr. B. C. Mitter* for Mr. Cohen.

Mr. Pugh for Mr. Allan Wilkie.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This is an application by Mr. Elias Moses Cohen, proprietor of the Grand Opera House, Calcutta, against Mr. Allan Wilkie of the Empire Theatre, Calcutta, an actor and proprietor of a theatrical company known as Allan Wilkie Co. The present application seeks to restrain and deter Mr. Wilkie by an injunction until the termination of the suit from playing in any theatre in Calcutta or any other town under his own or any other management other than the Plaintiff's management until after the termination of the tour and the return of the Defendant and his company to England as provided for in cl. 9 of the agreement mentioned in the petition. The rest of the application refers to an application for attachment before judgment. Mr. Cohen by an agreement, dated the 21st June last year, engaged Mr. Wilkie and his company to come out to the East for a certain tour. There is no doubt to my mind that the expense of bringing Mr. Wilkie and his company out was borne by Mr. Cohen and although it may be that that money has been repaid the entire financing of the company was undertaken and advances made by Mr. Cohen. It is, not denied now that the tour has come to an end and the only question that I have to consider is whether the 9th clause in the agreement can be enforced by an injunction. The 9th clause is in these terms: "The said Allan Wilkie undertakes not to play at any theatre in Calcutta or in any other other town under his own or under any other management until after the termination of the tour and the return of himself and the company to England in pursuance of the agreement.' Now in India the law relating to contracts in restraint of trade is codified in the 27th section of the Indian Contract Act. That section provides that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. It is pretty obvious that in the present case in the English Courts cl. 9 of the agreement would be enforced by injunction on the ground (1) that the clause was considered by the parties to be reasonably necessary for the protection of the covenantee and (2) on the ground that the Defendant had had all the benefits under the agreement. But in India one has simply got to look to see what the Legislature has provided in the Statute and sec. 27 of the Contract Act clearly provides that a contract in respect of trade

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by which a man is restrained from exercising his lawful profession, trade or business is void, and the words do not mean that he should be absolutely restrained. Then Mr. Sinha says this contract is really in the nature of the contract mentioned in sec. 57 of the Specific Relief Act. That is not so. The contract provided for in sec. 57 of the Specific Relief Act is where one party having undertaken to employ another can obtain an injunction to restrain the other from working for any other person other than the one he has agreed to work for. It is not suggested in this case that if Mr. Wilkie be restrained by injunction that he has got the right to perform in Mr. Cohen's theatre or that Mr. Cohen under the terms of the agreement is bound to employ him. It seems to me that this cl. 9 in the contract is under the terms of sec. 27 of the Indian Contract Act void as being in restraint of trade. That being so the present application in so far as it seeks for an injunction to restrain Mr. Wilkie from performing until he has gone through the operation of going back from India to England and then starting again from England to India, fails. The other part of the application seeking to attach Mr. Wilkie's property has not been pressed. The present application therefore fails and must be dismissed with costs.

Messrs. B. N. Basu & Co., Attorneys for the Plaintiff.

Messrs. Leslie and Hinds, Attorneys for the Defendant.

H. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 1858 OF 1908.

MOOKERJEE, J.
TEUNON, J.
1911,
Heard, 26 and 27, January.
Judgment, 27, January.

HARIHAR CHATTAPADHYA, Plaintiff, Appellant,
v.
DINU BERA, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 182, 20, 21, 44, 45—Homestead owned by raiyat of different villages, occupancy right if may be acquired in—Ejectment—Non-occupancy raiyat.

The language of sec. 182, Bengal Tenancy Act, justifies the proposition laid down in KRIPANATH CHAKRABURTI *v.* SHEIKH ANU (2), *that in the absence of local custom or usage the provisions of the Bengal Tenancy Act are applicable to the homestead of a person who is a raiyat although he is not a raiyat of the village in which the homestead land is situated and is not a raiyat of the same landlord as the landlord of the homestead land.*

Quære, *whether to establish his occupancy right in the homestead the raiyat must show that he was a "settled raiyat of the village" in which the homestead is situated within the meaning of sec. 20 of the Act.*

Held—*That if he was not an occupancy raiyat, he would be a non-occupancy raiyat and could not be ejected except in the manner provided by secs. 44 and 45 of the Act.*

This was an appeal preferred on the 19th of August 1908, against the decree of Babu Mohim Chandra Sarkar, Subordinate Judge, 2nd Court of Zillah 24-Pergunnahs, dated the 8th of May 1908,

(2) 4 C. L. J. 332: s. c. 10 C. W. N. 944 (1906).

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reversing the decree of Babu Pankaja Kumar Chatterjee, Munsif, 3rd Court at Alipore, dated the 9th of July 1907.

The facts of the case were as follows :—

Dinu Bera by a registered *kabuliyat*, dated 6th Sraban 1303, B. S., corresponding to 20th July 1896, took jama of about 1 bigha, 8 cottas of kheraji land situate in village Mudi Shahanagore, Dihi Panchannogram, within the jurisdiction of Thana Tollygunge, in the Suburbs of Calcutta, within the limits of the Calcutta Municipality, for three years for the purpose of residing there and from that timeforth he lived there and continued to hold over after the expiry of the lease. The Plaintiff landlord, Harihar Chatterjee, served on him on the 26th Aswin 1312, corresponding to October 1905, a notice to vacate the land within the last date of the month of Chait of 1312, that is by 14th April 1906.

The Defendant did not quit and the present suit was filed on 4th December 1906 for ejectment of the Defendant from the land and also for arrears of rent due up to 1312, B. S., and damages.

The defence, *inter alia*, was that the Defendant was a raiyat in the village and was a settled raiyat and had acquired rights of occupany in other lands situate in the village under other landlords and that therefore he had acquired right of occupancy in the homestead and so could not be ejected and also that the notice was not valid in law.

The first Court decreed the suit but the Court of Appeal below found that the Defendant was a raiyat within the meaning of the Bengal Tenancy Act, and that he had by cultivation of the land for more than 25 or 30 years acquired right of occupancy in other lands situate in the village under other landlords and that therefore he had acquired right of occupancy in the land in suit under secs. 21 and 182 of the Bengal Tenancy Act, and he therefore dismissed the suit.

The Plaintiff preferred the present second appeal.

Babus Mahendra Nath Roy and *Dhirendra Lal Kastagir* for the Appellant.

Babus Basanta Kumar Bose and *Atul Krishna Roy* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal on behalf of the Plaintiff in a suit for ejectment and recovery of rent and damages. The case for the Plaintiff was that the land in dispute was let out to the Defendant on the 20th July 1896 for a term of three years, that after the expiration of the term of the tenancy, the Defendant was allowed to hold over, that on the 12th October 1905 the Plaintiff served upon the Defendant a notice to quit the land on the 14th April 1906, that in spite of the service of such notice the Defendant continued in occupation and that consequently on the 4th December 1906 the Plaintiff commenced this action to eject the Defendant as a trespasser. He further claimed rent for the year 1312, that is up to the date on which the Defendant was asked to vacate the premises, and damages for use and occupation thereafter. The Defendant resisted the claim substantially on the ground that his tenancy was not terminable and that as a matter of law it had not been validly terminated by the steps taken by the Plaintiff.

The Court of first instance found that the Defendant was not shown to be a raiyat in respect of other lands in the same village, that he had not acquired a right of occupancy in the land in dis-

pute which had been taken by him for purposes of homestead and had been used by him as such and that consequently his tenancy in respect of this land was terminable and had been terminated by the notice to quit served upon him. In this view the Court of first instance decreed the suit both as regards the prayer for ejectment and the claim for rent and damages.

Upon appeal the learned Subordinate Judge has reversed this decree. He has held that the combined effect of secs. 21 and 182 of the Bengal Tenancy Act is to confer upon the Defendant the status of an occupancy raiyat in respect of the land in suit and that consequently he is not liable to be ejected. In this view the Subordinate Judge has dismissed the suit.

The Plaintiff has now appealed to this Court and on his behalf it has been contended that the Defendant has not acquired a right of occupancy in the land in suit, that the Subordinate Judge has overlooked material evidence on the question of the occupation by the Defendant of other lands in the village as a raiyat, and finally, that in any event the Plaintiff is entitled to a decree for rent up to the date of the institution of the suit.

In our opinion, in so far as the claim for ejectment is concerned, the Plaintiff cannot possibly succeed. But before we deal with the question of the status of the Defendant, it is necessary to advert for a moment to the finding of the Subordinate Judge that the Defendant is a raiyat in respect of other lands in the village. That finding has been attacked on behalf of the Appellant on the ground that the Subordinate Judge has erroneously stated that the Plaintiff has not adduced any evidence to rebut that on the side of the Defendant to prove that he holds other lands in the village under different proprietors and that he has acquired a right of occupancy in those lands. No doubt the expression used by the learned Subordinate Judge is open to criticism, but we are unable to hold that he has overlooked the evidence mentioned in the judgment of the Court of first instance. We must therefore proceed on the assumption that the Defendant has been rightly found by the Subordinate Judge to be a raiyat in respect of other lands in the same village. In fact the Subordinate Judge has found that the Defendant has been a cultivating raiyat of other lands in the village for more than 25 or 30 years before the suit. In other words, he was a settled raiyat in respect of those lands at the time when the lease of the land now in dispute was granted to him. The question therefore arises whether sec. 21 of the Bengal Tenancy Act, read with sec. 182 is sufficient to confer upon the Defendant the status of an occupancy raiyat in respect of the homestead land now in dispute.

Now sec. 182 provides that when a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local custom or usage and subject to local custom or usage, by the provisions of the Act applicable to land held by a raiyat. In the case before us, no evidence has been adduced on behalf of either party to show that there is any local custom or usage applicable to the incidents of the tenancy in question. Consequently the incidents of the tenancy must be governed by the provisions of the Act applicable to land held by a raiyat. The learned Vakil for the Appellant has, however, contended that as the land now in dispute is not held under the

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same landlord as the land cultivated by the Defendant, sec. 182 has no application. This contention is opposed to the judgment of Mr. Justice Geidt in the case of *Protap Chandra* v. *Biseswar Pramanik* (1) and to the decision of this Court in the case of *Kripanath Chakraburti* v. *Sheikh Anu* (2). The case last mentioned lays down that the provisions of the Bengal Tenancy Act are applicable to the homestead of a person who is a raiyat, although he is not a raiyat of the village in which the homestead land is situated and is not a raiyat of the same landlord as the landlord of the homestead land. It may be observed that this view is justified by the language used in sec. 182 and we see no reason to restrict the operation of that section by importing into it words not to be found therein. Consequently we must hold that although the land in dispute is homestead land, as it is held by the Defendant who is a raiyat otherwise than as part of his holding as a raiyat, the incidents of his tenancy are in the absence of any local custom or usage, regulated by the provisions of the Bengal Tenancy Act applicable to land held by a raiyat. *Primâ facie*, therefore, the provisions of sec. 21 are applicable. But the learned Vakil for the Appellant has contended that before sec. 21 can be applied, it must be shown that the land in suit has been held by the Defendant as a raiyat, because sub-sec. (1) of sec. 21 provides that every person who is a settled raiyat of a village within the meaning of sec. 20 shall have a right of occupancy in all land for the time being held by him as a raiyat in that village. The learned Vakil for the Appellant has conceded that his contention is opposed to the decision of Mr. Justice Rampini in the case of *Munshi Golam Mowla* v. *Abdul Sowar* (3), but he has argued that in that decision sufficient weight was not attached to the qualifying words "held by him as a raiyat in that village." Upon the arguments which have been addressed to us we need not decide this question for the purposes of the case before us, and when it arises in a case where it really calls for decision, the matter may require further consideration. But we are of opinion that the Plaintiff must fail on another ground. The suit is clearly barred under secs. 44 and 45 of the Bengal Tenancy Act. Sec. 45 as it stood at the time of the institution of the suit, provides that a suit for ejectment on the ground of expiration of the term of a lease shall not be instituted against a non-occupancy raiyat unless notice to quit has been served on the raiyat not less than six months before the expiration of the term and shall not be instituted after six months from the expiration of the term. Now the Defendant has been found to be a raiyat. Even if it is assumed that he is not an occupancy raiyat in respect of the disputed land because as the learned Vakil for the Appellant contends, sec. 21 has no application to the land in suit, he is at least a non-occupancy raiyat. Hence, before the Defendant is ejected, the requirements of sec. 45 must be fulfilled. But it cannot be disputed that no notice to quit was served on the Defendant within six months before the expiration of the term; that is within six months before the 20th July 1899. Nor has the present suit been instituted within six months after the expiration of the term. It is obvious therefore that sec. 45 is a bar to the claim for eviction of the Defendant and the refusal

(1) 9 C. W. N. 416 (1904).

(2) 4 C. L. J. 332: s. c. 10 C. W. N. 44 (1906).

(3) 13 C. L. J. 255 (1893).

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of the Court below to make a decree for ejectment was correct.

In so far as the claim for rent is concerned the learned Vakil for the Respondent has conceded that the matter has been overlooked by the Subordinate Judge. We observe, however, that interest was claimed by the Plaintiff at the rate of 75 per cent. per annum under the terms of the lease. Under sec. 178, sub-sec. (3), cl. (*g*) of the Bengal Tenancy Act, nothing in any contract made between a landlord and a tenant after the passing of the Act, can affect the provisions of sec. 67 relating to interest payable on arrears of rent. Consequently the Plaintiff is not entitled to claim interest at a rate higher than 12 per cent. per annum. A decree therefore will be made in favour of the Plaintiff for the rent of the year 1312 and the first two instalments of 1313 with interest at 12 per cent. per annum.

The result, therefore, is that the decree of the Court below in so far as it dismisses the claim for ejectment must be affirmed; but in so far as it dismisses the claim for rent and damages it must be reversed and in lieu thereof a decree will be made in favour of the Plaintiff as stated. The Plaintiff must pay the Defendant his costs in the Court of first instance and in the Court of Appeal below; but there will be no order for costs in this Court.

Decree modified.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2096 OF 1909.

MOOKERJEE, J. CARNDUFF, J. 1911, Heard, 4 and 6, July. Judgment, 28, July.	BISHUN SINGH, Defendant, Appellant, *v.* A. W. N. WYATT, Plaintiff, Respondent.

Malicious abuse of civil process, if and when actionable—Decree, invalid, execution under erroneous belief in its validity—Trespass, actionable without proof of malice and want of reasonable cause—Want of reasonable and probable cause, if question of law—Second appeal—Damages for trespass—Principle of assessment—Exemplary and nominal damages—Limitation Act (IX of 1908), if creates rights to sue.

Nothing in the Limitation Act can give rise to a cause of action unless a right to sue exists independently of its provisions.

When there has been arrest of person or seizure of property in consequence of a civil action which is unfounded, vexatious and malicious, an action for damages may lie against the Plaintiff.

Whether there was reasonable or probable cause is a mixed question of fact and law and the High Court in second appeal though bound to accept the facts found is entitled to examine whether the inference drawn from those facts is legitimate.

If a litigant executes any form of legal process which is invalid for want of jurisdiction, irregularity or any other reason, and in so doing he commits any act in the nature of trespass to person or property, he is liable therefor in an action of trespass; it is not necessary to prove any malice or want of reasonable or probable cause.

Where therefore the Defendant had ob-

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tained an attachment of the property of the Plaintiff under an erroneous impression that he had a decree capable of execution, the Defendant was liable to be sued by the Plaintiff for damages for trespass.

CLISSOLD *v.* CRATCHLEY (3) *followed.*

Where land with standing crop on it was attached by the Defendant in execution of a decree which he erroneously believed he held against the Defendant, but the Plaintiff did not ask the direction of the Court or make any the slightest effort for the protection of the crop, which in consequence deteriorated and ultimately became valueless:

Held—*That the attachment was not the proximate cause of the loss of the crop, and the Defendant could not be made liable for the value of the crop.*

The Plaintiff was also not entitled to recover the amount she had to pay to the pleader whom she employed to search the records and ascertain whether there was a valid decree against her in favour of the Defendant.

For an act of trespass for which no blame attached to the Defendant he could not be held liable to pay exemplary damages. Only nominal damages (which is not necessarily small damages) should be allowed in recognition of the fact that there has been an infraction of a legal right which is actionable without proof of actual damage or harm.

This was an appeal preferred on the 7th of October 1909 against the decree of F. W. Ward, Esq., District Judge of Zillah Mozufferpur, dated the 25th of August 1909, reversing the decree of Babu Ashutosh Ghose, Munsif of Matihari, dated the 18th of June 1908.

(3) [1910] 2 K. B. 244.

The facts of the case fully appear from the judgment.

Babu Gonesh Dutt Singh for the Appellant.

Babu Dwarka Nath Mitter for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal on behalf of the Defendant in an action for damages for what has been described as malicious abuse of judicial process. The circumstances under which the claim has been preferred, have not formed the subject of serious controversy in this Court, and may be briefly narrated. On the 3rd June 1901, the predecessor of the Plaintiff commenced an action for rent against the Defendant for the years 1307 and 1308, F. S. The substantial dispute between the parties related to the rate of rent annually payable; the Defendant pleaded that the rent was much lower than what the Plaintiff had demanded, and that whatever was lawfully payable had been duly paid. The Court of first instance overruled the defence and decreed the suit. Upon appeal, the Subordinate Judge reversed that decision and dismissed the suit. On appeal to this Court, the Plaintiff-Appellant asked for leave to withdraw from the suit, with liberty to bring a fresh suit on the same cause of action. On the 2nd March 1906, the application was granted and the following order was recorded: "The application is allowed on condition that the Appellant pays to the Respondent the costs incurred by him in this litigation, including the costs of this Court, within six weeks of the arrival of the record in the lower Court. If such costs are not paid within the time aforesaid, this appeal will stand dismissed with costs." The

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records were sent down in due course and appear to have been received in the lower Court on the 17th June 1906. Meanwhile, the Plaintiff, who had already instituted a suit on the 8th February 1906, for recovery of the arrears of rent for the years 1310 to 1313, deposited the money in Court on the 23rd May 1906. No notice of the deposit was given to the Defendant, and it has now been ascertained that the entry of the payment, as made in the Court Register, was inaccurate and misleading, because the names of the parties as Plaintiff and Defendant were interchanged. There is some evidence to show that one of the officers of the Plaintiff verbally informed the Defendant that the deposit had been made: but, in the events which had happened, and in view of the fact that the records had been removed from Champaran to Chapra, it was not possible for the Defendant, to whom the challan had not been shown, to ascertain whether the money had actually been deposited, and to withdraw the sum from the Court. The result was that, when the suit commenced on the 8th February 1906 for realisation of the arrears of the years 1310 to 1313 came on for trial, the Defendant objected that, as the Plaintiff had not carried out the order of the High Court in the appeal in the previous suit for rent, the subsequent suit could not be entertained. This objection prevailed, and the suit was dismissed on the 31st May 1906, as the Plaintiff was unable to satisfy the Court that she had deposited the money in accordance with the order of this Court. She then appealed to the District Judge and contended, not that the doposit had been made in time, but that, as the order of the High Court referred to a suit for rent for an earlier period, failure to comply with that order could not bar the subsequent suit, and the District Judge, on the 20th November 1906, gave effect to this contention. The Defendant then appealed to this Court and contended that, as the order of the High Court in the previous suit had not been carried out, the result was that the appeal preferred to this Court on that occasion stood dismissed, and the decision of the Subordinate Judge, as to the rate of rent, was in effect confirmed: consequently the trial of the question of the rate of rent was barred by *res judicata*. This Court, on the 5th April 1909, directed an enquiry into the question, whether the order of the High Court in the previous suit had been carried out in time. The lower Court, upon investigation and upon evidence adduced by the Plaintiff reported that the deposit had been made on the 23rd May 1906 before the expiry of the time allowed for the payment of the money. On receipt of the report, this Court held, on the 19th April 1910, that the previous suit had been withdrawn and no question of the *res judicata* arose for consideration. Meanwhile, on the 6th June 1907, that is after the adjudication by the Courts below that the costs had not been paid in time and the appeal to this Court, consequently, stood dismissed with costs, the Defendant as decree-holder applied for execution of the decree for costs throughout that litigation. The Plaintiff as judgment-debtor entered appearance and objected to the execution on the ground that no notice, under sec. 248 of the Civil Procedure Code of 1882, had been served and that the whole of the decretal amount had been already deposited in Court. The execution Court overruled the first objection on the ground that the order of this Court, made on the 2nd March 1906, was conditional and could

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be performed within six weeks of the arrival of the records in the Court below, that is, within six weeks from the 17th June 1906, so that there could be no decree for the Plaintiff to execute till the 29th July 1906, that is, within one year of the date of application for execution. As regards the objection on the merits, the Court dicrected an enquiry, and the pleader for the Plaintiff, whose services were specially retained to make the investigation, satisfied the Court that the deposit had been made. The result was that, on the copy of the challan produced in Court for the first time, on the 3rd August 1907, the Court held that the deposit had been made and dismissed the application for execution. Meanwhile, however, events had happened which have culminated in the present litigation. Immediately on the presentation of the application for executions, the Court, at the intance of the Defendant, as decree-holder, attached 14 bighas of land, on which there was standing crop of indigo. The attachment apparently continued from the 6th June 1907 to the 5th August 1907, and the judgment-debtor, the present Plaintiff, does not appear to have intimated to the Court that the crop was liable to deterioration. On the 26th September 1907, the Plaintiff commenced the present action for recovery of Rs. 600 from the Defendant as damages for malicious abuse of legal process. His case was that the Defendant maliciously took out execution for recovery of costs, which, he knew, had already been deposited in Court; that the wrongful attachment, in the course of the execution proceedings, had resulted in the destruction of his indigo crop, and had also affected his credit. The Defendant repudiated the allegation of malice and contended that he acted in good faith, that there was reasonable and probable cause for the attachment, and that the damage of the crops alleged by the Plaintiff was not the approximate result of the attachment effected at his instance. The Court of first instance found in favour of the Defendant and dismissed the suit. Upon appeal the District Judge has decreed the claim. He has held that the attachment was malicious and unlawful, and he has given the Plaintiff a decree for Rs. 290, namely, Rs. 179 as value of indigo lost, Rs. 53 as litigation expenses, and Rs. 58 as exemplary damages. The Defendant has now appealed to this Court, and, on his behalf, the decision of the District Judge has been assailed substantially on three grounds; namely, *first*, that upon the admitted facts, the suit is not maintainable; *secondly*, that, upon the facts found by the District Judge there was reasonable and probable cause for the attachment effected by him, and, *thirdly*, that the damages have been awarded on principles erroneous in law.

In support of the first objection taken by the Appellant, it has been contended that it is not an actionable wrong to institute civil proceedings without reasonable and probable cause even if malice be proved, for in contemplation of law, the Defendant, who is unreasonably sued, is sufficiently indemnified by a judgment in his favour which gives him his costs against the Plaintiff. In support of this proposition, reference has been made to the exposition of the law by Bowen, L. J., in *Quartz Hill* v. *Eyre* (1), where that learned Judge stated that, in the present day and according to our present law, the bringing of an ordinary action, however malicious and however great the want of reasonable and probable cause,

(1) 11 Q. B. D. 674 at p. 690 (1883).

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will not support a subsequent action for malicious prosecution. It is not necessary for us to examine whether this statement embodies an inflexible rule of law, or whether there are not well recognised exceptions to it. There is high authority for the proposition that it is an actionable wrong maliciously and without reasonable and probable cause to issue execution against the property of a judgment-debtor, for example, to seize his goods under a writ of *fieri facias* after the judgment debt has been paid; this is not a trespass, it has been said, for the judgment still stands and will support the writ of execution, but it is an actionable abuse of judicial process [*Churchill* v. *Siggers* (2)]. But whether this is trespass, as indicated in *Clissold* v. *Cratchley* (3), or malicious abuse of judicial process it is actionable. A similar view was adopted in *Raj Chandra Roy* v. *Shama Soondari* (4), and is supported by the decision of their Lordships of the Judicial Committee in *Mudhun Mohun Doss* v. *Gokul Doss* (5). Sir James Colville observed in the case last mentioned that, if it was important in India to check any tendency to resist the execution of legal process, it was hardly less important to maintain the principle that they who misused legal process were responsible for the consequences of that misuse. The broad proposition formulated by the learned Vakil for the Appellant, that the suit as framed is not maintainable, cannot consequently be supported, and the statement that the institution of an ordinary civil action however unfounded, vexatious and malicious it may be, is not a good cause of action must be qualified when there has been arrest of person or seizure of property. We may add that sec. 491 of the Civil Procedure Code of 1882 expressly recognises such right of action, for it authorises a Court which has issued an order for arrest or attachment in the course of a suit, to award compensation not exceeding Rs. 1,000, if it should appear that such arrest or attachment was applied for on insufficient grounds; it then provides that the Court shall not award a larger amount than it would do in a suit for compensation and that an order under the section shall bar a suit for compensation in respect of such arrest or attachment. Sec. 497 embodies similar provisions with regard to compensation for the issue of an injunction on insufficient grounds. In fact, it is not difficult to trace decisions in the reports in which this principle has been directly or indirectly recognised. [*Doyal* v. *Dwarka Nath* (6), *Huro Sooonduree* v. *Bungshee Mohun* (7), *Mahomed Rezaooddin* v. *Hossain Buksh* (8), *Gobardhan* v. *Banee Chandra* (9), *Wilson* v. *Kanhya Sahoo* (10), *Nund Kumar* v. *Gour Sankar* (11) and *Dharma Narain* v. *Sreemutty Dossee* (12)]. The learned Vakil for the Respondent also relied upon Art. 29 of the Second Schedule of the Indian Limitation Act, 1877, to show that the Legislature contemplated suits for compensation for wrongful seizure of immoveable property under legal process. It is not necessary, however, to place any reliance upon the provisions of the Limitation Act, because, as has been pointed out by their Lordships of the Judicial Committee, nothing in

(2) 3 E. and B. 929, 937 (1854).
(3) [1910] 2 K. B. 244.
(4) I. L. R. 4 Cal. 583 (1879).
(5) 10 M. I. A. 563 (1866).

(6) 8 W. R. 88 (1867).
(7) 3 W. Mis. 28 (1865).
(8) 6 W. R. Mis. 24 (1866).
(9) 21 W. R. 375 (1874).
(10) 11 W. R. 143 (1869).
(11) 13 W. R. 305 (1870).
(12) 18 W. R. 440 (1872).

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the Limitation Act can give rise to a cause of action unless a right to sue exists independently of those provisions. [*Harinath* v. *Mothoor Mohan* (13) and *Khunni Lal* v. *Govind Krishna* (14)]. The question next arises what is the precise nature of the right of action of the Plaintiff in the case before us. In our opinion, the Plaintiff, if entitled to damages, can succeed, not on the ground of malicious abuse of legal process, but on the ground that the Defendant has committed an act of trespass. As we have already pointed out, the order of this Court of the 2nd March 1906 was to the effect that, unless the Plaintiff paid to the Defendant the costs of that litigation within six weeks of the arrival of the record in the Subordinate Court, the appeal would stand dismissed with costs. It has not been suggested and we do not think it could reasonably be suggested that this order implied that the money should be handed over personally to the Defendant: payment into Court to the credit of the Defendant would, in our opinion, be sufficient compliance with the direction of this Court. Such payment was, as has now been ascertained, actually made within the prescribed time. Consequently the conditional order never ripended into a decree in favour of the Defendant; in other words, the essence of the matter is that the Defendant had not, in the eye of law, any decree for costs against the Plaintiff which he was competent to execute. We are not now concerned with the question whether there was not reasonable excuse for the conduct of the Defendant. The fact remains that the Defendant obtained an attachment of the property of the Plaintiff under the erroneous impression that he had a decree capable of execution; the Defendant is, therefore, liable to be sued by the Plaintiffs for damages in trespass. This view is amply supported by the decision of the Court of Appeal in *Clissold* v. *Cratchley* (3). In that case, execution was taken out by a solicitor for costs payable under an order of Court; the debt had, in fact, been paid at his office to a clerk, who had authority to receive it, on the very date that the writ was issued but about three hours before. As soon as execution was levied, the judgment-debtor apprised the solicitor that the debt had been paid, and execution was forthwith withdrawn. In an action against the solicitor and his client to recover damages for improper levy of execution, it was held by the Court of Appeal that, although neither the solicitor nor his client had sued out the writ maliciously they were liable in trespass. Fletcher Moulton, L. J., observed that a writ of execution upon a satisfied judgment was null and void. Farwell, L. J., added that no writ of execution can lawfully issue on a judgment that has been paid or satisfied before issue of the writ, because there is no judgment left on which to base the writ, so that the writ is void *ab initio* and trespass will lie against the satisfied creditor and his solicitor who have put the sheriff in motion. Vaughan Williams, L. J., relied upon a passage from Bullen and Leake (Precedents of Pleading, 3rd Ed., p. 353), where it is stated that, if the party arrested can shew that the judgment was satisfied by payment or otherwise before the arrest, he may then maintain an action; the arrest in such a case would in general support an action of trespass. It is fairly clear that the liability is for

(13) L. R. 20 I. A. 188 (1893).
(14) 13 C. L. J. 575 at p. 583 (1911).

(3) [1910] 2 K. B. 244.

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trespass, not malicious abuse of process; there is no abuse of process lawfully issued but the institution of proceedings without legal authority in its inception. (Kinkead, Commentaries on Torts, Vol. I, sec. 233; Street, Foundations of Legal Liability, Vol. I, p. 334). The substance of the matter is that, if a litigant executes any form of legal process which is invalid for want of jurisdiction, irregularity, or any other reason, and in so doing he commits any act in the nature of trespass to person or property, he is liable therefor in an action of trespass; it is not necessary to prove any malice or want of reasonable or probable cause. This is an obvious corollary of the elementary principle that mistake, however honest or inevitable, is no defence for him who intentionally interferes with the person or property of another; the fundamental proposition cannot be disputed that in a case of this description a supposed justification is no justification at all. A litigant who effects an arrest or seizes property must justify the trespass by pleading a valid execution of legal process, and any irregularity or error which has the effect of making the process totally invalid will deprive him of all justification [*Painter* v. *Liverpool Oil Gas Light Company* (15) and *Brooks* v. *Hodgkinson* (16)]. The learned vakil for the Appellant has, however, laid considerable stress upon the circumstance that in the subsequent suit for rent when objection was taken that the action could not be maintained as the Plaintiff had failed to carry out the order of this Court, the Plaintiff failed to prove that the payment had been made as alleged by him. The learned Vakil has contended that, as execution was taken out after this decision, the Defendant is protected. We are unable to accept this contention as well-founded. It may be conceded that no action will lie against any person for issuing execution or otherwise acting in pursuance of a valid judgment or order of a Court of Justice, even though it is erroneous and even though it is afterwards reversed, or set aside for error. The principle that a valid judgment, however erroneous in law or fact, is a sufficient justification for any act done in pursuance of it was recognised in the cases of *Williams* v. *Smith* (17) and *Smith* v. *Sydney* (18), but it has no application to the circumstances of the case before us. Here the writ of attachment was not issued on the faith of the decision in the second rent suit which was subsequently set aside by this Court as the ultimate Court of Appeal. The Defendant took out the writ of attachment on the assumption that the order as to payment of costs had not been carried out and there was thus a decree in his favour capable of execution against the Plaintiff. The execution also was based on this theory which had been previously set up successfully to defeat the second rent suit. We are, therefore, of opinion that the Defendant cannot rightly contend that as he relied upon the judgment of a competent Court and as he acted upon the faith of it, however erroneous the judgment might be, he ought to be protected. We must consequently hold that upon the admitted facts, the suit is maintainable, and that the Defendant is liable for damages for trespass. The first contention of the Appellant must, therefore, be negatived.

In so far as the second contention of

(15) 3 A. & E. 433; 42 R. R. 423 (1836).
(16) 4 H. & N. 712 (1859).
(17) 14 C. B. N. S. 596 (1863).
(18) L. R. 5 Q. B. 203 (1870).

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the Appellant is concerned, namely, that upon the facts found by the District Judge, there was reasonable and probable cause for the attachment effected at his instance, it is not necessary for us to examine it in detail, in the view we take of the scope of the suit and the nature of the liability of the Defendant. As we have already explained the claim cannot be treated as one for damages for malicious abuse of judicial process: it is essentially a suit for damages for trespass. Consequently, the presence or absence of reasonable and probable cause is immaterial. We may add, however, that, upon the facts as already set out, we are not prepared to agree in the conclusion of the learned District Judge: nor are we prepared to accept the contention of the Respondent that the question is one of fact with which this Court is not competent to deal in second appeal. Whether there was reasonable and probable cause is a mixed question of fact and law: we are bound to accept the facts as found by the Court of Appeal below, but we are entitled to examine whether the inference drawn therefrom is legitimate [*Panton* v. *Williams* (19), *Lister* v. *Perryman* (20), *Hailes* v. *Marks* (21), *Shama Bibee* v. *Chairman of Baranagore Municipality* (22) and *Ram Gopal* v. *Shamskhaton* (23)]. We need not consider this point in further detail, however, for the reasons stated.

In so far as the third ground urged by the Appellant is concerned it has been argued that the damages have been assessed upon entirely erroneous principles. The learned District Judge has assessed damages under three heads, namely, *first*, the value of the indigo crop which deteriorated and ultimately became valueless: *secondly*, the litigation expenses incurred by the Plaintiff in the execution case, and, *thirdly*, exemplary damages, as the conduct of the Defendant was inexcusable. In so far as the first of these elements is concerned, we are of opinion that the District Judge was clearly in error. We shall assume that, on the authority of the decision in *Ram Kumar Ghose* v. *Gobind Nath Sandyal* (24), the presumption is that when the land was attached, the standing crop also was attached. It may further be assumed that, as laid down in the cases of *Chedalal* v. *Mulchand* (25), *Madayya* v. *Yenkata* (26), *Gangaprosad* v. *Narain* (27) and *Sadu* v. *Sambhu* (28), standing crop is immoveable property, though this view may be difficult to reconcile with *Surat Lal* v. *Umar Hazi* (29), *Mangun Jha* v. *Dulin Golab* (30) and *Abdullah* v. *Asrafali* (31). Yet the question remains whether the attachment was the proximate cause of the loss of the crop. As soon as the attachment was effected, the Plaintiff might and ought to have intimated to the Court that if the decree-holder intended to attach, not merely the land, but also the crop, steps had to be taken for the protection of the perishable property. If such a representation had been made, the Court might either have permitted the Plaintiff to cut the crop on such terms as to security as might be reasonable or

(19) 2 Q. B. 169; 57 R. R. 631 (1841).
(20) L. R. 4 H. L. 521 (1870).
(21) 7 H. & N. 56 (1861).
(22) 12 C. L. J. 410 (1910).
(23) I L. R 20 All. 93; s. c, L. R. 19 I. A. 228 (1892).

(24) 12 W. R 391 (1869).
(25) I. L. R. 14 All. 30 (1891).
(26) I. L. R. 11 Mad. 193 (1887).
(27) I. L. R. 15 All. 394 (1893).
(28) I. L. R 6 Bom. 592 (1882).
(29) I. L. R. 22 Cal. 877 (1895).
(30) I. L. R. 25 Cal. 693 (1898).
(31) 7 C. L. J. 152 (1907).

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might have appointed a Receiver. The conduct of the Plaintiff, on the other hand, is inexplicable. He never asked for the direction of the Court and did not make any the slightest effort for the protection of the property. Under these circumstances, we are unable to hold that the loss which may have resulted to the Plaintiff was the inevitable consequence of the attachment effected by the Defendant. In so far as the second element is concerned, the case is equally clear. When the Defendant applied for execution and the Plaintiff objected that the money had been deposited in due time, he had to employ a pleader to search the records to ascertain when the deposit had been made by his officer. It is inconceivable upon what principle the Plaintiff can claim to recover from the Defendant costs so incurred. In so far as the third element is concerned, we need only say that this is mainfestly not a case in which exemplary damages can be legitimately claimed. Apart from the question of legal liability, we are unable to hold that the Defendant is in any way to blame for the events that have happened. The Plaintiff sued the Defendant for rent. After the litigation had been carried on to this Court, he found it necessary in his own interest to withdraw from the suit. He obtained what must be deemed an indulgence upon certain terms as to payment of costs. He might have paid the costs to the Defendant personally; in fact upon a strict and literal interpretation of the language of the order, this ought to have been done. Instead of adopting this the obvious course, he deposits the money in Court: but he does not furnish a copy of the challan to the Defendant to enable him to withdraw the money. He seems to have considered that his duty ended as soon as the deposit was made and that it was immaterial whether the Defendant could draw out the money except after considerable search and trouble. By an unfortunate error on the part of the Court officer, an inaccurate entry is made in the deposit register. When in the subsequent rent suit the Defendant asserts that the costs have not been deposited, the Plaintiff is unable to prove that he has made the deposit, and it is not till a special enquiry has been directed by this Court, that the Plaintiff is able to establish the fact, after as he admits, an expensive search by his pleader. Under these circumstances, it is difficult to appreciate how any blame can be thrown upon the Defendant for the course which he adopted, namely, to apply for execution to realise the costs due to him. No doubt, the Defendant, as we have already explained, is guilty of trespass. But the case is manifestly not one for exemplary damages. The assessment made by the District Judge cannot, therefore, be supported. The Plaintiff is entitled only to nominal damages which as Lord Halsbury puts it in *Mediana* v. *Comet* (32) is not necessarily small damages: nominal damages are allowed in recognition of the fact that there is an infraction of a legal right which though it gives the Plaintiff no right to any real damages at all, yet gives him a right to the verdict or judgment because his legal right has been infringed: in other words, as Holt, C. J., observes in *Ashby* v. *White* (33), an action lies for trespass, though it does no damage, for it is an invasion of the property of the Plaintiff and the other has no right to come there. We, therefore, assess the damages at

(32) [1900] A. C 113 at p. 116.
(33) Lord Raymond 938 at p. 955.

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Rs. 75. But as the claim was grossly exaggerated and based on entirely erroneous grounds, the Appellant must have the costs of this appeal, which we find on assessment amount to an aggregate sum of Rs. 75. Consequently although the Plaintiff obtains a decree for damages, he will realise nothing from the Defendant. The parties will pay their own costs in both the Courts below.

The result, therefore, is that this appeal is allowed, and the decree of the District Judge discharged. The Plaintiff is declared entitled to damages which are set off against the costs payable to the Defendant. There will, therefore, be no decree in his favour capable of execution.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 955 OF 1911.

HOLMWOOD, J. SHARFUDDIN, J. 1911, 21, November.	SHYAMA CHURN MAJUMDAR and others, Accused, Petitioners, *v.* THE KING-EMPEROR, Opposite Party.

Indian Penal Code (Act XLV of 1860), secs. 225, 353 and 147—Arrest on a warrant allowing bail without intimating that bail has been allowed, legality of—Lawful custody—Rescue from custody.

On a warrant which provided for bail a constable arrested one S without giving him intimation that bail had been allowed; S was then rescued by a number of persons, who assaulted the constable.

Held—*That the arrest of S was illegal, as before actually making the arrest the constable should certainly have said, "Can you give the required bail?"*

That as S was not in lawful custody, his rescue did not constitute any offence and the persons who rescued S had the right of private defence and as they, under the circumstances of the case, had not exceeded that right, they could not be held guilty of any offence.

This was a Rule granted on the 7th of August 1911 against an order of Babu Amrita Lal Gupta, Deputy Magistrate of Magurah, dated the 23rd of June 1911, convicting Petitioner No. 1, under secs. 225B and 353, I. P. C., and sentencing him to rigorous imprisonment for three months under the former section and to three months' rigorous imprisonment under the latter section (to run consecutively), and sentencing the rest to rigorous imprisonment for one year each, which order was, on appeal, affirmed by Mr. H. C. Liddell, Sessions Judge of Jessore, on the 28th of July 1911.

The facts material to the report were briefly as follows:—

A warrant had been issued on 16th January 1911 for the arrest of Shyama Charan Majumdar in connection with a case under secs. 147, 325 and 379, I. P. C., and on 2nd March 1911 in the early morning a constable, Sital Sukul, was deputed by the Sub-Inspector of Police along with numerous chowkidars and others to go to Shyama Charan's house, surround it and arrest him: the house was surrounded about dawn and Shyama Charan was found at the south of the house where he was arrested by Sital Sukul, on which Shyama Charan raised a cry and some persons together with the son of Shyama Charan came and dragged Syama Charan with the constable; the constable was beaten on the back with a lathi and Shyama Charan was rescued. It appears that the warrant for the arrest of Shyama Charan had allowed bail but the constable made the arrest without giving any intimation that bail had been allowed.

On these allegations the Petitioners were prosecuted on charges under secs. 147, 225 and 353, I. P. C., and were convicted and sentenced to various terms of imprisonment. On appeal the conviction and sentences were upheld.

Mr. K. N. Chaudhuri and *Babu Debendra Nath Bagchi* for the Petitioners.

The JUDGMENT OF THE COURT was as follows:—

We are opinion that this Rule must be made absolute on the first three grounds taken together which practically amounts to this, that a small bail was entered upon the warrant and that the constable did not give the slightest intimation to the arrested person of the fact that bail had been allowed. On the contrary he appears to have said that it was no use rescuing the prisoner because the daroga was coming presently. The warrant had been made over by the daroga for execution and it was the constable's bounden duty under the law to at once state that bail would be taken. Before actually making the arrest he should certainly have said, "Can you give the required bail?" We are of opinion that the arrest was illegal.

Now comes the question whether the accused persons were justified by the law of private defence in committing a common assault upon the constable. The medical evidence clearly shows that nothing but simple hurt was caused. The conviction under sec. 147 must clearly go, inasmuch as the accused was not in lawful custody. For the same reason the conditions under secs. 225 and 353 must go; and having regard to the medical evidence we cannot find that there was any offence committed by exceeding the right of private defence.

The Rule, therefore, must be made absolute and the Petitioners discharged from their bail.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1524 OF 1911.

HOLMWOOD, J.
SHARFUDDIN, J.
1912,
17, January.

NRISINGHA DEB CHATTERJEE and anr., Petitioners,
v.
THE KING-EMPEROR, Opposite Party.

Bail bond—Bail, prisoner on, committing suicide—Discharge of sureties.

When a person who has been let out on bail commits suicide, the sureties are discharged from their obligation to produce him.

This was a Rule issued on the 4th of December 1911 against an order of Mr. J. Vas, District Magistrate of Maldah, dated the 19th of August 1911, directing forfeiture of Rs. 5 out of the money stipulated in the surety bond, an application for a revision of which order was dismissed by Mr. A. Majid, Sessions Judge of Rajshahye, on the 19th of September 1911.

The Petitioners stood sureties for the production of one Satya Narain Singh who was sentenced to rigorous imprisonment for 2 years under sec. 377, I. P. C., by the Deputy Magistrate of Maldah, and was released on bail pending the disposal of an appeal preferred by him before the Sessions Judge.

The said appeal was ultimately dismissed and the Petitioners were called upon to produce Satya Narain.

The Petitioners were unable to produce him before the Magistrate as he had committed suicide by hanging before the Petitioners came to know the result of the appeal.

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The Petitioners stated all these facts before the District Magistrate who nevertheless directed that the Petitioners should forfeit Rs. 5 each in respect of their bail bonds.

The Petitioners thereupon obtained this Rule.

Babu Akhil Bandhu Guha for the Petitioners.

The JUDGMENT OF THE COURT was as follows :—

This Rule must clearly be made absolute on the ground on which it was issued. It is absurd to contend that when a person on bail commits suicide the sureties are liable for default in his appearance. The proposition only needs to be stated to expose its fallacy. The order of the lower Court will be discharged and the money if paid will be refunded.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 649 OF 1911.

CASPERSZ, J.
SHARFUDDIN, J.
1911.
12, July.

UTTAM CHAND, Petitioner,
v.
THE KING-EMPROR, Opposite Party.

Excise Act (V, B. C. of 1909), secs. 46, 56—Servant leaving shop and trying to export ganja—*Master if may be punished.*

A servant employed in the Petitioner's ganja *shop left the shop and was found travelling with 2½ seers of* ganja *from the District of Arrah to Bindhyachal and was convicted under sec. 46 of the Excise Act:*

Held—*That the Petitioner could not be punished for the servant's act under sec. 56 of the Act when it did not appear that the servant was acting for the Petitioner's benefit and within the scope of his employment.*

This was a Rule granted on the 5th June 1911 against an order of S. M. Abul Hayat, Deputy Magistrate of Arrah, dated the 29th of April 1911, convicting the Petitioner under sec. 46 read with sec. 56 of the Excise Act and sentencing him to pay a fine of Rs. 200.

The facts of the case will sufficiently appear from the judgment.

Mr. Caspersz and *Babu Surendra Kumar Bose* for the Petitioner.

Mr. Sultan Ahmad for the Crown.

THE JUDGMENT OF THE COURT was as follows :—

The Petitioner, Uttam Chand, has an extensive business in excise shops of which he holds a considerable number in nine districts of this province including a *ganja* shop at Koelwar in the District of Arrah. His Koelwar servant, Lakhi Chand, was convicted, under sec. 46 of the Bengal Excise Act (V of 1909), for being in possession of two and a half seers of *ganja* which he was attempting to export from Arrah District to Bindhyachal. Lakhi Chand confessed his guilt.

The question, now, is whether the conviction of the Petitioner, the master of Lakhi Chand, can be supported on the language of sec. 56 of the Act. The section is as follows :—"When any offence punishable under sec. 46 is committed by any person in the employ and acting on behalf of the holder of a license granted under this Act, such holder shall also be punishable as if he himself had committed the offence unless he establishes that all due and reasonable precautions were exercised by him to prevent the commission of such offence."

In the opinion of the convicting Magistrate, the Petitioner had so many servants and so much business to attend to that it was due to laxity of supervision on his part that his servant, Lakhi Chand, was

UTTAM CHAND v. THE KING-EMPEROR.

able to leave his Koelwar shop and commence travelling to Bindhyachal with 2½ seers of *ganja*.

The substantial grounds argued on this Rule are two in number. With regard to the fourth ground specified in the petition, there is no finding, in the judgment of the convicting Magistrate, that the 2½ seers of *ganja* belonged to the Petitioner, that is, came from his Koelwar shop. The Magistrate says :—"It is extremely probable that he (Lakhi Chand) took the *gañja* from the Koelwar excise shop of the the accused." That, however, is not a sufficient finding on which to implicate the master of Lakhi Chand. The other ground—the 3rd in the pe ition—is that Lakhi Chand was acting outside the scope of his employment and was not acting on behalf of the Petitioner when he committed the offence under sec. 46 (*a*) of the Excise Act.

Sec. 46 enumerates various offences, and we think that if a master is to be held liable for all the acts of his servants, his liability must extend to all parts of sec. 46. As we put it to the learned Deputy Legal Remembrancer, who appeared to show cause, "If his servant Lakhi Chand had cultivated *ganja* in the garden of his own private residence would the master be liable for that act?" The only possible answer to this question is in the negative.

The language of sec. 56 is very clear and does not, in any way, conflict with the general principle alluded to in *Suffer Ally Khan* v. *Golam Hyder Khan* (1), namely, that a master is not criminally responsible for the wrongful act of a servant unless he can be shown to have expressly authorised it. That case was one of mischief, but the principle is of extensive authority. Under sec. 56, the prosecution must show that Lakhi Chand was not only in the employ of the Petitioner, but also acted on his behalf in removing the *ganja* from his shop. Lakhi Chand was, presumably, committing a criminal offence. His business was to remain at the Koelwar shop, and there to conduct sales for the Petitioner; but when he travelled beyond the scope of that business, it is not possible to implicate the Petitioner in his acts which were not done for the benefit of the Petitioner but rather for Lakhi Chand's private purposes. The expression "on behalf of" connotes some benefit to the person on whose behalf another person may act.

Various authorities have been cited to us on constructions of the Arms Act, the Opium Act, and the Bengal Motor Car and Cycle Act. We have examined them all but we have not derived such assistance from them as would warrant a detailed discussion. There is one case, to which we may allude, namely, *Emperor* v. *Haji Shaik Mahomed Shustari* (2), which was cited to us by the learned Deputy Legal Remembrancer; but it does not carry his arguments any further than the principle we have already mentioned. No doubt, when a servant does anything within the scope of his employment for that purpose, his action will be binding on the master, and the master will be criminally liable for any wrongful act of the servant. In the particular case cited, which was under the Indian Emigration Act (XXI of 1883), the master was deemed to be so liable.

In these circumstances, we think the conviction cannot be supported. It is therefore set aside and the Rule made absolute. Any fine paid or levied, will be refunded.

Rule made absolute.

(1) 6 W. R. Cr. 60 (1876).

(2) I. L. R 32 Bom. 10 (1907).

THE

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Contents.

NOTES.

The constitution of Benches and the distribution of business amongst them from Friday the 19th April 1912 has been as follows :—

PATNA GROUP AND THE PRIVY COUNCIL DEPARTMENT.—The Hon'ble the Chief Justice, and the Hon'ble Mr. Justice Chapman.

PRESIDENCY GROUP.—The Hon'ble Mr. Justice Brett and the Hon'ble Mr. Justice Sharfuddin.

RAJSHAHI GROUP.—The Hon'ble Mr. Justice Stephen and the Hon'ble Mr. Justice Richardson.

BURDWAN GROUP.—The Hon'ble Mr. Justice Mookerjee and the Hon'ble Mr. Justice Beachcroft.

CRIMINAL BUSINESS.—The Hon'ble Mr. Justice Holmwood and the Hon'ble Mr. Justice Imam.

REGULAR APPEALS OF ALL THE GROUPS.—The Hon'ble Mr. Justice Chitty and the Hon'ble Mr. Justice Teunon.

SPECIAL APPEALS OF ALL THE GROUPS—The Hon'ble Mr. Justice Carnduff and the Hon'ble Mr. Justice N. R. Chatterjea.

ORIGINAL SIDE.—As before.

REUTER WIRES SOME OF THE PROVISIONS OF THE new India Bill which was introduced into Parliament on Thursday last. The Bill is described as one "to make such amendments in the laws relating to the Government of India as are consequential on the appointment of a separate Governor of Fort William in Bengal and other administrative changes in the local Government of India." The Bill makes an amendment of the schedule of the Indian Councils Act of 1909 by which a maximum of fifty members each is provided for the Legislative Councils of Bengal and Behar. Sec. 4 of the Bill renews the powers of the Governor-General to redistribute territories and extends this power to territories under his immediate authority and management as well as to those of Presidencies and Lieutenant-Governorships. By another provision the Advocate-General of Bengal ceases to be, as in practice he has for some time ceased to be an ex-officio member of the Bengal Legislative Council.

FROM THIS BRIEF SUMMARY IT IS IMPOSSIBLE TO offer much comment on the Bill. In our article on the subject of the legality of the recent redistributions we pointed out that the creation of the Province of Behar by proclamation was an act of doubtful legality and that the abolition of the Council of Eastern Bengal and Assam might possibly be *ultra vires* of the Government of India and suggested a validation of these measures by the Parliamentary Bill. The Bill now introduced evidently does not do that but by an amendment of the Indian Councils Act of 1909 recognising the new Province of Behar and eliminating the Council of Eastern Bengal indirectly seeks to give Parliamentary sanction to the two acts of doubtful validity.

THE EXTENSION OF THE POWER OF THE GOVERNOR-General to make redistribution is evidently meant to remove any similar causes of uncertainty for the future. We are not at all sure that this new extension of the powers of the Governor-General is at all desirable or necessary. In the redistribution of the territories between the provinces it has now been definitely recognised that the wishes of the people affected by the transfer

should be considered. If that is so, we should think that the absolutely uncontrolled power of the Governor-General should rather be restricted than enlarged. With the partition of Bengal still fresh in our memory we cannot look upon the further extension of the powers of the Governor-General in this direction without serious apprehensions. There is absolutely no reason why the Legislative Council should not be consulted in carrying out changes in boundaries between the provinces, specially when it has been shown by recent experiences that a mere redistribution of boundaries may be a source of really serious grievances amongst the people. We must reserve further remarks on the subject till we have a fuller account of the provisions of the Bill.

THE JUDGMENT OF MR. JUSTICE FLETCHER IN *Cohen* v. *Wilkie*, reported at p. 534 of the last number, is of importance as pointing out the difference between the law relating to agreements in restraint of trade as obtaining in England and that embodied in sec. 27 of the Indian Contract Act. It is not necessary for our present purpose to take special note of the change in the current of legal opinion effected by the decision of the House of Lords in *Nordenfelt* v. *Maxim Nordenfelt Co.*, [1894] A. C. 535, which virtually abolished the somewhat arbitrary test laid down in previous decisions as to when such agreements should be pronounced unreasonable and on that ground unenforceable. Suffice it to say that English law has, both before and after this case, required that an agreement restraining a person from the exercise of "a lawful profession, trade or business of any kind" (to quote the language of the Indian Statute) to be unenforceable must be shown to have been unreasonable.

SEC. 27 OF THE INDIAN CONTRACT ACT HOWEVER declares all such agreements (subject to certain exceptions in favour of co-partners and sellers of the good-will of a business) to be void and inoperative. It is idle to speculate on the reasons which led the Indian Legislature to make this departure from legal ideas prevailing in England. It may be, as suggested by Mr. Justice Kindersleys in *Oakes & Co.* v. *Jackson*, I. L. R. 1 Mad. 134, that "trade in India is in its infancy and the Legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained" or, what is more likely, this may be (as has been suggested by Sir Frederick Pollock) one of the many instances of careless drafting which are by no means uncommon in the Indian Contract Act.

BE THAT AS IT MAY AND QUITE APART FROM THE provisions of sec. 27 of the Contract Act, the decision of Fletcher, J., seems to be fully justified by the facts of the case. The particular clause in the agreement in the circumstance of the case could not reasonably be enforced by injunction even under English law. Mr. Cohen had ceased to employ Mr. Allan Wilkie and his option under the contract to employ Mr. Wilkie for a further period had not been exercised. Even under English law as recently interpreted by Lord Justice Vaughan Williams in the *Carl Rosa Opera Co. Ld.* v. *Britt*, noted by us at p. 97 (xcvii) in this volume, Mr. Cohen could not prevent Mr. Wilkie by injunction from performing elsewhere when he himself did not want or care to employ him. It ought to be noted that in the *Carl Rosa* case the Plaintiffs who had the option, gave notice to Defendant to renew and not to perform elsewhere but Defendant also gave notice to leave. The Plaintiffs thereupon filled up his place, which was interpreted by His Lordship as an acceptance by the Plaintiffs of the repudiation by Defendant of the contract and injunction was refused. The facts of this case are much stronger than *Cohen's* case and we fail to comprehend how after failure on the part of Cohen to exercise the option there could be any foundation for a case for injunction.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Ex parte Robinson & others.* Before LORDS JUSTICES WILLIAMS, FARWELL AND KENNEDY. 29th February 1912.

Bias in a trial Judge, nature of, for a writ of prohibition or mandamus *actual bias in fact, not essential.*

This was a petition by way of appeal. The facts were as follows.

The question of the renewal of an inn was referred to the Justices of Halifax. They refused it and one of the Justices intimated that it was done by six votes to five. Subsequently the said Justice (R.) published in a newspaper the names of the Justices and the manner each voted. Another Justice W. thereupon wrote to the newspaper:—

"Allow me to protest most emphatically against the action of Mr. R. in placing my name amongst these who voted for the retaining of the licence of the Malt Shovel Hotel. I should be nothing less than a traitor, considering the position I hold, if I had voted as he states in his letter. I did not vote for its retaining, but for its refusal. I am not ashamed of the publicity he has given to my name if he had placed it in its proper place."

The inn-keepers consequently asked for an order

nisi calling upon the Justices to show cause why they should not be prohibited from proceeding further with the matter and as to why a writ of *mandamus* should not issue against them to hear the application for renewal according to law. Justice W. explained his protest by stating in an affidavit.

"In writing the letter I had in view solely my position as a justice of the peace for the said borough, and my duty as I conceived it to be to act when sitting as such Justice in accordance with the evidence given before me."

It appeared that Justice W. had been for 21 years the Secretary of the Unity Tent Branch of the Independent Order of Rechabites, as a member of which society he had signed the following declaration :—"I hereby declare that I will abstain from all intoxicating liquors. . . . . I will not engage in the traffic of them, but in all possible ways will discountenance the use, manufacture, and sale of them."

The Court below dismissed the application which gave rise to the present petition.

The Court (LORD JUSTICE KENNEDY dissenting) allowed the appeal, and granted the rule. In the course of his judgment LORD JUSTICE VAUGHAN WILLIAMS said :—

It was not suggested that the mere fact that a Justice was a Rechabite or a member of some total abstinence society rendered him unfit to act as Magistrate in those cases raising the question of renewal or non-renewal of a licence.

He could not doubt that the words in Mr. W.'s letter—meant "considering the position I hold" "as a lifelong member of the Rechabite Society." The suggestion put forward here was that Mr. W. in his letter was expressing a view of his obligations to the society to which he belonged which rendered him unfit to take part as a Justice in these licensing cases because of the view of his obligations to that society which he therein expressed, and that the letter meant that if he voted in favour of a renewal he would be a traitor to that society. It was suggested in Mr. W.'s affidavit that that was an impossible view to take. He (the Lord Justice) did not suggest that Mr. W. was consciously misstating his view; but from what he knew of the Rechabites and of total abstainers he thought they would be the first to admit that, if persons took strong views, not only on temperance questions, but also on the burning questions of the day, they were very likely to deceive themselves.

Of course, he did not attribute any wilful misstatement to Mr. W. but what he really suggested was that the five Magistrates who were in the minority were all traitors. He could not have meant that, and if he did not mean that, what did he mean? Obviously he was referring to his position as Secretary of the Rechabites' Society, and Mr. Elliot had admitted very frankly that, if that were so, it would involve holding that Mr. W. was so affected with a leaning as to what he ought to do in every case as to render bias on his part likely.

It was not necessary to prove bias in fact. If there was such a probability the Court ought not to inquire whether there was bias in fact or whether there was not plenty of evidence to support the conclusion at which he had arrived. As a matter of fact there was plenty of evidence here which had been read to the Court. The question, however, was not whether there was bias in fact, but whether the circumstances were such as to make bias so probable that the Justice was placed in such a position that he ought not to take part in the case.

LORD JUSTICE KENNEDY who dissented thought that the words used in the letter meant that, sitting as a Magistrate and having regard to the evidence he (Mr. W.) would have been nothing less than a traitor to his oath as a Magistrate if he had acted otherwise.

Messrs. Elliot, K. C., and Williamson showed cause.

Messrs. Danckwerts, K. C., and Compston in support.

B. D. *Rule granted.*

COURT OF APPEAL.—*Lever Brothers, "Ld." v. Masters' Equitable Pioneer Society, "Ld."* Before the MASTER OF THE ROLLS AND LORDS JUSTICES MOULTON AND BUCKLEY. 2nd March 1912.

Costs, discretion as to allowing.

This was an appeal from a decision of Joyce, J., and raised the question of allowing costs in an action. The Appellants sued for injunction to restrain the Defendants from passing off soaps not manufactured by the Plaintiff under certain names. The Court below ordered that having regard to the undertaking given by the Defendants and accepted by the Plaintiff no injunction was necessary, and it passed no order as to costs. Hence this appeal which was dismissed. In the course of his judgment the MASTER OF THE ROLLS said :—

It was a case in which costs were in the discretion of the Judge, and there was no appeal without leave, but in the present case leave had been given. What was the duty of the Court of Appeal where leave to appeal had been given?

It was not open to them to take a different view than had been laid down in *Rotch* v. *Crosbie*, (54 Solicitor's Journal 30), following the decision of the Court of Appeal in *Bew* v. *Bew*, ([1899] 2 Ch. 467), which was a strong case because it was a considered judgment delivered after consultation

with the Judges of the other Court. The principle was that if the Court of Appeal was satisfied that the Judge had not applied some rule which in fact excluded his discretion, it was necessary to show that there had been no proper exercise of his discretion. That was the principle which the Court was bound to follow. The Court was bound to ask whether there were circumstances which justified the learned Judge in exercising his discretion as he did. Reading the judgment of the learned Judge it was plain that there were ample circumstances.

Sir R. Finlay, K. C., and *Messrs. Younger, K. C., Preston and Finlay* for the Appellants.

Messrs. Hughes, K. C., Walter, K. C., Atkin, K. C., and Radford for the Respondents.

B. D. *Appeal dismissed.*

KING'S BENCH.—*Whiteman* v. *Newey*. Before JUSTICES HAMILTON and LUSH. 9th February 1912.

Racing debts—Plea under Gaming Act defeated by fresh consideration.

This was an appeal from a decision of a County Court Judge. There was a dispute about racing debts between the Plaintiff and the Defendant. They agreed to refer it to arbitration. The award was in favour of the Plaintiff but the Defendant nevertheless refused to pay. Hence the suit to which the Defendant pleaded the Gaming Act. The Court below dismissed the claim. On appeal the judgment was reversed. The learned Judges held that upon the facts there was a new promise to pay by the Defendant founded upon a fresh consideration which was sufficient to prevent the operation of the Gaming Act.

Messrs. Sankey, K. C., and Merlin for the Appellant.

Messrs. Thomas, K. C., and Ward for the Respondent.

B. D. *Appeal allowed.*

KING'S BENCH.—*Lazarus* v. *Cairn Line of Steamships, "Ld."* Before MR. JUSTICE SCRUTTON. 14th February 1912.

Contract, Implied warranty.

This was an action for damages for breach of a contract. The Defendant Company used to run steamers between England and the United States and Canada, and in respect of Steerage passengers had a keen competition to meet with another Company. The Defendant entered into a contract with the Plaintiff whereby they agreed to accept steerage passengers booked by the Plaintiff only. The term fixed was 3 years. Within six months the Plaintiff and the Defendant worked so well that the competing Steamship Company determined to buy up the Defendant's interest in that particular traffic. The Defendant Company thereupon asked the Plaintiff not to book any more passengers for them. Hence this suit. The Plaintiff contended that although there was no express term in the agreement which said that the Defendants must keep up regular sailings, the Defendants had impliedly contracted that they would not voluntarily put it out of their power during the three years to carry out the sailings to America. The learned Judge dismissed the claim. In the course of his judgment he said there were four propositions which could be derived from decided cases :—

(1) That the first thing to consider was the express words the parties had used ; (2) that a term they had not expressed was not to be implied because the Court thought it was a reasonable term, but only if the Court thought it was necessarily implied in the nature of the contract the parties had made ; (3) that where there was a principal subject-matter in the power of one of the parties, and an accessory or subordinate benefit arising by contract out of its existence to the other party, the Court would not, in the absence of express words, imply a term that the subject-matter should be kept in existence merely in order to provide the subordinate or accessory benefit to the other party ; (4) but that where there was an express term requiring the continuance of the principal subject-matter, or giving the Plaintiff a right to a continuing benefit, the Courts would not imply a condition that the Plaintiff's right in this respect should cease on certain events not expressly provided for.

The first two propositions were clearly stated and illustrated in the decisions of *The Moorcock* (13 P. D., 157) and *Hamlyn* v. *Wood* 1891, 2 Q. B., 488).

The third proposition was illustrated—(1) by *Rhodes* v. *Forwood* (1 App. Cas., 256), where an agent who had the sole right of sale of coals sent from a particular colliery to Liverpool, but no express words giving him a right to require any coals to be sent to Liverpool, was held not entitled to complain of the sale of the colliery which prevented his principals from even considering if they would send coals to Liverpool, the contract sought to be implied being the second one contended for in this case ; (2) by *Northey* v. *Trevillion* (18 *The Times* Law Reports, 648), where an agent who was for ten years sole buying agent in England for a firm in India, without an express provision entitling him to receive any orders, was held not justified in complaining of the dissolution of the firm in India, which prevented buying orders from coming forward. Again the contract sought to be implied was the second one contended for here ; (3) by *Hamlyn* v. *Wood*

(1891) 2 Q. B. 488, where a Plaintiff who had brought all the refuse of a brewery for a term of years, without any provision as to the quantity he was to receive, was held not entitled to complain of the sale of the brewery, whereby the Defendants had no longer any refuse to supply. Similar decisions were *In re English and Scottish Insurance Company, ex parte Maclure* (L. R., 5 Ch., 737), and *Bovine (Limited)* v. *Dent* (21 *The Times* Law Reports, 82).

The fourth proposition was illustrated by *Turner* v. *Goldsmith* (1891, 1 Q. B., 544), where the Court, finding an express contract to employ the agent for five years, declined to imply a condition that the employment should cease if the principal discontinued business after the destruction of his manufactory by fire: and by *Ogdon* v. *Nelson* (1905, A. C., 109), where the Court, finding an express promise to pay £2,00,000, declined to imply a term that the payment was conditional on the business continuing.

Turning to the contract in this case, the Plaintiff to succeed, said his Lordship, must find a contract express or by necessary implication, by the Defendants, to run ships in the North Atlantic trade, with no implied term that the obligation shall cease if the Defendants sell their line. He admits there is no express obligation to run ships at all. What does he propose of necessity to imply? How often are the ships run; at what seasons? Are they to run at a loss to the Defendants, that the Plaintiff may make his commission? If a ship is lost at sea, must the Defendants replace it, however bad trade may be?

The Defendants were entering into a trade where they had to fight a ring, and bound themselves to charge, if they ran ships, a freight 5*s.* lower than the lowest freight of their competitors. Such an enterprise might lead to enormous losses. Was it necessary, was it even reasonable, that they should bind themselves to run, at whatever loss, for three years, that the agent might earn his commissions? Is it not sufficient protection to him that if they run, he must be the sole passenger agent; that if they do not run fortnightly he can act, as he did, for other lines; and that if they enter the North Atlantic Conference he is provided for? That the agreement does not expressly provide for them going out of the trade by being bought out may be a *casus omissus*; but how can the Court say that an agreement that they shall not do so must necessarily be implied, or conjecture with any certainty whether the parties did overlook the contingency, and what agreement they would have made if they had not overlooked it?

The view I take of this agreement is similar to that which the House of Lords took in *Rhodes* v. *Forwood* (1 App. Cas., 256). There appears to me to be no express agreement that the Defendants shall run ships at all. They are the parties on whom the loss of running ships will fall, and they are left to run as many or as few as they think expedient in their own interest. The Plaintiff is content to provide passengers for the ships they do run, thinking that the better he does his work the more likely they are to run ships, and omitting to provide for the contingency of their retiring from the trade. In my opinion, there is neither an express nor an implied contract that the Defendants shall run any ships at all; and therefore there is no such implication as the Plaintiff desires to make.

Messrs. Atkin, K. C., Bailhache, K. C., and Roche for the Plaintiff.

Messrs. Sanderson, K. C., and Chaytor for the Defendants.

B. D.

CHANCERY DIVISION.—*In re Palmer.* Before MR. JUSTICE EVE. 5th March 1912.

Income or capital, whether sums received by trustees to a Will were.

This was the trial of a summons which raised the question whether certain sums of money received by trustees were to be treated as income or capital.

The testator died in 1906, and at the time of his death he was entitled to ordinary and deferred share in the Société Egyptienne. In July 1905, the company sold and transferred its assets to the Crédit Foncier Egyptien. In March 1909 at an extraordinary general meeting it was resolved to wind up the Société Egyptienne, and the liquidation was still proceeding. Since the death of the testator the trustees of his Will had received various sums and various distributions of shares of the Crédit Foncier in respect of the ordinary and deferred shares of the Société Egyptienne held by the trustees.

The learned Judge held that the distributions were income and payments received since liquidation were capital. He said:—

The general principle of *Bouch* v. *Sproule* (12 A. C., 385), the leading case on the point, had been stated by Mr. Justice Stirling in *In re Malam* ([1894] 3 Ch., at p. 585), that "when a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a Company which has the power either of distributing its profits as dividends or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as

capital or appropriated as an increase of the capital stock in the concern enures to the benefit of all who are interested in the capital."

If ever there was a case in which that principle ought to be applied it was the present. The testator was one of the founders of the company, and made his will at a time when he was president of the Company. The question was whether the company had power to treat these payments as capital, and, if so, whether it had exercised such power. The company had power to destribute excess of capital as dividends, and if the company were not distributing the excess as profits they were doing what they ought not to do. That really disposed of the whole matter. The distribution purported to be made under the articles as profit, and was an exercise of the power to distribute as profits.

Messrs. Underhill, Lawrence, K. C., Hodge, Whinney and Austen-Cartmell for the various parties.

B. D.

CHANCERY DIVISION.—*Re Conseulo, Duchess of Manchester.* Before MR. JUSTICE SWINFEN EADY. 12th February 1912.

Testator domiciled in England—Liability to estate duty for foreign personal assets.

The Duchess of Manchester who was domiciled in England died leaving valuable personal property in England and in America. By her will she appointed executors in both countries and both took out probate. The question now raised was whether estate duty was payable in respect of the American property in the hands of the executors there by the English executors. The learned Judge held that they were liable. In the course of his judgment he said :—

It was well established that whether legacy or succession duty was payable depended on the domicil of the testator, and was not affected by the question where the property might happen to be locally situate at the death. *Thompson* v. *Advocate-General* (12 C. and F. 1) finally established this rule.

The question arose again in *Attorney-General* v. *Napier* (6 Ex. 217), and it was held that the point was concluded by that case. On this principle it was decided that where a British official on duty in India died there, not having acquired a domicil there, the whole of his property was liable to legacy duty here, although it was almost entirely situate there at the time of death. *In re Tootall's Trusts* (23 Ch. D. 532) was to the same effect.

The Finance Act did not adopt for the purpose of estate duty the principle of fictitious situation of personal property in the place of domicil. All personal property physically situated here at the death of the owner was liable to estate duty even though the deceased had a foreign domicil—*Winans* v. *Attorney-General* ([1910] A. C. 27). The Act in sec. 2 (2) recognised the actual physical situation of personal property out of the United Kingdom, and included it for the purpose estate duty only if legacy or succession duty would have been payable in respect of it. That question could only be solved by reference to the domicil of the deceased.

The result is that the American personalty of the testatrix, who was domiciled here, must be included in property passing on the death in respect of which estate duty is payable.

The next question is what is the extent of the liability of any of the English executors for estate duty on American personalty. It was urged that they had not possession of the funds or the means of compelling information about them, and could neither ascertain nor provide for the amount of duty. Section 6 (2) said that the executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death on delivering the Inland Revenue affidavit.

The testatrix was competent to dispose at death of the American personalty, and therefore the executors were under an obligation to pay estate duty in respect thereof, subject, however, to th limitation to be presently mentioned. Sub-se (3) says that an executor not knowing the value may undertake to bring into the account when that value is ascertained, and sec. 8 (3) said tha the executor shall be accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has receive as executor or might, but for his own neglect or default, have received. There was thus no hardship on the executor. He was only liable to the extent of the assets he might receive and which would be available to satisfy his liability. The right of the Crown to duty and the limited liability of the executor to pay it were, in his Lordship's opinion, free from doubt.

His Lordship therefore determined that the executors were liable to estate duty on all the assets of which the testatrix was competent to dispose, including the American personalty to the extent of assets come to their hands or which would have so come but for their own neglect or wilful default. The same point recently came before the Court in Scotland in the case of *Re Douglas*, the papers in which were provided by the Commissioners, and which was decided on 31st October last by Lord Cullen, the Lord Ordinary in Exchequer causes. Lord Cullen there said :—

"The qualification which Mr. Murray sought attach to sec. 6 of the Act, to the effect that he executor was only liable to account for duty ayable on the estate which has come into his ands or is within his title, is not expressed in it, nd I have no sufficient grounds for implying it. he words of the section seem to me to be quite olute." His Lordship entirely concurred in hat view.

Messrs. Macnaghten, K. C., Micklem, K. C., nd Methold for the executors.

Messrs. Astbury, K. C., Beaumont, Manby and usten-Cartmell for others.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. CRIMINAL REFERENCE No. 4 OF 1912. THE EMPEROR *v.* KHUDU MEHTAR, Accused. 27th March 1912.

Insanity, nature of evidence to prove.

The accused committed the murder of his own hild and mother-in-law and attempted to kill his ife and another person whom he believed to be he paramour of his wife. He was tried by a ury who found him not guilty but the Sessions udge disagreeing with the verdict made the reerence to the High Court. It was argued *inter lia* that the fact that the accused did not make ny attempt to conceal his guilt showed that he vas insane.

Their Lordships observed :—

* * * * * As to the absence of any ttempt at concealment we find that in this ountry at any rate, when men give way to homiidal impulse and kill their wives and other relaives upon suspicion of unchastity, it is almost the nvariable practice for them to make no attempt t concealment. So far from agreeing with the earned doctors in England, who lay down the roposition that the absence of any attempt at oncealment is a sign of insanity, we do not hink any such doctrine applies to this country. t is the experience of both of us that it is very ommon for no attempt at concealment to be nade. * * * * We have already shown that he motive for committing all these murders was he same. They were all committed on the same npulse and the number of them does not in any vay show insanity. It does show that want of elf-control which Lord Justice Bramwell says is he justification for the law of England, which is ollowed by the Penal Code in this country, being what it is. The law has expressly excluded cases of mere homicidal impulse from the exception to the guilt of murder by reason of unsoundness of mind. The examples of unsoundness of mind of the description which would bring the case within sec. 84, I. P C., are very well given at p. 607 of the Ruling in *Queen-Empress* v. *Kader Nasyer Shah*, I. L. R. 22 Cal. 604."

Their Lordships convicted the accused under secs. 302 and 307, I. P. C., but in consideration of the fact that the accused's mind was deranged by illness and melancholia, sentenced him to transportation for life.

Babu Krishna Kamal Moitra for the Accused.
Babu Atulya Charan Bose for the Crown.

B. C.

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. CRIMINAL REVISION No. 299 OF 1912. MAHAMMED ISMAIL AND OTHERS, Petitioners *v.* THE EMPEROR, Opposite Party. 28th March 1912.

Sec. 107, Criminal Procedure Code, proceeding under whether litigation between the parties is a good reason for drawing up.

In this case the Magistrate drew up the proceeding under sec. 107, Cr. P. C., in these terms :—"Whereas it appears that various litigations have been going on between the above-mentioned parties and hence there is every likelihood of a breach of the peace within the local limits of my jurisdiction, &c.

Their Lordships in making the Rule absolute observed :—

"The Rule was issued on the ground that the proceedings were incompetent because they only referred to various litigations which have been going on between the parties as the basis for holding that there was a likelihood of a breach of the peace. The learned Magistrate in a lengthy explanation informs us that there are many other reasons for apprehending a breach of the peace. If so, he must take proceedings according to law after setting out those reasons in a fresh proceeding. The present proceeding is certainly incompetent and must be set aside, &c. &c. . . ."

Mr. Donough and *Babu Gour Chandra Pal* for the Petitioners.

B. C.

CIVIL APPELLATE JURISDICTION. Before STEPHEN, and D. CHATTERJEE, JJ. APPEAL FROM APPELLATE DECREE No. 2678 OF 1910. TARINI KANT BHATTACHARJEE AND OTHERS, Appellants *v.* BHOBANI NATH DEY SARKAR, Respondent. 18th March 1912.

Lunacy Act (XXXV of 1858), sec. 14—Lease, grant of, validity of—Avoidance of

The suit was brought by the Plaintiff on his becoming *sui juris* for damages in respect of occupation of lands by the Defendants.

The Defendants set up an *ijara* potta granted by the mother of the Plaintiff. She purported to grant it as the guardian of the father of the Plaintiff who was a lunatic. It was a lease for more than 5 years and it was not granted under the authority of the Court in conformity with the provisions of sec. 14 of the Lunacy Act.

Held—That the lease was voidable.

In this case the lease was avoided by the Plaintiff, who on becoming *sui juris*, and within the period of limitation, brought the suit electing to treat the lease as a nullity.

That it was not necessary to take proceedings to set aside the *ijara* before the institution of the present suit for damages.

Babus Sarat Chandra Roy Chowdhury and *Ambica Pada Chowdhury* for the Appellan s.

Babu Mohini Mohun Chuckerbutty for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and N. R. CHATTERJEA, J. LETTERS PATENT APPEAL No. 60 OF 1911. BOODH SINGH BOTHRA AND ANOTHER, Appellants *v.* GOPAL CHAND DUGAR, Respondent. 1st April 1912.

Prescription—Right to discharge foul water—Decree, form of.

The appeal arose out of a suit brought to establish the Plaintiff's right to discharge foul water into a water-course running over the Defendant's land and for incidental relief.

A decree was passed in the Plaintiff's favour by the Court of first instance and the lower Court of appeal, and on appeal, the decree of the lower Appellate Court was upheld.

The following decree was passed in the case: "There should be a declaration that the Plaintiff has a right to discharge water through the drain S. A. from his cess-pool, and there must be an injunction that the Defendants do not obstruct him in the use and enjoyment of that right: And, if and so far as is necessary for that purpose, by reason of anything already done, there must be a direction to the Defendants to remove at thei costs anything that would be an obstruction to th channel, but not to remove the house or buildin which has been erected or any part of it, excep so far as may be necessary for the purpose of givin the Plaintiff the benefit of the channel which h is entitled to."

Dr. Rash Behari Ghose and *Babus Hurn Kumar Mitter* and *Ram Chandra Majumdar* fo the Appellants.

Babu Sib Chandra Palit for the Respondent.

A. T. M. *Appeal dismissed.*

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CIVIL APPELLATE JURISDICTION. Before JENKINS C. J., and N. R. CHATTERJEA, J. APPEAL FRO APPELLATE DECREE No. 1652 OF 1909. HEM CHANDRA SARKAR, Appellant *v.* LALIT MOHON KAR AND ANOTHER, Respondents Heard, 7th February. Judgment, 3rd Apri 1912.

Guardians and Wards Act (VIII of 1890), sec 30—Mortgage without consent of Judge, if valid—Mortgagee, remedy of.

The appeal arose out of a suit upon a mortgag bond executed by the mother of the Defendant while they were minors, in favour of the Plaintif The Defendants' mother was their guardian ap pointed under the Guardians and Wards Act bu she did not obtain permission of the District Judg for the mortgage,

Held—That the mortgage executed without th permission of the Court was not absolutely void but was voidable. That it was not necessary fo a person in the position of the Defendants to brin an action to set aside the transaction and that i was sufficient if they declared their will to rescin by way of defence when an action was brough to enforce the mortgage against them. But as th money was raised on the mortgage for the benef of minor sons, the Defendants could not avoid th mortgage without restoring the benefit which the had received under the mortgage and the equitabl doctrine was applicable not only when they a was Plaintiffs sue for a declaration that the mort gage not binding but also when they are Defend ants in an action upon the mortgage.

Eastern Mortgage & Agency Co., Ld. v. *Rebat Koer* (3 C. L. J. 268) followed.

The Plaintiff was therefore entitled to enforc the mortgage against the Defendants.

Babu Dwarka Nath Mitter for the Appellant.

Babus Ram Chandra Majumdar and *Chandr Sekhar Banerjee* for the Respondents.

A. T. M. *Appeal allowed.*

[PRIVY COUNCIL.]

[APPEAL FROM BENGAL.]

LORD SHAW.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.

1912,
Heard, 1 and 2, February.
Judgment, 20, March.

JADU LAL SAHU and others, *v.* MAHARANI JANKI KOER and others.

Pre-emption, law of—Application to Hindus in Behar—Formalities to be observed—Performance of same by manager under Court of Wards, when Plaintiff a "disqualified proprietor"—Court of Wards Act (IX of 1879, B. C.), sec. 40—Co-sharers, who are, persons jointly liable to pay Government revenue, if.

In Behar the right of pre-emption is enforcible irrespective of the persuasion of the parties concerned.

FUKEER RAWOT *v.* SHEIKH EMAMSBUKSH (1) *followed.*

Where it was found that the formalities required by law to be performed by the pre-emptor or some one on his behalf were duly performed on behalf of the Plaintiff, who had been declared a disqualified proprietor under the Court of Wards Act, by the manager appointed by the Court of Wards:

Held—***That independently of sec. 40 of the Act, as also under powers conferred by that section, the manager was competent to observe the formalities and the validity of his action in the matter did not depend upon the subsequent adoption of it by the Court of Wards.***

The fact that the vendor and the pre-emptor were jointly liable for the payment of the Government revenue assessed on the villages comprised in the mehal showed that the latter was a co-sharer and as such entitled to pre-empt.

(1) B. L. R. F. B. Rul. 35; W. R. F. B. 143 (1863).

This was an appeal from a judgment* and decree of the High Court of Judicature at Fort William in Bengal, dated the 31st January 1908, which affirmed a judgment and decree of the second Subordinate Judge of Mozufferpur, dated the 17th September 1906.

The Plaintiff was the widow of the late Maharajah of Bettiah whose estate was being administered by the Court of Wards; she was represented in the suit by her next friend, Mr. J. R. Lowis, the manager of the estate under the Court of Wards. The suit was brought to establish the Plaintiff's right of pre-emption in respect of certain property situated in the Champaran District in Behar, in which the Plaintiff, the first Defendant and Defendants Nos. 12 to 25 were co-sharers.

The first Defendant was the vendor of the property in dispute, the purchasers being Defendants Nos. 2 to 11 hereinafter referred to as the purchasers. Defendant No. 3 died during the pendency of the case, and by an order, dated 7th February 1906, was represented in the suit by Defendants Nos. 2, 4 and 5. Defendants Nos. 2 and 4 to 11 were the present Appellants to His Majesty in Council. Defendants Nos. 12 to 25 were joined as *pro formâ* Defendants, no relief being sought against them.

The property in dispute was the share of the first Defendant in Mehal Motihari, which she had sold to the purchasers by a deed, dated 28th July 1904. The property sold included a small piece of land in the Gaya District to which Plaintiff made no claim, and which was apparently inserted in the deed solely for the purpose of enabling it to be registered at Gaya. The consideration was stated in the deed to be Rs. 39,967. The Plaintiff and the first Defendant claimed that the deed did

* Reported in I. L. R. 35 Cal. 575 (1908).

not include part of the first Defendant's share in Tolah Begampur, which formed part of Mehal Motihari, and this was sold by first Defendant to the Plaintiff by a deed, dated 24th February 1905.

Mr. Lowis, the manager of the Raj, first became aware on the 13th August 1904 that the sale had been completed. The information was conveyed to him by a letter from Mr. Leslie, the solicitor to the Raj.

Mr. Lowis immediately upon receipt of Mr. Leslie's letter performed the ceremony of Talab Mawasibat, and on the 15th August proceeded to Motihari, where he performed the ceremony of Talab Istishad, first at the Raj Office and then at the Collectorate.

The present suit was instituted on the 9th March 1905. The plaint, in addition to setting out the facts as above, further alleged that the consideration for the sale was falsely stated in the deed of 28th July 1904, being, in fact, only Rs. 26,000, and not Rs. 39,967. The Plaintiff prayed for a declaration that she had a right of pre-emption in respect of the first Defendant's share in Mehal Motihari, save and except the share in Tolah Begampur already referred to, but that if it was held that that share passed by the conveyance, then that she had a right of pre-emption in respect of that also, for an enquiry as to the actual consideration paid, and for an order that the purchasers should convey to her the property bought by them, on her paying them the actual consideration found on such enquiry to have been paid.

The first Defendant practically supported the Plaintiff's case.

The purchasers in their written statement raised a number of defences:—They denied that Plaintiff had any cause of action; alleged that the ceremonies of Talab Mawasibat and Talab Istishad had not been duly performed; that those ceremonies could not be performed for the Plaintiff by her manager; that the real consideration was Rs. 39,969; that the share in Tolah Begampur passed by their conveyance, and that by her subsequent purchase of that share the Plaintiff had lost her right of pre-emption; that the Plaintiff's manager had information of the negotiations for sale long before the execution of the deed of sale, that he refused to pay adequate consideration, and that they on such refusal themselves completed the transaction.

The following issues among others were settled on the 27th September 1905.

"1. Has Plaintiff a cause of action for the suit?

"2. Could the Plaintiff perform the preliminary ceremonies of Talab Mawasibat and Talab Istishad through her manager and were those ceremonies duly performed?"

On the 11th July 1906, the purchasers filed a petition praying that the first issue might be disposed of before going to trial of the remaining issues, on the ground that the pre-emptor and purchasers not being Mahomedans, the right of pre-emption could only be based on a local custom, which had not been alleged in the plaint.

After hearing arguments on both sides the Subordinate Judge, on the 14th July 1906, delivered a preliminary judgment on this issue. He held that the purchasers' petition was an attempt to raise a fresh issue, which had not been raised in the written statement, namely, whether such a custom did in fact, exist, and that this issue could not be raised at the stage which the suit had then reached. He further held on the authorities that the adoption of the Mahomedan law of pre-

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emption by the Hindus in Behar had been judicially recognized, and decided the issue in Plaintiff's favour.

After recording evidence, both oral and documentary, the Subordinate Judge delivered his final judgment on the remaining issues on the 12th September 1906. He first decided in Plaintiff's favour three preliminary points which had been raised by the purchasers, namely, that a Hindu widow could exercise a right of pre-emption, that the manager had under the circumstances power to invest in the purchase of landed property, and that the sanction of the proper authorities had been given to the institution of the suit.

On the second issue he held that the ceremonies of Talab Mawasibat and Talab Istishad could be performed for Plaintiff by her manager, and that they had in fact been duly performed, and in each case without unnecessary delay. He further held that the true consideration for the sale was Rs. 26,000, and in the result the suit was decreed with costs, and it was ordered that, on payment by Plaintiff to the purchasers of Rs. 26,000 within two months from the date of the judgment, she should get possession of the property in dispute.

Against this decree the purchasers appealed to the High Court of Judicature at Fort William in Bengal and on the 31st January 1908 the High Court delivered its judgment* affirming the judgment and decree of the Subordinate Judge on all the issues.

Hence this appeal.

Mr. K. Brown for the Appellant.—The Respondent is not a "sharer" within the meaning of that word in the Hedaya. A co-sharer is a person who has some title, or possession or advantage from land along with another. Mere joint liability for payment of Government revenue is not co-partnership. If the Plaintiff had any right of pre-emption it was confined to 16 villages only. In the remaining her *milkeat* or estate was quite separate. *Wahed Ali Khan* v. *Hunooman Pershad* (2), *Gobind Chunder* v. *Raj Kishore* (3). Further the customary law of pre-emption on which the Plaintiff relies must be proved to prevail among the Hindus of this particular district in Behar. The Court below erred in taking judicial notice of the custom. *Fukeer Rawot* v. *Sheikh Emamsbuksh* (1). Again, Mr. Lowis, manager, was not competent to perform the ceremonies of *talab-i-mawasibat* and *talab-i-istishad.* The powers of a manager of the Court of Wards are defined by Bengal Act IX of 1879, secs. 39 and 40. *Nundo Parshad* v. *Gopal Thakur* (4). The Plaintiff could not ratify her agent's act. Ratification to be effective must be made within the time allowed for the exercise of the option and before our right became indefeasible. Reference was made to Indian Contract Act, 1872, sec. 200; *Walker* v. *Furwell* (5), *Lyell* v. *Kennedy* (6); Fry's Specific Relief (5th Ed.), p. 281, note A. The manager had no right to perform the ceremonies.

[MR. AMEER ALI.—What do you say as to the application of sec. 189, Indian Contract Act?]

It was not an emergency. The section does not supersede Act IX of 1879, B. C., and ought not to be extended to a case like the present. Cunningham and She-

* Reported in I. L. R. 35 Cal. 575 1908).

(1) B. L. R. F. B. Rul. 35; W. R. F. B. 143 (1863).
(2) 12 Suth. W. R. 484, 485 (1869).
(3) 14 Suth. W. R. 365 (1870).
(4) I. L. R. 10 Cal. 1008, 1012 (1884).
(5) 4 Ex. Rep. 786: s. c. 19 Law. J. Ex. 158 (1850).
(6) 14 App. Cas. 437 (1889).

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phard's Commentary on the Indian Contract Act, p. 425.

Mr. L. DeGruyther, K. C., and *Mr. Eddis* for the Respondent.—The pre-emptor's time to purchase the property does not expire till after the time fixed by the decree. Under the Mahomedan law a pre-emptor has the right of inspection of the property and of refusal to purchase it even after the passing of a decree in his favour. The preliminary demands are meant to indicate an intention to purchase. There is nothing to prevent a manager or agent to make the demands on behalf of his principal. The Respondent is a co-sharer within the meaning of the Mahomedan law.

Hidaya (Harrington's), p. 548, Bk. 38, Ch. 1. The essence of the right is that he must be a partner in the land sold. A mehal in India is a unit of property. Every person who is a co-sharer in a mehal is a co-partner. There is a right of pre-emption applicable to a mehal because it is a unit of property and is marked out by boundaries.

(Their Lordships intimated that they did not wish to hear *Mr. DeGruyther* any further).

Mr. Brown replied.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The suit out of which this appeal arises was brought by the Plaintiff-Respondent to establish her right of pre-emption in respect of certain undivided shares in a number of villages comprised in Mehal Motihari, situated in the District of Champaran.

The shares in question belonged to a Mahomedan lady named Barkatunnissa, the first Defendant to this action, who sold the same to the Sahu Defendants by a deed of sale, dated the 28th of July 1904. Barkatunnissa owned an interest in 24 out of the 31 villages comprised in the mehal, whilst the Plaintiff possesses shares in 18. The vendees had admittedly no proprietary interest in Mehal Motihari prior to their purchase from Barkatunnissa.

The Plaintiff claims that as a co-sharer in the mehal she is entitled to the right of pre-emption in respect of the shares sold to the Sahus by the first Defendant.

Champaran appears to have been part of the Civil Division of Saran until some time after the institution of the suit. The action was accordingly brought in the Court of the Subordinate Judge of Saran, but owing to the subsequent amalgamation of Champaran with Tirhoot, it was tried before the Subordinate Judge of Mozufferpur (the Suddar station of Tirhoot) who decreed the Plaintiff's claim. This decree has been affirmed by the High Court of Bengal.

It has been urged on behalf of the Appellants that as the right claimed is a creation of the Mussulman law, and it is not proved that the Mussulman law of pre-emption is in force among the Hindus of the District of Champaran, both the pre-emptor and the vendees being Hindus, the action must fail.

The suit was instituted on the 7th of March 1905, the Sahu Defendants filed their defence on the 16th of June, and issues for trial were settled on the 27th of September 1905. It was not, however, until the 11th of July 1906, when, as the learned Judges of the High Court observe, "the suit was ripe for hearing," that the Sahu Defendants for the first time raised a question as to the existence of the right of pre-emption among the Hindus of Champaran. Both the Courts in India

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have, in their Lordships' judgment rightly, overruled the Defendants' objection.

The law of pre-emption, under which the Plaintiff claims the right, was introduced into India with the Mahomedan Government. The Province of Behar, to which the District of Champaran appertains, was an integral part of the Mahomedan Empire and consequently it would not be surprising to find that in Behar the right of pre-emption is enforcible irrespective of the persuasion of the parties concerned.

In the case of *Fukeer Rawot* v. *Sheikh Emamsbuksh* (1), a Full Bench of the High Court of Bengal gave judicial recognition to the existence of the right of pre-emption among the Hindus of Behar. In delivering the judgment the Chief Justice (Sir Barnes Peacock) reviewed the earlier cases bearing on the subject, and held that :—

". . . . a right or custom of pre-emption is recognised as prevailing among Hindus in Behar, and some other provinces of Western India; that in districts where its existence has not been judicially noticed, the custom will be matter to be proved; that such custom when it exists, must be presumed to be founded on and co-extensive with the Mahomedan law upon that subject, unless the contrary be shown; that the Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption, but that the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Mahomedan law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record."

In their Lordships' judgment the decision in *Fukeer Rawot's* case (1) is conclusive on the point raised on behalf of the Defendants. Their abstention from taking the objection in a definite and distinct form at the earliest stage of the case was, it may fairly be presumed, due to the explicit enunciation of the law in the ruling referred to.

It has also been contended that the formalities insisted upon by the Mussulman law as essential preliminaries to the assertion of the right, could not be performed by the manager of the Plaintiff's estate appointed by the Court of Wards.

It appears that the Plaintiff is a "disqualified proprietor" under the Court of Wards Act (Bengal Act IX of 1879), having been declared to be incompetent to manage her property, and her estate is in the charge of the Court of Wards. Sec. 40 of the Act which defines the general duty of managers appointed by the Court of Wards provides that he "shall manage the property committed to him diligently and faithfully for the benefit of the proprietor, and shall in every respect act to the best of his judgment for the ward's interest as if the property were his own."

The Mussulman law insists that the first formality technically called "the immediate demand" should be observed by the pre-emptor or someone on his behalf immediately on receipt of the news of the sale, otherwise the right of pre-emption falls to the ground. The second formality consists in the repetition of the "demand" with as little delay as possible under the circumstances, in the presence of witnesses either before the vendor or the vendee or on the premises. The Courts in India have found that the ceremonies were duly performed by the manager in accordance with the prescriptions of the law. Had he failed in performing either of the ceremonies, he would have caused irre-

(1) B. L. R. F. B. Rul. 35; W. R. F. B. 143 (1863).

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parable loss to the Plaintiff, as her right would have been absolutely defeated by his laches. In their Lordships' opinion Mr. Lowis, as manager of the Plaintiff's estate, was competent, independently of the provisions of sec. 40 of the Court of Wards Act, to observe the formalities on her behalf. The section, however, which defines his duties appears to their Lordships to fully clothe him with authority to act as he did; the validity of his action, therefore, did not depend on its subsequent adoption by the Court of Wards. In this view the English cases cited at the Bar have no application to the present case.

It was also urged that the claim to co-parcenary, on which the Plaintiff's right of pre-emption was based, arose out of the fact that the vendor and pre-emptor were jointly liable for the payment of the Government revenue assessed on the villages comprised in the mehal, and that this joint liability does not constitute the co-parcenary contemplated by the Mahomedan Law. This argument seems to proceed on a misconception of the land system of India. A mehal is a unit of property; it may consist of one village or of several villages: it may be owned by one or several proprietors who may have an interest in all or some of the villages comprised in the estate. Their joint liability for the Government revenue arises from the fact that they own undivided interests in the property; and that joint liability does not cease in the case of any co-sharer until his particular share has been partitioned by the Revenne authorities, when the share so partitioned becomes a separate unit of property.

On the whole their Lordships are of opinion that the decree of the High Court should be affirmed, and this appeal dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors: *Messrs. Sanderson, Adkin, Lee and Eddis* for the Respondent.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

L. P. APPEAL NO. 33 OF 1910.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
15, March.

TIRTHABASI SINGH and others, Plaintiffs, Appellants,
v.
PURNA CHANDRA NAG and others, Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 149, sub-sec. (3), question of title if to be decided in suit under—Appeal—Bengal Tenancy Act (VIII of 1885), sec. 153—Suit framed as for determination of title.

Sec. 149 of the Bengal Tenancy Act provides a very simple and expeditious machinery for the purpose of protecting a tenant against the harassment of litigation consequent on rival claims of title to the reversion of the tenant's interest.

Sub-sec. (3) of sec. 149 of the Bengal Tenancy Act contemplates a suit which culminates not in a decree but in an order of a limited kind, an order restraining payment out of the money. It is not necessary to decide the question of title in issuing an injunction under that section.

In a suit brought under sec. 149, sub-sec. (3) of the Bengal Tenancy Act, in which the Plaintiff keeps within the terms of the section and asks only for the relief contemplated by it, no question of title can

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be decided. It would be otherwise if the suit be framed as one for determination of the Plaintiff's title.

Semble—*An appeal would not lie under sec. 153 of the Bengal Tenancy Act against an order under sec. 149, sub-sec. (3) of the Act.*

This was an appeal under sec. 15 of the Letters Patent filed on the 11th of April 1910 against a decree of Mr. Justice D. Chatterjee, dated the 23rd of March 1910, passed in appeal from Appellate Decree No. 674 of 1908, which had been preferred against a decree of Babu A. C. Batabyal, Subordinate Judge of Zillah Burdwan, dated the 13th of December 1907, reversing that of Babu Hem Chandra Bose, Munsif at Burdwan, dated the 1st of September 1906.

The facts of the case will appear from the judgment of D. Chatterjee, J., which was as follows :—

D. CHATTERJEE, J.—In a previous suit brought by the Defendant No. 1 against the Defendants Nos. 2 to 4 the Defendants Nos. 2 to 4 pleaded that the rent was not due to the Defendant No. 1 but to the Plaintiff in this case in whose favour they had in 1292 executed a *kabuliyat* in respect of the land in suit. Upon this plea being taken notice was served upon the Plaintiff under cl. 3 of sec. 149 of the Bengal Tenancy Act and the Plaintiff brought the suit for the reliefs contemplated by that section.

The first Court decreed the suit of the Plaintiff holding that his possession and title by adverse possession was made out. The second Court on appeal has dismissed the suit holding that the possession of the Plaintiff by receipt of rent from the Defendants Nos. 2, 3 and 4 extended from 1292 to 1299 and that thereafter the Plaintiff had been prevented from the realisation of the rent from the Defendants Nos. 2, 3 and 4 by reason of the opposition made on behalf of the Maharaja of Burdwan and the Defendant No. 1 claiming through the Maharaja of Burdwan. The learned Sub-Judge therefore has held that since the title of the Plaintiff by adverse possession for more than 12 years fails the Plaintiff is not entitled to a decree.

It is contended in second appeal before me that the lower Appellate Court is wrong in that the Plaintiff has succeeded in showing that he brought the Defendants Nos. 2 to 4 upon the land, that the Defendants were upon the lands under his lease and that the Defendants Nos. 2. 3 and 4 were estopped from pleading that the Plaintiff had no title at the time when they obtained their lease from him and therefore his possession must be presumed to have continued notwithstanding non-payment of rent by the Defendants Nos. 2, 3 and 4 specially because no other persons are found to have received rent from the Defendants Nos. 2, 3 and 4 so as to operate as an ouster of the Plaintiff.

I find, however, from the record that long after 1299 up to which time the Plaintiff is found to have enjoyed possession by receipt of rent there was a suit for declaration of title by the Maharaja of Burdwan against the Plaintiff and the Defendants Nos. 2, 3 and 4 and in that suit the title of the Maharaja of Burdwan was proved. In this case also it has been found upon investigation by the Civil Court Amin that the disputed land falls within the Maharaja's property. The title therefore in favour of the Maharaja or any person claiming through the Maharaja has been made out. The question of title being thus finally decided between the parties in a previous suit it was hardly

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open to the Court to hold otherwise. In any event the lower Appellate Court has found that the title of the Defendant No. 1 as *putnidar* under the Maharaja to the the land in suit has been made out and if that be so the right to the rent would also lie in the Defendant No. 1 and the Plaintiff would not be entitled to an injunction under sec. 149, cl. 3. It is said that it is not competent to the Court in a proceeding under sec. 149 of the Bengal Tenancy Act to consider the question of title as a main question in issue between the parties. I do not think that the contention is well supported by the decisions passed upon that section of the Act. On the other hand the section seems to contemplate a proceeding by which the third Party to whom notice is given under cl. 3 must come to Court to prove his right to injunction which cannot be given unless and until he proves that any right and title possessed by him is in jeopardy on account of any action taken by the Defendant. In order to entitle the Plaintiffs to an injunction questions both of possession and of title must be gone into. I think in this case both the questions have been gone into and found against the Plaintiff. The appeal therefore fails and is dismissed with costs.

[The Plaintiffs preferred this appeal under sec. 15 of the Letters Patent.]

Babus Dwarka Nath Chuckerbutty and *Sarat Chandra Mittra* for the Appellants.

Babus Asita Ranjan Chatterjee, *Asoka Nath Ray*, *Gour Chandra Pal* and *Bepin Behary Ghosh* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This appeal arises out of a suit which was described to us in the opening by the Appellant as one under sec. 149, sub-sec. (3) of the Bengal Tenancy Act, and it was made a matter of complaint that the *onus* was cast on the Plaintiff to his detriment and to the undue advantage of the Defendants. It was urged that this operated prejudicially to the Plaintiff in this suit and it could not have been the intention of the Legislature in enacting sec. 149 to alter the position of the rival parties as to matters of proof. This is a forcible argument taken in the abstract, but applied to the circumstances of this case, it has no value. To begin with, I fail to see that there has been any such possession as could have brought into play the provisions of sec. 28 of the Indian Limitation Act having regard to the findings of the lower Appellate Court. Therefore, it seems to me that in that respect the Plaintiff in this case has not been prejudiced, nor the Defendants advantaged by the course of procedure that has been adopted. That is probably sufficient for the disposal of the case.

But I would point out that while this suit is described as one under sec. 149, sub-sec. (3), it is more than that. Now, as I read the scheme of the Act and sec. 149 in relation to that scheme, this particular section was introduced for the purpose of protecting a tenant against the harassment of litigation consequent on rival claims of title to the reversion on the tenant's interest. The sections appears to me to afford a very simple and expeditious machinery. It enables a Defendant who admits that money is due from him on account of rent to plead that this money is due not to the Plaintiff but to a third person, and to utilize that plea, provided he pays into Court the amount admitted to be due. When this is done notice is to be given to this third person whose title the tenant sets up. Then it is

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provided in sub-sec. (3) that "unless the third person within three months from the receipt of the notice institutes a suit against the Plaintiff and therein obtains an order restraining payment out of the money it shall be paid out to the Plaintiff on his application." The final sub-section provides that nothing in this section shall affect the right of any person to recover from the Plaintiff money paid to him under sub-sec. (3). Now, I have said that this suit is not one exclusively under sec. 149, sub-sec. (3), and my reason for so saying is this : sub-sec. (3) contemplates a suit which culminates not in a decree but in an order of a limited kind, an order restraining payment out of the money. It is therefore an order not finally decisive of the substantial rights of the parties, but providing a machinery for the purpose of carrying out the scheme whereby it is sought to relieve a tenant from harassment. Here more than such an order was sought. Payment of the money was prayed and from the issues formulated in the suit on which the parties went to trial it is manifest that the contest between the parties was one of title. Cases have been brought to our notice for the purpose of determining what is the true effect of sub-sec. (3) of sec. 149, but in those cases the same course has been pursued as in this; the Plaintiff has gone beyond the provisions of of sec. 149, sub-sec. (3) with the consequences indicated. If a third person desires to retain the benefits which the procedure of this section would secure to him then he must keep his claim within the terms of this section and be content with an order. It is not for us now to say whether an appeal would lie from such an order, but I feel constrained to say that the language of sec. 153 does not sustain the argument that an appeal would lie under that section. I come back to that which is the matter immediately before us. For the reasons which I have indicated the findings of the lower Appellate Court appear to me to be conclusive against the claim now advanced by the Plaintiff-Appellant : and, therefore, this appeal must be dismissed with costs.

N. R. CHATTERJEA, J.—I agree.

H. C. S. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1015 OF 1909.

BRETT, J. CARNDUFF, J. 1912, Heard, 1, March. Judgment, 5, March.	KRISTA DAS LAHA and ors., Defendants, Appellants, *v.* JOTINDRA NATH BASU and ors., Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 160, cl. (g), 195—Protected interest—Mortgage by a putnidar *if protected interest—Sale under the Bengal Tenancy Act—Putni Regulation (VIII of 1819), sec. 11.*

Where a putni *kabuliyat provided as follows : "I in succession to my sons, grandsons, etc., heirs and representatives, shall, with felicity, hold and enjoy the aforesaid share, with right to make gift, sale, mortgage, etc., and* dar-putni mourasi, mokurari, gantidari, *etc., settlements at a proper* jama *and to every way make alienations and create encumbrances;" and the* putnidar *created a mortgage in favour of the Plaintiff,*

Held, *that the recitals in the kabuliyat merely set out the ordinary incidents of a* putni *grant as laid down in sec. 3 of the Putni Regulation and did not give the* putnidar *an express authority in writing by the landlords to create a mortgage and the mortgage created in favour of the*

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Plaintiff by the putnidar *was not a "protected interest" within the meaning of sec. 160, cl.* (g) *of the Bengal Tenancy Act.*

The right of a putnidar *to give the tenure in mortgage is subject to the conditions imposed by sec. 11 of the Putni Regulation.*

The "express authority" referred to in that section means such authority apart from the conditions of the lease.

The effect of sec. 160, cl. (g) *of the Bengal Tenancy Act would further be subject to the saving provisions of cl.* (e) *of sec. 195 of the same Act.*

This was an appeal preferred against a decree of Mr. F. Roe, District Judge of Zillah 24-Pergunnahs, dated the 31st of March 1909, affirming that of Babu Aghore Chandra Hazra, Subordinate Judge of that district, dated the 14th of July 1908.

The facts of the case are shortly as follows :—

Defendant No. 1 was a *putnidar*. The *putni kabuliyat* given by him to Defendants Nos. 2 to 5, the landlords, provided as follows :

"From the beginning of the year 1299, I take a *putni* settlement from you, settling Rs. 2,502-8-15 gundas (rupees two thousand five hundred and two, annas eight, and gundas fifteen only) as the annual *putni jama*. Becoming owner of the said 1 anna 12 gundas share of the aforesaid zemindari lot in *putni* right from the 1st of Baisakh of the current year 1299 (twelve hundred and ninety-nine), I, in succession to my sons, grandsons, etc., heirs and representatives, shall, with felicity, hold and enjoy the aforesaid share, with right to make gift, sale, mortgage, etc., and *dar-putni mourasi*, *mokurari*, *gantidari*, etc., settlements, at a proper *jama* and to every way make alienations and create encumbrances.

The Plaintiffs brought a suit to enforce a registered mortgage bond for Rs. 2,675, dated 20th November 1896, said to have been executed by Defendant No. 1. Defendant No. 1, the *putnidar*, defaulted in paying the rent due on the *putni* tenure and in consequence Defendants Nos. 2 to 5, the landlords, in execution of the rent decree purchased the tenure themselves. Thereupon the Plaintiffs brought the present suit against Defendants Nos. 1 to 5 to recover the sum advanced on the mortgage by sale of the *putni* tenure which then passed to the hands of the landlords. Defendant No. 1 did not appear in the Plaintiffs' suit. Defendants Nos. 2 to 5 contested the suit. The question for determination before the lower Courts was whether the mortgage in question came within the meaning of "protected interests" under sec. 160, cl. (*g*) of the Bengal Tenancy Act. Both the lower Courts found for the Plaintiffs and held that the mortgage was a "protected interest" and could not be annulled. Defendants Nos. 2 to 5 then preferred the present appeal.

Dr. Rash Behari Ghose, *Babus Golap Chandra Sarkar* and *Debendra Nath Ghosh* for the Appellants.

Babus Basanta Kumar Bose, *Surendra Chandra Sen* and *Sarat Chandra Ghosh* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The present appeal arises out of a suit brought by the Plaintiffs as mortgagees to enforce a mortgage executed in their favour by the Defendant No. 1, who is a *putnidar*, by obtaining a decree against him jointly with the Defendants Nos. 2 to 5 who are his landlords, and in satisfaction of the decree, by selling up the

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putni tenure which, after the mortgage had been given, had been sold by the landlords in satisfaction of a decree for the recovery of arrears of rent and had been purchased by them. What appears to have happened is that the Defendant No. 1 the *putnidar* after he had given the mortgage to the Plaintiffs, defaulted in paying the rent due on the *putni* tenure. In consequence, the Defendants Nos. 2 to 5, the landlords, brought a suit under the Tenancy Act against the *putnidar* to recover the rent, and obtained a decree. Thereafter they sold up the *putni* tenure in execution of the decree and purchased it themselves. By this sale the claim for rent was apparently satisfied. The mortgagees, the Plaintiffs in the present suit, seek to satisfy their claim under the mortgage by sale of the *putni* tenure which is now in the hands of the landlords, and both the lower Courts have held that they are entitled to do so as they have a protected interest under sec. 160, cl. (*g*) of the Bengal Tenancy Act.

The landlords, the Defendants Nos. 2 to 5, have appealed, and the question which we have to decide is whether the Plaintiffs are entitled to a decree for the recovery of the mortgage-debt against the landlords jointly with the mortgagor, and whether they can in execution of that decree, sell up the *putni* tenure which has now passed into the hands of the landlords. For the Appellants, reliance has been placed on the wording of cl. (*g*) of sec. 160 of the Bengal Tenancy Act, and it is urged that the terms of the *kabuliyat* given by the *putnidar* at the time of the settlement which the lower Courts have regarded as an express authority given to the *putnidar* by the landlords in writing to create mortgages, are, in fact, nothing of the sort, but that the recitals in the *putni* lease merely set out the ordinary incidents of a *putni* grant as laid down in sec. 3 of the Putni Regulation and that in fact, these recitals gave the *putnidar* no right which he had not under the Regulation. In this contention we agree. Even if the recitals could be regarded as an express authority within the meaning of sec. 160, cl. (*g*) of the Bengal Tenancy Act, the effect of that section would certainly be subject to the saving provisions of cl. (*e*) of sec. 195 of the same Act, which provides that "nothing in this Act shall affect any enactment relating to *putni* tenures in so far as it relates to such tenures." We hold, therefore, that the mortgage created in favour of the Plaintiffs is not a protected interest within the meaning of sec. 160, cl. (*g*) of the Bengal Tenancy Act.

At the same time it is clear that, under the terms of the *putni* lease, the *putnidar* had a right to mortgage the *putni* tenure, but that right was subject to the conditions imposed by sec. 11 of the Putni Regulation. That section provides:—"No transfer by sale, gift, or otherwise no mortgage or other limited assignment, shall be permitted to bar the indefeasible right of the zemindar to hold the tenure of his creation answerable, in the state in which he created it, for the rent which is, in fact, his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect under express authority obtained from such zemindar." This evidently means an express authority apart from the conditions of the lease and it is not even suggested that any such express authority was obtained from the landlords in the present case. Thus, though the mortgagees undoubtedly would have had a right to discharge the landlords' claim

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for rent so as to save the property which was covered by their mortgage and so to save their security from sale for arrears of rent and, after they had done so, to sell up the tenure in satisfaction of their claim under the mortgage, certainly, after they had allowed the property to be sold in the exercise of the indefeasible right of the landlords for recovery of the rent due on the tenure, they had no legal right to come forward and claim to be entitled to realise the mortgage-debt by sale of the tenure, which had passed into the hands of the landlords and so be released from the burden of the arrears of rent. By their own default in failing to pay the rent, the security for the payment of their debt has passed out of the hands of the mortgagor and all that the mortgagors are, under the law, entitled to in the present suit is a personal money decree against the debtor for the recovery of the mortgage-debt. The judgments and decrees of both the lower Courts are set aside and the suit of the Plaintiffs is decreed with costs for the full amount of the debt against the Defendant No. 1 personally and dismissed against the Defendants Nos. 2 to 5. The appeal is decreed and the Defendants Nos. 2 to 5 are entitled to their costs in all the Courts against the Plaintiffs.

H. C. S. *Appeal decreed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2918 OF 1908.

BRETT, J.
CARNDUFF, J.
1912,
27, February.

BARADA PROSAD BARMAN and others, Plaintiffs, Appellants,
v.
PRASANNO KUMAR DAS and others, Defendants, Respondents.

Lease, construction of—Permanency, inference as to—Dwelling-house—Long possession.

The mere facts that a lease of land was for dwelling purposes and that the lessees have been allowed to remain in possession of the land on payment of rent for a long period would not in themselves be sufficient to establish the permanent nature of the tenancy where there is nothing to show that the building was contemplated to be or in fact was a masonry building.

This was an appeal preferred on the 21st of December 1908 against the decree of Babu Ashutosh Banerjee, Subordinate Judge of Zillah Backergunge, dated the 1st of September 1908, affirming that of Babu Bimal Chandra Chatterjee, Munsif at Barisal, dated the 20th of January 1908.

The facts of the case will appear from the judgment.

Babus Jogesh Chandra Ray and *Prokash Chandra Majumdar* for the Appellants.

Babus Ram Chandra Majumdar and *Gunoda Charan Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The present appeal arises out of a suit brought by the Plaintiffs to eject the Defendants from a piece of homestead land measuring 2½ karas after service of notice to quit. The Court of first instance found that the notice had been duly served but

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that it was bad in law and it further held that the tenancy was a permanent one and therefore the Plaintiffs were not entitled to get a decree for ejectment but were only entitled to a decree for rent. On appeal, the lower Appellate Court has found that the notice to quit was duly served and that the notice was valid in law; and on these points, no argument has been addressed to us at the hearing of this appeal. The lower Appellate Court has further found that, as the land was let out for the building of a dwelling-house on it, it must be presumed that the tenancy was a permanent one. On these findings, the Subordinate Judge has confirmed the judgment and decree of the first Court and has dismissed the suit.

The Plaintiffs have appealed to this Court and, in this appeal, the only question which has been raised is whether the tenancy under the terms of the lease by which it was created is a permanent tenancy or not. The *kabuliyat* executed by the Defendant No. 1 who is one of the original lessees and by the father of the Defendant No. 2 who is the other lessee has been translated and we have had it before us. The document, after setting out the title of the lessor, goes on to say:—"We" the lessees, "having prayed for taking *karsa malguzari* settlement of the homestead lands of Sonatun Chang, etc., etc., for dwelling in the same, you granted us a pattah in respect of the said homestead lands at a jama of total Rs. 3." The description of the settlement is that which would apply to an ordinary lease for a year or for a term of years. There is nothing in the description to indicate that the lease was to be permanent or heritable. The document goes on to say that the lessees "shall raise houses on the homestead lands and dwell in the same and pay rents annually to the Sarkar." In fact, the lease, in its terms, appears to be nothing more than an ordinary yearly lease of a piece of homestead land for the purpose of building a house on it for dwelling purposes. There is no suggestion in the lease itself that the house is to be of a permanent character, that is to say, a masonry dwelling-house; and the fact that no selami appears to have been paid at the time when the lease was granted seems to us to support the conclusion that the intention of the lessor was merely to grant a yearly lease of the land.

On behalf of the Respondents, however, it has been urged that this lease must be interpreted to be a permanent lease because it was a lease for building purposes; and, in support of this view, we are first referred to a decision of this Court in the case of *Johoorulal* v. *Dear* (1). That was the case of a lease granted to an European pensioner. The judgment is not very clear as to what style of house was built on the land after the lease had been granted, but, from the fact that the house was surrounded by a wall, the building appears to have been of a permanent character, and would seem to have been a masonry building or something of that description. In the present case, it is to be observed that the lease was granted on the 16th Bhadra 1283, B. S., corresponding to 31st August 1876; that is to say, that the lessees or their successors in interest have been in occupation for the last twenty years or more. The learned Pleader for the Respondents relies on this circumstance as well as on the fact that the land was let out for building purposes to support the conclusion that the lease was a permanent lease. The mere fact, however,

(1) 23 W. R. 399 (1875).

that the lessees have been allowed to remain in possession of the land on payment of rent for a long period would not in itself be sufficient to support the conclusion that the lease was in its inception a permanent lease ; and the most that the Respondents are able to say with regard to the second point, namely, that the lease was for building purposes is that, from the time that they obtained the lease, they have spent Rs. 500 in throwing earth, planting trees and making corrugated iron sheds. It cannot, therefore, be said in the present case that the expense incurred by the Defendants in building the house is of a very extravagant nature. From the fact, as appears from the written statement, that Rs. 500 was the total amount spent during thirty years, it is evident that the expenditure is certainly not very large.

The next case which is relied on is that of *Gangadhur* v. *Ayimuddin* (2). The facts of that case are, however, entirely different from the facts of the present case. In that case, the land had been let out for upwards of sixty years for building purposes and the building was of a substantial character and was built sixty years before by the ancestor of the Defendants. In those circumstances, this Court held that the Court was at liberty to presume that the land was granted for building purposes and that the grant was of a permanent character. We do not think, however, that that ruling can be accepted as any authority in the present case. There is nothing whatever to prove that the building is of a permanent character or that masonry building has been constructed on the holding. The last case relied on is that of *Promoda Nath* v. *Srigobinda* (3). In that case it was held that, when the lease was granted, the parties contemplated the possibility of a masonry building being erected on the land and, in fact, a permanent structure was erected on the land. In the present case, it has not been seriously argued that it was the intention of the parties that a masonry building should be constructed on the land. The learned Pleader for the Respondents argues that, as the lease did not restrict the lessees from constructing a masonry building, therefore, it should be presumed that the intention was that they should erect a masonry building. We do not think that from that omission in the document we should draw such a conclusion and we are of opinion that the absence of any words in the document itself indicating that the lease was intended to be permanent or that the rights under the lease were to pass to the heirs of the lessees supports the conclusion that the intention was to grant a yearly lease and not a permanent lease of the land. The learned pleader has, however, argued that because the word স্বত্বাভিষিক্ত is used in one clause of the lease which restricts the lessees from transferring the land by gift or sale or mortgage or by letting out the same, it must be concluded that the intention of the parties was to grant a permanent lease. The word used, however, does not, in our opinion, necessarily indicate that the lease was intended to be of a permanent character and we do not think that it is possible to arrive at the conclusion suggested by the learned pleader, especially as the expression occurs only in the paragraph restricting the rights of the lessees and in the body of the lease no words are used to show that the rights of the lessees under it were to be permanent or heritable.

(2) I. L. R. 8 Cal. 960 (1882).

(3) I. L. R. 32 Cal. 648 : s. c. 9 C. W. N. 463 (1905).

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We are unable to agree with the view which the lower Courts have taken that the lease granted by the Plaintiffs to the Defendant No. 1 and the father of the Defendant No. 2 created a permanent tenancy. In our opinion, it created a yearly tenancy terminable by six months' notice to quit, the period covered by the notice terminating at the end of the year of the tenancy. The lower Appellate Court has found that such a notice was duly served on the Defendants and, in these circumstances, we are of opinion that the Plaintiffs are entitled to a decree entitling them to eject the Defendants. We accordingly decree the appeal, set aside the judgment and decree of the lower Appellate Court and direct that the suit be decreed with costs in all the Courts. The Plaintiffs will be given a decree entitling them to eject the Defendants from the lands in suit, reasonable time not less than six weeks from the date of the arrival of the record in the lower Court being given to the Defendants for the removal of the materials of the house from the land.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1084 OF 1909.

MOOKERJEE, J. CARNDUFF, J. 1911, Heard, 14 and 17, July. Judgment, 17, July.

MOHARAM CHAPRASI and another, Defendants, Appellants,
v.
TELAMUDDIN KHAN and another, Plaintiffs, Respondents.

Lease—Presumption of permanency—Lease for building purpose—Long possession—Uniform rent—Permanency, question of mixed law and fact—Second appeal.

Where the origin of a tenancy was unknown, and it was established (1) that the original tenant and his successor had been in occupation of the land for over sixty years, (2) that the rent had never been varied, (3) that the tenancy had been treated by the landlord as heritable and (4) that the land was let out for residential purposes, the inference was held to be legitimate that the tenancy at its inception was permanent.

The question of the nature of the tenancy is a mixed question of fact and law; the inference as to the nature of the tenancy from the facts found is a question of law which can be gone into on second appeal.

This was an appeal preferred on the 27th of May 1909 against the decree of Babu Bidhu Bhusan Banerjee, Subordinate Judge of Zillah Pubna and Bogra, dated the 24th of March 1909, reversing that of Babu Kumudini Kant Ray, Munsif at Pubna, dated the 6th of June 1908.

The facts of the case will appear from the judgment.

Babus Kishori Lal Sarkar and *Harish Chandra Ray* for the Appellants.

Babu Shyama Charan Ray for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal on behalf of the Defendants in an action in ejectment. The case for the Plaintiffs-Respondents is that the Defendants who were tenants-at-will were in occupation of the disputed land, that their tenancy has been terminated by a proper notice to quit and that they have nevertheless refused to vacate the land. The Defendants resisted the claim substantially on two grounds, namely, *first*, that they held under a permanent lease granted to their predecessors on the 23rd May 1898: and, *secondly*, that if the lease was not established, there were cir-

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cumstances from which the Court could draw the inference that the tenancy in its inception was of a permanent character. The Court of first instance found in favour of the genuineness of the lease and dismissed the suit. Upon appeal, the Subordinate Judge has declined to give the Defendants the benefit of the lease for two reasons. He holds, *first*, that it is doubtful whether the lease is genuine, and, *secondly*, that if it is genuine, it is not proved to be binding upon the landlords inasmuch as, on the face of it, it appears to have been executed by a person whose authority has not been established. The Subordinate Judge then proceeds to hold that although the Defendants have proved that they have been in occupation of this land for many years at a uniform rate of rent and although the property had descended from the original tenant to his daughter, these circumstances are not sufficient to justify an inference that the tenancy in its inception was of a permanent character, because the Defendants have not proved that they raised substantial structures on the land. In this view, the Subordinate Judge has reversed the decision of the original Court and made a decree for ejectment.

In support of the appeal, it has been contended that the decision of the Subordinate Judge is erroneous and on both the branches of the case, reference has been made to a number of judicial decisions bearing upon the questions discussed. In our opinion, there is no room for serious controversy that the decision of the Subordinate Judge cannot be supported.

In so far as the first branch of the case is concerned, as we have already stated, the Subordinate Judge has not explicitly found that the lease is not genuine. He suspects its genuineness and does not come to any specific finding; but he holds that it was not binding upon the landlords, because the authority of the executant was not proved. This view of the Subordinate Judge is clearly erroneous. On the authority of the decisions in *Ubilaik Pal* v. *Dallial Rai* (1) and *Uggra Kant* v. *Hurro Chunder* (2), the Subordinate Judge has held that the provisions of sec. 90 of the Indian Evidence Act merely establish that the document was executed by the persons whose signatures it purports to bear; but that cannot and does not prove the authority of the executants to bind the landlord. This view is unquestionably sound. But it must be remembered that the landlords did not suggest in either of the Courts below that the lease was not binding upon them, because it had been executed on behalf of their predecessors by a person who had no authority to bind them in this transaction. The question was not raised for very obvious reasons. No doubt the lease was originally granted on behalf of the landlords who were at the time infants; but upon attainment of majori y, they ratified the transaction, recognised the predecessor of the Defendants as their tenant and for many years accepted rent from him at the rate mentioned in the lease. Under these circumstances it was not open to them to repudiate the transaction as wholly unauthorised. No question, therefore, arises in this case as to the authority of the executants to bind the landlords. In this view, it would be necessary for us to remand the case to the Subordinate Judge for a specific finding upon the question of the genuineness of the lease. It is needless, however, to adopt this course, because we are of opinion

(1) I. L. R. 3 Cal. 557 (1878).
(2) I. L. R. 6 Cal. 209 (1880).

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that the Appellants are entitled to succeed upon the second branch of the case.

In so far as the second branch of the case is concerned, if we assume for a moment that the lease of the 23rd May 1848 has not been proved to be genuine, the position is that the origin of the tenancy is unknown. It has been established that the original tenant Jugarnath was in occupation up to the time of his death in 1884. Jugarnath was thus in possession for at least 36 years upon payment of a small rent which was never varied in his life-time. Since his death, his daughter, the second Defendant, has been in occupation for at least 20 years up to the commencement of this suit. It has not been suggested on behalf of the landlords that the rent was ever varied during this period when the successor-in-interest of the original tenant was in occupation. We have, therefore, four facts firmly established in the case; *first*, that the original tenant and his successor have been in occupation of the land, for over 60 years; *secondly*, that the rent has never been varied; *thirdly*, that the tenancy has been treated by the landlord as heritable; and, *fourthly*, that the land was let out for residential purposes. Upon these facts, we are of opinion that the inference is legitimate that the tenancy in its inception was permanent: [*Durga Mohun* v. *Rakhal* (3), *Tarakpada* v. *Shyama Charan* (4), *Prosunno* v. *Rutton* (5), *Govinda Chandra* v. *Ayenuddin* (6), *Jahoorulal* v. *Dear* (7), *Nubodurga* v. *Dwarka Nath* (8), *Dunne* v. *Nobo Krishna* (9), *Caspersz* v. *Sarbadhikari* (10), *Nabu Mondul* v. *Cholim Mullik* (11), *Beni Madhab* v. *Jai Krishna* (12)].

The learned Vakil for the Respondent has, however, contended that the question of the nature of the tenancy is one of fact and that it is not open to us in second appeal to interfere with the conclusion of the Subordinate Judge upon this part of the case. In support of this view, he has placed reliance upon the cases of *Dulhin Gulab Koer* v. *Balla Kurmi* (13), *Gungadhur* v. *Ayemuddin* (14) and *Durga Mohun* v. *Rakhal Chandra* (3). It may be conceded that there are possibly expressions in some of these judgments which lend some apparent support to the contention of the Respondent. But it is fairly clear from the decision of the Judicial Committee in the cases of *Ram Gopal* v. *Shamskhaton* (15) and *Naba Kumari* v. *Behari Lal* (16) that the question is really a mixed question of fact and law. No doubt, the question is one of fact to this extent that we are not in a position to interfere with the findings of the Subordinate Judge as to the length of the tenancy, the fixity of rent, and other similar matters. But in so far as the Court is invited to draw an inference as to the nature of the tenancy from the facts found by the Subordinate Judge, the question is undoubtedly one of law [*Grant* v. *Robinson* (17)]. Much reliance was, however, placed by the learned Vakil for the Respondent upon the deci-

(3) 5 C. W. N. 801 (1901).
(4) 8 C. L. R. 50 (1881).
(5) I. L. R. 3 Cal. 696 (1877).
(6) 11 C. L. R. 281 (1882).
(7) 23 W. R. 399 (1875).
(8) 24 W. R. 301 (1875).
(9) I. L. R. 17 Cal. 144 (1889).
(10) 5 C. W. N. 858 (1901).
(11) I. L. R. 25 Cal. 896 (1898).
(12) 7 B. L. R. 152 : s. c. 12 W. R. 495 (1869).
(13) I. L. R. 25 Cal. 744 (1898).
(14) I. L. R. 8 Cal. 960 (1882).
(15) I. L. R. 20 Cal. 93 (1892).
(16) I. L. R. 34 Cal. 902 : s. c. 6 C. L. J. 122 (1907).
(17) 11 C. W. N. 242 (1906).

sion in *Smith* v. *General Motor Cab Co.* (18). That case is clearly distinguishable. There the question arose whether the relation between the parties to the suit was that of master and servant or of bailor and bailee. The House of Lords in affirmance of the decision of the Court below held that the question was one of fact and not of law. It was observed that it was not argued by the parties that upon the admitted facts as a matter of law the relation of the parties was that of master and servant or bailor and bailee. One of the parties relied upon certain circumstances which unquestionably supported the view that the relation between the parties was that of bailor and bailee, while his opponent relied upon other circumstances which supported the position that the relation between the parties was that master and servant. As Lord Atkinson put it, there was thus a conflict of evidence and the Court was called upon to discover upon the evidence the true relation between the parties. Here the question is whether upon the facts which have been found by the Court below, it can legitimately be held that the tenancy in its inception was of a permanent character. There can be no doubt that in view of the decision of this Court in the cases of *Dinendra* v. *Tituram* (19), *Winterscale* v. *Sarat Chandra* (20) and of the Judicial Committee in the cases of *Gopal Lall* v. *Teluck Chunder* (21), *Dhunput* v. *Gooman* (22), *Ram Chunder* v. *Jogesh Chunder* (23), *Suttosurrun* v. *Mohesh Chandra* (24), *Upendra Krishna* v. *Ismail Khan* (25), *Nilratan* v. *Ismail Khan* (26) and *Naba Kumari* v. *Behari Lal* (16), the inference is irresistible that the tenancy in its inception was of a permanent character. The Subordinate Judge himself indeed would have arrived at the same conclusion but for the error into which he fell when he assumed that to bring a case within this rule, it was essential to establish that there were permanent structures on the land. But the decision of the Judicial Committee in *Naba Kumari* v. *Behari Lal* (16) shows conclusively that although the presence of permanent structures on the land may be a very important factor, it is by no means essential to establish that the tenancy in its inception was of a permanent character. The decree of the Subordinate Judge cannot consequently be supported.

The result is that the appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored with costs in all the Courts.

Appeal allowed.

(18) (1911) A. C. 188.
(19) I. L. R. 30 Cal. 801 (1903).
(20) 8 C. W. N. 155 (1903).
(21) 10 M. I. A. 183, 191 (1865).
(22) 11 M. I. A. 433 (1867).
(23) 12 B. L. R. 229 (1873).
(24) 12 M. I. A. 263 (1868).
(16) I. L. R. 34 Cal. 902: s. c. 6 C. L. J. 122 (1907).
(25) L. R. 31 I. A. 144: s. c. I. L. R. 32 Cal. 41 (1904).
(26) L. R 31 I. A. 149: s. c. I. L. R. 32 Cal. 51 (1904).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 95 OF 1910
AND
RULE No. 4178 OF 1909.

BRETT, J.
CARNDUFF, J.
1912,
22, February.

SURENDRA MOHINI DEBI, Appellant,
v.
LOHARAM CHATTOPADHYA, Respondent.

Civil Procedure Code (Act XIV of 1882), sec. 311—Auction-purchaser if necessary party to proceeding to set aside sale.

SURENDRA MOHINI DEBI *v.* LOHARAM CHATTOPADHYA.

The auction-purchaser was not a necessary party to a proceeding under sec. 311 of the old Civil Procedure Code to set aside a sale.

Where a sale under the said section was set aside by consent of the decree-holder without the knowledge of the auction-purchaser,

Held—*That the order setting aside the sale was not without jurisdiction.*

This was an appeal preferred on the 3rd of March 1910 against the order of H. E. Ransome, Esq., District Judge of Zillah Nadia, dated the 29th of July 1909, affirming the order of Babu Tarapada Chattopadhya, Munsif, 2nd Court of Krishnagar, dated the 15th of March 1909.

The facts of the case will appear from the judgment.

Babu Ram Chandra Majumder for the Appellant.

Babus Mohendra Nath Ray, *Hara Prosad Chatterjee* and *Biraj Mohan Majumdar* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

A suit was brought by Shib Coomari Debi, who is described in the present Rule as the Opposite-Party No. 21, against other persons, who are also parties to this Rule, or against their previous representatives-in-interest, for the recovery of the rent of a certain *dar-putni*. Shib Coomari Debi obtained an *ex parte* decree, and the *dar-putni* was sold in satisfaction of that decree on the 12th June 1907, and purchased by the Petitioner in this Rule, Surendra Mohini Debi, who from her description, appears to be the wife of the Opposite Party No. 7, Jananendra Nath Chattopadhyaya. On the 31st July 1907, an application was made, under sec. 311 of the old Code of Civil Procedure by Debendra Nath Chattapadhyaya, Opposite Party No. 13, and, on the same date, three other judgment-debtors, namely, Opposite Parties Nos. 1, 14 and 17, filed a similar application. The three last-mentioned persons also filed an application under sec. 108 of the old Code to have the *ex parte* decree set aside. On the 4th January 1908, the applications came up for disposal, and a petition of compromise between the decree-holder and the judgment-debtors was filed, by which the decree-holder consented to the sale being set aside on receipt of the amount decreed. The application under sec. 108, C. C. P., was also dismissed on the same day.

These proceedings were taken without notice to the auction-purchaser, and the case which is set up by the auction-purchaser, who is the Petitioner in this Rule, is that she was not aware of these proceedings.

On the 27th March 1908, the Petitioner put in an application under sec. 312, C. C. P., asking that the sale to her might be confirmed and the sale-certificate issued. That application was rejected by the Court of first instance on the ground that the sale, having already been set aside, could not be confirmed. There was an appeal against this order to the lower Appellate Court, and the case was remanded. On remand the Court of first instance arrived at the same conclusion as it had come to before. There was an appeal again to the District Judge against the decision on remand, and the District Judge dismissed the appeal, holding that, as the sale had been set aside, he could not interfere. At the same time he expressed the opinion that the auction-purchaser, not having been made a party to the proceedings for setting aside the sale,

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was not bound by them. Against this decision of the District Judge, the auction-purchaser first applied to this Court, on the 29th November 1909, and obtained the present Rule (No. 4178 of 1909) on the Opposite Party to show cause why the order of the District Judge, dated the 29th July 1909, should not be set aside, the sale confirmed and the sale certificate granted to her, or why such other order should not be made as to this Court might seem fit and proper. On the 3rd March 1910, the Petitioner also filed an appeal against the same order, which is Appeal from Order No. 95 of 1910, and the appeal and the Rule have now come before us for disposal.

A preliminary objection has been taken to the hearing of the appeal on the ground that no second appeal lies as the present case between the auction-purchaser and the judgment-debtors cannot be regarded as a proceeding between the parties to the suit or their representatives under sec. 244 of the old Code of Civil Procedure. The learned pleader who appears on behalf of the Appellant does not oppose the objection and, in our opinion, it must prevail and the appeal be dismissed.

We have then to deal with the Rule, and the ground which the learned pleader has advanced in support of it is that the auction-purchaser was a necessary party to the application under sec. 311 of the old Code of Civil Procedure, and that, as she was not made a party, the provisions of the section were not fully complied with and the order of the Munsif was made without jurisdiction. In support of the contention that an auction-purchaser was a necessary party to an application under sec. 311 of the old Code of Civil Procedure, the learned pleader who appears for the Petitioner, relies mainly on the decision of the Allahabad High Court in the case of *Keramat Khan* v. *Mir Ali Ahmed* (1). The learned Judges who decided that case, appear to have held that, as from the terms of sec. 312 of the Code it was obvious that the auction-purchaser must be a party to a proceeding under sec. 312 it followed that he was also a necessary party in the case of an application under sec. 311 in order to fulfil the conditions of sec. 311. Reliance is also placed on a decision of a single Judge of the Allahabad High Court, *Ali Gauhur Khan* v. *Bansidhur* (2). In that case, however, the question for consideration was whether the decree-holder was a necessary party to an application under sec. 311, and the learned Judge, in deciding that he was a necessary party, appears to have been influenced by the fact that, in the case of *Keramat Khan* v. *Mir Ali Ahmed* (1), to which we have already referred, it was held that the auction-purchaser was a necessary party. The learned Judge held that, if the auction-purchaser was a necessary party, therefore, much more the decree-holder should be held to be a necessary party; but he did not consider the question whether, in fact, the auction-purchaser was a necessary party or not. Reference has also been made to an unreported case of this Court (Appeal from Order No. 421 of 1906), which was decided on the 17th January 1908. That however was an appeal against a decision after remand, and, on referring to the judgment and the remand order, we find that the learned Judges of this Court, when remanding the case for a re-hearing, expressed the opinion that the auction-purchaser should be

(1) A. W. N. (1891) at p. 121.
(2) I. L. R. 15 All. 407 (1893).

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made a party to the miscellaneous proceedings,* and the learned Judges who decided the appeal after remand, having found that the directions of this Court had not been complied with and the auction-purchaser had not been made a party, held that the appeal was defective in form and that it should be dismissed with costs. The rulings to which we have been referred do not, in our opinion, give much assistance in the present case.

The learned pleader who appears for the Petitioner has, however, relied on the provisions of sec. 310A of the old Code, and he has contended that, as it has been held in certain cases that the auction-purchaser is a necessary party to an application under sec. 310A, it must necessarily follow that he is also a necessary party to an application under sec. 311. We have been referred to several decisions in which it has been held that to an application under sec. 310A the auction-purchaser is a necessary party, but on behalf of the Opposite Party in the present Rule it has been contended that those decisions are no authority for the contention which has been advanced before us in the present case. Sec. 311 itself contains no provisions to the effect that notice shall be issued to the auction-purchaser, and the ground on which a sale can be set aside under that section is not a ground on which, ordinarily, the auction-purchaser would have any interest or be able to offer any assistance. The ground is material irregularity in publishing or conducting the sale. As the auction-purchaser can have no part in a proceeding with regard to the publishing or conducting the sale, ordinarily, he would not be a person who would be directly interested in an application under that section. The learned pleader for the Petitioner has, however, contended that the auction-purchaser has interests in the property which might suffer if the proceedings were not conducted in his presence. He has not distinctly pointed out what those interests are; but we will take it that he refers to what was described in *Adhar Chander Banerjee* v. *Aghore Nath Aroo* (3), as the equitable or inchoate right of the successful bidder awaiting completion by the grant of the sale-certificate. Sales in execution of decrees are, however, held for the benefit of decree-holders not of auction-purchasers, and it seems to us that the Legislature in 1882 evidently considered that the latter's interests would be sufficiently safeguarded by the provisions of sec. 315 of the old Code. Sec. 310A does not apply to the same set of facts as form the subject of an application under sec. 311, and in an application under sec. 310A, the purchaser certainly has an interest in seeing that the provisions of cl. (*a*) of that section are complied with. Moreover even in a proceeding under sec. 310A, it has been held by this Court in *Bhairab Pal* v. *Prem Chand Ghose* (4) that notice to the auction-purchaser is not necessary. We may further observe that sec. 313 gives the purchaser a right to make an application to set aside the sale on certain special grounds, and in that section there is a distinct proviso that the judgment-debtor shall have an opportunity of being heard against the order. In sec. 311, there is no such proviso and it is only since the passing of the new Code of Civil Procedure that a general provision has been inserted in Or. XXI, r. 92 giving all persons affected a right to be heard on an application made by the decree-holder or any other

(3) 2 C. W. N. 589 (1898).

(4) Civil Rule No. 411 of 1897 (unreported).

person to have the sale set aside on the ground of material irregularity in publishing or conducting it. In our opinion, the ground advanced by the learned pleader on behalf of the Petitioner for setting aside the order of the lower Court cannot be maintained. So far as this Court is concerned, no authority has been produced before us to support the contention that the auction-purchaser is a necessary party to an application under sec. 311 of the old Code of Civil Procedure and the reasons given in the decisions of the Allahabad Court to which we have referred do not appear to us to be based on sound or sufficient grounds. We, therfore, see no reason to interfere with the order of the lower Court. The Rule is accordingly discharged with costs. We assess the hearing-fee at five gold mohurs.

We make no order as to costs in this appeal.

Appeal dismissed:
Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 1419 OF 1910.

HOLMWOOD, J.
SHARFUDDIN, J.
1910,
16, December.

RAM SARAN PATHUCK, 1st Party, Petitioner,
v.
RAGHUNANDAN GIR, 2nd Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 145, 147—Offerings made to a deity, whether could be the subject-matter of a proceeding under sec. 145—Profits arising out of land, whether offerings are—Secs. 145 and 147, analogy between.

In a proceeding under sec. 145, Cr. P. C., the Magistrate has no jurisdiction to make a declaration that a certain party is entitled to the possession of the offerings made to a deity in a temple.

The offerings given by worshippers for the worship of any deity are not profits arising out of land, e.g., the place of worship.

These offerings arise out of the deity irrespective of the building or the land upon which he may happen to dwell.

A case under sec. 147, Cr. P. C., is to be decided by the same procedure and on the same principles as a case under sec. 145, Cr. P. C.

A dispute as to the possession of the offerings is a dispute about moveable property; and it is now settled law that sec. 145, Cr. P. C., has no concern with moveable property.

This was a Rule granted on the 21st of November 1910 against an order of Babu Harbans Sahay, Deputy Magistrate of Gaya, dated the 23rd of September 1910.

The facts material to the report as they appeared from the judgment of the Magistrate were as follows :—

The subject-matter of dispute in this case is the temple of Pita Moheshwar in Gaya in which the deity is an idol of the God Shiva. It is open to the public for worship. Possession of the temple therefore as a matter of fact consists merely in receiving and appropriating the offerings made to the deity by the worshippers.

The 1st party is the hereditary Pujari and 2nd party has purchased the ownership from his vendor and mortgagor Kashi Lal under registered deed and claims to be in absolute and exclusive possession.

The proceedings in this case were started on an application of the 1st party filed on the 23rd May 1910 before the Magistrate in charge. The case as disclosed in the petition was that he had been for a long time the Pujari of the temple and performing pujahs, etc., and in lieu thereof he had been appropriating to himself ¼th of the offerings. He urged

that the 2nd party had only acquired the right of his vendor Kashi Lal who was a mere custodian of the remaining 12 annas offerings.

From the various documents which were exhibits in this case there was, the Magistrate held, no doubt that the temple was the private property of one Sita Dai who made a gift of the same to Chamman Lal. After him Kashi Lal came into possession of the estate under a will, dated 30th June 1896. From 1905 to 1907, this Kashi Lal executed several mortgages in favour of several persons mortgaging the temple and offerings in all of them. The 1st party, Ram Saran, himself is an attesting witness to the bond Ex. C which was in favour of Raghunandan Gir, purchased the temple with all rights of Kashi Lal therein under the kobala. Hence it was held that 2nd party and his predecessor in interest were absolute proprietors of the temple.

The Magistrate held as follows :—

"It appears that even admitting that 1st party used to do certain services in the temple as servant of the proprietors and owners of the temple, such possession cannot be pleaded in a proceeding under sec. 145, Cr. P. C. Possession that can be pleaded in such a proceeding must be possession based on a claim of right to possession. The possession of an agent or servant which is merely permissive cannot give a party to a proceeding *locus standi* as against his principal and master. Moreover on the evidence it is clear that Raghunandan Gir has been in actual possession of the temple and of the offerings from the time of his purchase, and so entitled to possession until evicted in due course of law."

Mr. K. N. Chaudhuri, *Babus Hari Bhusan Mukherjee* and *Prokash Chandra Sarkar* for the Petitioner.

Mr. Hyam and *Babu Monmatha Nath Mukherjee* for the Opposite Party.

The Judgment of the Court was as follows :—

This was a Rule calling upon the District Magistrate of Gaya to show cause why the proceedings against the Petitioner under sec. 145, Cr. P. C., should not be quashed on the ground that they are without jurisdiction and in direct contravention of the ruling, *Guiram Ghoshal* v. *Lal Behary Das* (1).

It has been pointed out to us by the learned Vakil who appears to show cause, and very properly pointed out, that so far as the declaration of possession of the temple and the land on which it stands in favour of Raghunandan Gir goes that declaration has been made with full jurisdiction, and is not in contravention of any ruling of this Court.

The only question which arises in this case is whether the declaration that Raghunandan Gir is in possession of the offerings is an order made with jurisdiction or not.

It is contended that the offerings made in a temple are of the same nature as the rents and profits arising out of lands.

Now, sec. 145, cl. 2 says "for the purpose of this section the expression 'land or water' includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property." It appears clear to us that the offerings given by worshippers for the worship of any deity are not profits arising out of a building. If the deity be in a cave or under a tree, as it originally was in years gone by, the offerings would accrue in exactly the same manner. The

(1) 14 C. W. N. 611 : s. c. 12 C. L. J. 22 (1910).

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offerings arise out of the deity irrespective of the building or the land upon which he may happen to dwell. To hold otherwise would be to allow the Criminal Courts to interfere with the customary laws of this country. There are certain rules differing in various sects and in various districts as to the apportionment of the offerings between the ground landlord, the actual holder of the temple, the middle-man and the *pujari*, and the sums which are devoted to the up-keep of the temple. Now it is quite impossible for the Criminal Courts to go into these matters and it is quite impossible to say that the whole of these offerings belongs to the ground landlord, middle-man, *pujari* or to the endowment. This matter, which depends entirely upon custom and sometimes upon an ancient grant or other documents, can only be adjudicated upon by a competent Civil Court. And that was the view which appears to have guided the Judges who decided the case of *Guiram Ghoshal* v. *Lal Behary Das* (1). They say that "considering the scope of sec. 145, Cr. P. C., we think that the present dispute (which was with regard to the right to perform the duties of a *pujari*) is certainly not one which was intended that the section should cover."

(1) 14 C. W. N. 611: s. c. 12 C. L. J. 22 (1910).

The argument that this case was under sec. 147, Cr. P. C., and therefore does not affect the present case which is one under sec. 145, Cr. P. C., does not help the Petitioner. Because a case under sec. 147, Cr. P. C., is to be decided by the same procedure and on the same principles as a case under sec. 145, Cr. P. C. And as the Judges say "it may be that it is impossible to perform the duties of a *pujari* without entering upon the land upon which the temple is built." But when it comes to the question of the offerings being disputed and not the house or the land it is clear that the dispute is about moveable property; and it is now settled law that sec. 145, Cr. P. C., has no concern with moveable property.

We, therefore, consider that the order so far as it affects the offerings of the temple was made without jurisdiction, and that portion of the order of the lower Court must be discharged, the Rule being made absolute to that extent and to that extent only.

Rule made absolute in part.

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NOTES.

IT IS REASSURING TO LEARN FROM REUTER'S telegram that the Government has decided to keep the Calcutta High Court as now directly under the Government of India instead of the local Government. This was one of the matters on which some uneasiness was felt by many people in connection with the Delhi changes. The direct connection with the Government of India is not only a source of added dignity to our High Court but also makes for greater independence in the Judges. It would surely have been a retrograde step if the High Court were placed under the local Government.

THE DEBATE ON THE SECOND READING OF THE India Bill in the House of Commons which has been telegraphed by Reuter does not throw much new light on the contents of the Bill or furnish much informed criticism on its provisions. Mr. Montagu contended that the Government of India had the power to create the provinces by a Proclamation as they did and in answer to one of his interrogators he referred to the provisions of various Parliamentary Statutes which in his opinion gave the Government the requisite power. We have discussed all those provisions in our article on the subject and have tried to show that these provisions do not cover cases like the constitution of the Province of Behar and the elimination of the Eastern Bengal Council. We do not think it necessary to labour the point any further as we think that in any case the Parliamentary recognition of these new Provinces and constitutions by the Bill under discussion will validate these acts of the Government of India.

IN THE COURSE OF THE DEBATE MR. MONTAGU threw out a suggestion which we cordially welcome. It was suggested that the Statutes which gave the Government of India the powers now claimed for them were obsolete. Mr. Montagu contended they were not obsolete; and in fact, whatever view we may take of the validity of the recent reconstitutions, it cannot be said that these Statutes which lay down the constitution of the Government of India are in any sense of the term obsolete. But this criticism forcibly brought out the fact that these constitutional Statutes are so numerous and of so bewildering a character, that it will surely be worth while to consolidate them. That would make the work of the student of the Indian constitution very much easier and will also save the Government from many a pitfall which the bewildering nature of the several statutes leads them into. Mr. Montagu expected that the statutes would soon be consolidated and in the interest of simplicity and clearness we cordially join with him in the expectation and hope that it will be shortly fulfilled. Ilbert's excellent Digest has made the work of consolidation very much easier than it would otherwise have been and it has always been a matter for wonder to most readers of that work why the statutes should not have been consolidated.

IT IS ANNOUNCED THAT MR. FREDERICK H. M. Corbet who is stated to have been long connected with Ceylon, has been appointed Advocate-General of Madras. Of the new Advocate-General personally we do not profess to have any special knowledge and we are not competent to offer any comments as to his personal fitness for the post. But we are, on principle, opposed to appointments like this from outside the local

bar, at any rate from the bar outside anywhere in India. It is not only that the appointment of an outsider to a prize pcst of the bar is objectionable and unjust as denying the local bar the satisfaction of their just expectations and as taking away from them a great deal of the incentive to progress, but it is otherwise very much open to question on wider grounds of policy.

INDIAN LAW IS NOW NO LONGER IN THAT ELEMENTARY stage when any one familiar with English law might be expected to cope with its intricacies. Commencing very largely as an offshoot of the English law, the Indian law has in the course of over a century of British administration developed into a complex structure having an individuality of its own. A long course of legislation and judicial interpretation of the law has made wide departures from English law and built up a fabric of no mean dignity or complexity. In these circumstances it would be scarcely good policy to place an utter strarger to the Indian law in a position in which he will have to discharge important functions in its administration. There can be no denying that as the chief legal adviser of the local Government in all matters of importance and performing statutory duties of considerable responsibility the Advocate-General has great need to be fully equipped for his work; and, the law of India being what it is, it would be idle to expect that anybody would be quite capable of discharging his duties adequately simply because he has been a successful lawyer elsewhere. At any rate he will surely take some little time before he can do his work as well as the foremost Indian lawyers with their perfect familiarity with the ins and outs of Indian law and Indian life might be expected to do.

THERE HAVE OF LATE BEEN SOME CRITICISMS directed to the successive appointment of Vakils as Advocate-General in Madras and it has been suggested that unless Advocate-Generals are appointed from members of the English Bar the tone of the profession tends to suffer. We do not know if this criticism has had anything to do with the latest choice of the Madras Government. We for our own part are not disposed on this question to enter into a controversy as to the fitness or otherwise of any branch of the profession in India for the post. Assuming that it was necessary for the Advocate-General of Madras to be a member of the English Bar and assuming that there were no suitable candidates available among the Barristers in Madras, that does not justify an appointment from outside India. It may be suggested that Mr. Corbet has experience of Ceylon. But the laws of Ceylon are not exactly the same as those of India and surely there is a great deal more of uniformity in the laws and legal traditions of all India than between Madras and Ceylon. If a Barrister was wanted one might more profitably be secured from India than from outside.

IN THIS ISSUE WE PUBLISH A NOTE OF THE sensational trial of Mr. and Mrs. Seddon on a charge of murder by arsenic. Like the *Crippen* case this case also rested entirely on circumstantial evidence. Miss Barrow died of arsenic poisoning in the house of Seddon where she was living with the husband and wife, practically alone. The doctor who attended at the last illness of the deceased certified that he had not given arsenic in any of the medicines he prescribed. These facts taken along with the conduct of the accused in connection with the burial and with cashing some £5 notes of the deceased lady and some other matters were held by the jury to be sufficient to justify a conviction for murder.

MR. JUSTICE BUCKNILL'S SUMMING UP IS A SOMEwhat strong vindication of circumstantial evidence on which there is a stronger tendency to rely at present than ever before. "It is not necessary," his Lordship observed, "that a crime shall be established beyond the possibility of a doubt, for there were doubts more or less involved in every human transaction. There were crimes done in darkness and secrecy which could only be brought to light by presenting circumstances which pressed more and more as they increased in number."

THIS IS ENTIRELY IN LINE WITH THE MODERN view of the value of circumstantial evidence upon which the *Crippen* case was decided. There are people who doubt the policy or justice of attaching so much value to circumstantial evidence alone. Circumstances are more ambiguous and much harder to interpret than direct evidence and there are surely greater risks in deciding on circumstantial evidence specially when it is a question of capital sentence. This is one view of the question. But there is another view and that has been strongly put by Mr. Justice Bucknill, which takes into consideration the vast number of secret crimes in which circumstantial evidence must be very largely if not exclusively relied upon. Whatever view is held on principle, there is no question that the latter view is fast gaining ground in judicial practice in England.

Reviews.

GOODEVE'S MODERN LAW OF PERSONAL PROPERTY. 5th Edition. *By John Herbert Williams, LL. M., and William Morse Crowdy, B. A. London: Sweet & Maxwell, Limited, 3, Chancery Lane, W. C. 1912. 20/.*

A new edition of a standard work like the present is always welcome. The present edition has been chiefly necessitated by the changes introduced in various branches of the law by Statutes passed since the date of the previous edition (1904). The editors have had in consequence to re-write the chapters dealing with Trade-marks, Patents, Companies and Copy-rights and portions of the chapters dealing with Ships and Policies of Assurance. The chapter on Debts has been enlarged by including a short summary of the material provisions of the Money Lenders' Act of 1900. Recent cases, in so far as they help to elucidate the subject, have been referred to and the editors hope not without reason that the book though primarily intended for students will continue to be of service to practitioners as well.

THE PROBATE AND ADMINISTRATION ACT (V OF 1881) AND THE SUCCESSION CERTIFICATE ACT (VII OF 1889). *By Trikamlal R. Desai, B. A., LL. B., Bombay. The 'Lawyer' Office, Girgaon. 1912.*

This is a handy annotated re-print of the two enactments mentioned. The notes do not purport to exhaust the case-law bearing on the provisions of the Acts, but they contain nearly all that one may require for ready reference. The notes are not confined to Indian cases only, but select English cases are referred where they assist in elucidating the provisions of the Acts.

THE COURT FEES AND SUITS VALUATION ACTS. *Completed by A. K. Nauniah, B. A., B. L. Published by T. A. Venkasawmy Row and T. S. Krishnasawmy Row, from the Lawyers' Companion Office, Trichinopoly and Madras. 1912. Price Rs. 3-4.*

This is re-print from the Lawyers' Companion series, revised and brought down to the end of 1911. The popularity attained by the series as a whole is a sufficient justification for the issue of the Acts annotated separately. We have no doubt that the excellence of the compilation coupled with its handsome get up will commend the publication to practitioners.

CHITTY'S STATUTES OF PRACTICAL UTILITY. Arranged in alphabetical and chronological order, with notes and indexes. Vol. 17, Part I, containing Statutes of Practical Utility passed in 1911 with incorporated enactments and selected statutory rules. *By W. H. Aggs, M. A., LL. B., of the Inner Temple, Barrister-at-Law. London: Sweet and Maxwell, Ld., 3, Chancery Lane. Stevens & Sons, Ld., 119 & 120, Chancery Lane. 1912. 10/6.*

Out of 86 Statutes passed in 1911, 38 of general application to the United Kingdom and 3 local Acts have been selected and so far as practicable annotated by means of cross-references and otherwise. The National Insurance Act naturally occupies the greatest amount of space in this collection. Amongst other important enactments dealt with is the Act which consolidated the Statutes relating to Perjury (The Perjury Act). This it may be noted.is the first annual continuation volume of the 6th edition of Chilly's Statutes. Considering the variety and complexity of the legislative output in England, the utility of annotated selections from them can hardly be questioned.

MEWS' ANNUAL DIGEST OF ENGLISH CASE-LAW. 1911. *London: Sweet and Maxwell, Ld., 3, Chancery Lane; Stevens & Sons, Ld, 119 & 120, Chancery Lane. 1912. 15/.*

Mews' Digest having been consolidated up to 1910, the Annual Digest for 1911 now appears under the style of "the First Annual Supplement." As in the Digests of previous years, the present Digest is not entirely confined to English cases. Select Scottish and Irish cases and some Indian cases also are incorporated. We are glad to notice that the compilers of the present volume have followed our suggestion regarding the citation of Indian cases from the Indian Appeals series of the English Law Reports. Some of these decisions of the Judicial Committee are of more than local interest and the Digest is the richer by their inclusion.

Notes of Cases.

ENGLISH LAW COURTS.

CENTRAL CRIMINAL COURT.—*Rex.* v. *Mr. and Mrs. Seddon.* Before MR. JUSTICE BUCKNILL AND A JURY. 4—14th March 1912.

Murder by arsenic—Conviction based entirely upon circumstantial evidence.

This was the trial of the two accused for murder of Miss. Barrow at their own house.

The case for the prosecution was that the deceased who was a spinster was possessed of leasehold property yielding an annual income of £120 and personal property chiefly cash of the value of £4,000. In July 1910, she went to live with the accused. Subsequently the leasehold property

and some stocks were transferred to the male prisoner. She fell ill on September 1st and was nursed by Mrs. Seddon. She died on September 14th. A certificate of death from epidemic diarrhœa was given. She possessed a large number of £5 notes which were cashed by the male or female prisoner. It was alleged that on August 26th, Miss Seddon (daughther) went to a chemist to purchase fly-papers. The body was exhumed on November 15th, when it was found that arsenic was widely distributed over the body. By her will which was alleged to have been executed on September 11th, she bequeathed her jewellery, furniture, etc., to Mr. and Mrs. Grant. The motive alleged for the crime was greed of gold.

The evidence in support of the prosecution consisted chiefly of the (1) undertaker who deposed that Mr. Seddon said to him that only £4 odd must suffice for the funeral and doctor's fees as that was all that was left by the deceased, that no mourning coach was sent to the house; (2) of a chemist who deposed that he sold a 3*d.* packet of fly-paper which was labelled poison; (3) of an assistant in the same firm as the prisoner who saw a large amount of gold on the prisoner's desk on the evening of September 14th; (4) of doctors who used to attend the deceased before her last illness and of the doctor who treated her for diarrhœa in her last illness. The latter proved that there was no arsenic in the drugs prescribed by him; (5) of medical experts who deposed that death was due to acute arsenical poisoning or poisoning by small dose over a long period of time. Fly-papers contained arsenic which could be extracted by boiling. There was also evidence that several £5 notes belonging to the deceased were cashed by one or other of the prisoners under false endorsements.

The case for the prosecution being concluded, Mr. Marshall Hall submitted that there was not sufficient evidence against either of the prisoners upon which they could be put in peril on a charge of murder. In all the cases of alleged poisoning, especially where two people had been charged together there had always been evidence tracing poison to the persons accused. He challenged the Attorney-General to point to any direct evidence that either of the prisoners possessed arsenic in any shape or form or administered it. The balance of evidence was such and the uncertainty was such that the case could not be allowed to go to the jury. It was admitted that arsenic was a remedy for asthma, and the finding of it in the hair showed that it might have been taken for 12 months. The Marsh test was a splendid one for detecting the presence of arsenic, but not for the purpose of measuring the quantity.

Both prisoners gave evidence in their own defence and were cross-examined at great length. Miss Seddon denied purchasing the fly-paper as alleged. Evidence was given that the transfers of leasehold property and stocks were made in a perfectly open and business manner by Miss. Barrow with the help of her solicitor and that Mr. Seddon got the leasehold in lieu of giving her an annuity of £52.

Mr. Justice Bucknill, in summing up, said that the Crown had to prove the case, and that meant that unless the Crown proved it to the satisfaction of the jury beyond reasonable doubt the prisoners were entitled to be acquitted. It was not necessary that a crime should be established beyond the possibility of a doubt, for there were doubts more or less involved in every human transaction. There were crimes done in darkness and secrecy which could only be brought to light by presenting circumstances which pressed more and more as they increased in number. Their duty was calmly to investigate the case and see what was the conclusion pressed upon their minds as men of the world, men of sense, and men of solid justice. If they saw a reasonable doubt they must, as they would be very glad to do—not give them the benefit of it—but they should acquit them. This case was founded on circumstantial evidence. Circumstantial evidence was made up of a series of circumstances, facts, or events, each of which was direct necessarily, otherwise they could not receive it, till at last the sum of these circumstances might very rightly and properly impel a jury to find a verdict of guilty. Therefore circumstantial evidence was very often as strong as the most direct evidence could be. These people were charged with poisoning Miss. Barrow. Needless to say that if they were guilty, or either of them was guilty, then it was a crime which had been carefully thought out and committed in secret. Poisoning was one of those secret crimes done in the dark.

If the crime were committed by the male prisoner, it was for the love of gold. If he killed Miss. Barrow for gold and his wife helped him to bring about the death by poison, she would be equally guilty. The jury might, however, see a great difference between the two. The case put forward by the Crown was that it was the cupidity of the man that brought about this unfortunate woman's death. There was, the jury might think, a difference between his cupidity and the position of his wife. Every point that could be taken in her favour must be taken by the jury, and those in favour of the man also. Although motive had been made so much of, and was—if it existed—so important a factor in the case, motive was not proof of the crime. It was brought into the case to assist the jury to come to the conclusion that the murder was the act of the Seddons or one of them, and that it was a murder not of passion or hatred or done in hot blood, but was designed for the purpose of getting money, or if they had got

it before by illegal means, that they should not be punished for what they had done—if they had done it. If there was a motive there was certainly an opportunity for the murder because Miss. Barrow, except for the little boy Grant, was living in their house alone.

The learned Judge recapitulated the circumstances of the case and asked the jury whether they were satisfied beyond reasonable doubt that Mrs. Seddon was guilty—that she had caused the death or actively helped her husband to kill the woman by the administration of poison. His Lordship pointed out that Mrs. Seddon's case was not on parallel lines with that of her husband. In reference to Miss Barrow's transferring her leasehold and other property to the male prisoner in return for an annuity, his Lordship pointed out that everything was done perfectly in order. In the matter of the transference of her leasehold property she and Seddon were each represented by separate solicitors and a proper deed was drawn up. She was a free agent, and she freely and voluntarily assigned the property to him. It was said by the prosecution that the murder was committed for the purpose of getting Miss Barrow's money. It was for the jury to consider that. They must take all the facts into consideration—the transfer of the property, the possession of the notes, and the cashing of them by Mrs. Seddon. Did those circumstances, coupled with the conduct of the man after the death, make out such a case against him that they could have no reasonable doubt that he was the man who administered the poison? Did Miss. Barrow die of arsenical poisoning? The jury would probably say "Yes," because Dr. Willcox and Dr. Spilsbury said so. But that was not enough to justify a verdict of guilty. Was the arsenic which caused her death administered by the prisoners or either of them? He implored them to remember that the Crown had to make out the guilt. If the Crown had been able to satisfy them beyond reasonable doubt then they must return a verdict of Guilty; but if they were not satisfied their verdict must be Not guilty. The presumption that a woman was acting under the coercion of her husband did not apply in a charge of murder.

The jury retired to consider their verdict, and after deliberating for about an hour they found Frederick Henry Seddon *Guilty*, and Margaret Ann Seddon *Not guilty*.

MR. JUSTICE BUCKNILL said that Mrs. Seddon was discharged and she left the Court.

MR. JUSTICE BUCKNILL.—I am satisfied that the jury have done well and rightly in acquitting her. I am satisfied that they have done justice to you.

The learned Judge then passed sentence of death upon the prisoner.

The Attorney-General, Messrs. Muir, Rowlatt and Humphrys for the Crown.

Messrs. Marshall-Hall, K. C., and Dunstan for Seddon.

Mr. Rentoul for Mrs. Seddon.

B. D.

HOUSE OF LORDS.—*Sun Insurance Office* v. *Surveyor of Taxes*. Before the LORD CHANCELLOR AND LORDS HALDANE, ALVERSTONE AND ATKINSON. 7th March 1912.

Income tax assessment of an Insurance Company —No fixed rule for estimating profits and loss—Question of fact and figure.

This was an appeal from a decision of the Court of Appeal which reversed a decision of Bray, J. The Appellants carried on fire insurance business in different parts of the world.

The practice of the office had been, to carry forward annually 40 per cent. of its premium receipts as being unearned and as a reserve or allowance in order to bring about the correct incidence as between year and year of the income which has to answer the accidental incidence of fire losses. This 40 per cent. amounted at December 31, 1901, to £466,138; and rose during the next three years to £522,472. For the three years the increase in the reserve thus amounted to £56,344, and affected the returns for the year of assessment to the amount of £18,778.

The Commissioners held the allowance to be reasonable and proper and their decision was confirmed by Mr. Justice Bray.

The Court allowed the appeal.

In the course of his judgment the Lord Chancellor said that in assessing such fire insurance companies one must proceed wholly or in part by estimate. An estimate being necessary and the arriving at it by in some way using averages being a natural and probably inevitable expedient, the law could not lay down any one way of doing this. It was a question of fact and of figures whether what was proposed in each case was fair both to the Crown and to the subject.

In this appeal, said his Lordship, there is a competition between two methods of estimate. That which I call the second is propounded by the Crown. That which I call the third is propounded by the company, who deduct 40 per cent. of the premiums at the end of each year. The relevant facts are here the reverse of what they were in the case of McGowan. The third method has been examined by the Commissioners and is stated in the special case to be right in this case. It was in terms admitted by the Surveyor of Taxes before the Commissioners that the fair and reasonable allowance for this company to make, if entitled to make any allowance, was 40 per cent. The surveyor's point was that no allowance or deduction at all ought to be made, because he said the proper method according to law was the second

method. He did not prove, or try to prove, that it was fair in this case. So that all the evidence and the finding in the present appeal was in support of the Appellant's contention. In these circumstances it seems to me quite obvious that the third and not the second method must be applied here for the plain reason that upon the materials before us it is the fair and only way presented to us by which the truth can be approximately attained.

In the hope that it may help to prevent future misunderstanding, I will recapitulate my own opinion. There is no rule of law as to the proper way of making an estimate. There is no way of estimating which is right or wrong in itself. It is a question of fact and figures whether the way of making the estimate in any case is the best way for that case. Experience seems to have satisfied Courts of law for a considerable time that the method which I have described as the second is a useful working rule. But no one has said in this House that there is any constraint to accept it. It may be that the character or mode of carrying on this insurance business may alter or may have altered, and what was a good method once may become inaccurate or even obsolete.

I am equally anxious that your Lordships should not be supposed to have laid down that the method applied by the Commissioners in the present case has any universal application. If the Crown wishes in any future instance to dispute it they can do so by evidence, and it is not to be presumed that it is either right or wrong. A rule of thumb may be very desirable, but cannot be substituted for the only rule of law that I know of—*viz.*, that the true gains are to be ascertained as nearly as it can be done. I think this appeal must be allowed.

LORD HALDANE, in the course of his judgment, said that the question of what was net profit or gain must primarily be one of fact to be ascertained by the tests applied in ordinary business. Mr. Justice Bray had put the case as analogous to one in which if goods were brought their value could not be treated as profit without deducting the value of the liability to pay for them which the buyer had incurred. Such cases as *Imperial Fire Insurance Company* v. *Wilson* (35 L. T., 271) and *Scottish Union and National Insurance Company* v. *Smiles and Northern Assurance Company* v. *Russell* (2 T. C., 551) were not, when carefully examined in the light of what appeared to be the true principle, reliable as authorities for a proposition which would run counter to the practice and good sense of the commercial community.

Messrs. Dauckwerts, K. C., and Bremner for the Appellants.

The Attorney-general, the Solicitor-General and Mr. Finlay for the Respondent.

B. D. *Appeal allowed.*

COURT OF APPEAL.—*In re H. M. S. Hawke.* Before LORDS JUSTICES WILLIAMS, FARWELL AND KENNEDY. 13th March 1912.

Admission of additional evidence—General principles discussed.

This was an application by the Plaintiffs for leave to produce further evidence upon the hearing of the appeal. In the course of his judgment LORD JUSTICE VAUGHAN WILLIAMS discussed the general principles applicable to such motions. He said that a suggestion was made by Mr. Laing that if this evidence was of such a nature that it would assist those who were investigating the facts with the intention of arriving at the truth, it would be an injustice to shut it out, and further, that where the Court had the opportunity afforded to it of getting at the truth before arriving at a final decision in the matter, it would be unjust not to take advantage of that opportunity.

He (the Lord Justice) did not agree. The Court, of course, always wished to arrive at the truth, but there were certain rules governing the trials of actions, rules which led to the conclusion that when once the trial took place, *primâ facie* further evidence should not be allowed to be called unless a strong case had been made out for so doing. On this point of the case he only proposed to read a short passage from the judgment of Lord Chelmsford in the case of *Shedden* v. *Patrick and the Attorney-General* (L. R., 1 Sc. and D., 470, at p. 545) where His Lordship said:—"It is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting a new trial. If this were permitted, it is obvious that parties might endeavour to obtain the determination of their case upon the least amount of evidence, reserving the right, if they failed, to have the case retried upon additional evidence, which was all the time within their powers."

He thought the principle was there laid down on which he ought to act on the question of allowing further evidence to be given. The reason the present case had given him so much trouble and anxiety was this—that it was almost impossible on a short statement of the case to grasp the facts, or form an absolute judgment as to whether the owners of the Olympic were deliberately content to go to trial with the evidence then in their possession and to take the risk of judgment in their favour on that evidence. He would have expected the affidavits filed on behalf

of the Plaintiffs to say that this new evidence was not available at the trial, because it had not occurred to them, or if it had occurred to them, that they could not by due diligence have produced it before. But not having sufficient materials to enable him to judge or to form the the conclusion that the owners of the Olympic were deliberately content to fight the case on the lines they did, he was reluctantly driven to say that this matter of the further evidence ought to be postponed until the hearing of the appeal, and it would be so postponed if he allowed the further evidence to be taken *de bene esse.*

The Court would then be able to judge as to whether it should be admitted or not. He had, therefore, reluctantly come to the conclusion that the application should be granted.

Messrs. Laing, K. C., and Stephens for the Petitioners.

Messrs. Aspinall, K. C., Bateson, K. C., and Dunlop for the Opposite Party.

B. D. *Application granted.*

COURT OF APPEAL.—*Hendon Urban District Council* v. *Bass.* Before LORDS JUSTICES WILLIAMS, FARWELL AND KENNEDY. 12th March 1912.

Volunteers, theory of common employment applied to—Boys called on to move fire escape—Liability for negligence.

This was the Defendants' application for new trial in an action tried by Darling, J., with a Jury. The Respondent who was a minor aged 14 sued for damages for injuries received. The Defendants maintained a fire brigade composed of tradesmen. The brigade used a fire escape pulled by men. The brigade were having a fire-drill, and when it was over one of the men cried out to the boys in the street who were witnessing the fun, "Now, boys, help to pull this truck home." They did so and in so doing an accident occurred in which the Plaintiff was injured.

At the trial the learned Judge left the following questions to the jury :—*First*, were the Defendants themselves guilty of negligence; *secondly*, was the fire escape a fit and proper one for its purpose; *thirdly*, were the Defendants' servants guilty of negligence in the management of the fire escape or in allowing the Plaintiff to pull it; *fourthly*, was the boy aware of the danger? The jury answered the first question in the negative, the second and third in the affirmative, the fourth in the negative, and assessed the damages at £100.

Hence this appeal which was allowed. In the course of his judgment LORD JUSTICE VAUGHAN WILLIAMS said :—

The findings and the evidence showed a strong for saying that the plaintiff and the other boys who were with him were volunteers to assist those who had the management of the fire escape, and that they were in the same position for the purposes of this case as if they had been servants of the Defendants in receipt of wages.

This case was covered by authorities which placed volunteers in the same position as employed workmen, and which had the effect of making these boys persons in common employment with those who had the management of the fire escape. He did not wish to be supposed to mean that in a case like this, where a boy was allowed to help in pulling a fire escape, the owners of the fire escape could not possibly be held liable for injuries sustained by him while so doing. They might be in some cases, as *e.g.*, in a case where the second question put to the jury in this case was answered differently. If the answer to that question had been in the negative, probably the Plaintiff would have had a good cause of action against the Defendants.

Again, he was far from saying that, if there had been evidence that boys frequently played with this fire escape, not only when it was stationary, but while it was being moved, and that the attention of the Defendants had been called to this, and that some accident had previously occurred in consequence, there would not have been a manifest duty on the Defendants to instruct their men to prevent boys from interfering with the machine or assisting in the use of it. No such case, however, had been made out.

This was a simple case of a boy, not of very tender years, being invited by those in the management of this machine to help as a volunteer in pulling it, and getting damaged while so doing. In these circumstances it seemed to him to be impossible to say that the Defendants were under any liability at all. He was clearly of opinion that the doctrine of common employment did apply to this case.

Messrs. Shearman, K. C., and Goddard for the Appellant.

Mr. Ricardo for the Respondent.

B. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CIVIL APPELLATE JURISDICTION. Before BRETT and SHARFUDDIN, JJ. APPEAL FROM ORDER No. 236 OF 1911. BABAR ALI BASAR, Appellant *v.* SHEIK KUMAD BOSE RAI CHOWDHRY, Respondent. Heard, 10th and 11th April, 1912. Judgment, 11th April 1912.

Decree, adjustment of—Civil Procedure Code (Act V of 1908), Or. 21, r. 2—Admission by father—Son, if can execute decree.

A suit was brought by the father of the two Respondents in the present appeal and by his brother Sudhanya Roy against the present Appellant and a decree was obtained on the 9th September 1907. In October 1907, a sum of Rs. 200 was admittedly paid by the judgment-debtor to the decree-holders. Afterwards, Sudhanya Roy, the brother of the father of the Respondents, brought a partition suit against his brother Sital Roy and, in his plaint, he alleged that Sital had not entered in the assets of the family property the decree which they had obtained on the 9th September 1907, against Babar Ali. Sital, in his written statement, put in an objection to this allegation. He said that, at the time when this decree was obtained by the two brothers against Babar Ali, there was enmity between them and Babar Ali, that afterwards Babar Ali had come under their influence and Rs. 200 was accepted in full satisfaction of that decree and that Babar Ali was given to understand that he was exempted from further liability. Afterwards when satisfaction was certified to the Court, the payment was certified as made only in satisfaction of one instalment due under that decree. Sital afterwards died and Sudhanya, his brother, after putting in a petition admitting receipt of another Rs. 200 from Babar Ali in Aghran 1316, filed a certificate admitting full satisfaction of his half share of the decree and then put in the application which gave rise to the present appeal, in which he sought on behalf of the two minor sons of Sital for execution of the decree for the balance which, he alleged, was outstanding in their favour.

The Court of first instance dismissed the application. The order was set aside on appeal. The judgment-debtor appealed to the High Court.

Held, that the point for consideration was not one falling under the provisions of r. 2 of Or. 21 of the Code of Civil Procedure, but was, whether in the face of the admission made by the father, the two sons were entitled to succeed in the present application.

In ordinary cases, no Court should accept any payment in satisfaction of a decree or any adjustment made in satisfaction of a decree which was not certified to the executing Court as contemplated by Or. 21, r. 2 of the Code of Civil Procedure.

Babus Satis Chunder Ghose and Smritis Chunder Ghose for the Appellant.

Babu Upendra Lal Roy for the Respondent.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and N. R. CHATTERJEA, J. LETTERS PATENT APPEALS NOS. 63 AND 64 OF 1911. SRI SRI GODS GOPINATH JEW AND ANOTHER, by their *shebait* BHARAT RAMANUJA MAHANTA, Appellant *v.* THE MIDNAPUR ZEMINDARY CO., LD. 12th April 1912.

Bengal Tenancy Act (VIII of 1885), secs. 5 (5), 6, 158—Tenure-holder—Rent, permanently fixed—Rent, if becomes enhancible because amount changed by agreement.

The appeals arose out of a proceeding under sec. 158 of the Bengal Tenancy Act, and the only point was whether the Appellant was a tenure-holder or a *raiyat* holding at fixed rates, and if a tenure-holder, whether his rent was liable to enhancement during the continuance of his tenure.

The terms under which the tenure was held from 1848 and possibly before, were to the effect that " there shall be no increase or diminution of the above rent," that is the rent of Rs. 17 *sicca.* As a result of litigation and possibly to buy peace, the Mohant entered into an arrangement with the zemindars that if they restored him to the right to which he was entitled, he was quite willing to pay rent of Rs. 108-13-12.

The Court of first instance held that the Appellant was a raiyat holding at fixed rates. On appeal to the District Judge it was held that he was a tenure-holder and his rent was liable to enhancement. On second appeal it was held by Mr. Justice Coxe that he was not in a position to interfere with the decision of the lower Appellate Court, though the inclination of his mind was in favour of holding that the present Appellant was not a tenure-holder, but a raiyat. From his judgment, the present appeals were preferred.

Held, that the Appellant was a tenure-holder; he was one to whom the presumption for which provision is made in sub-sec. (5) of sec. 5 of the Bengal Tenancy Act, applied.

That the effect of the whole arrangement was that in place of Rs. 17 *sicca* Rs. 108 was the rental, but subject to the same provisions as were contained in the original tenancy. That his rent was not liable to enhancement during the continuance of his tenure.

Mr. S. P. Sinha, Babus Biraj Mohan Mojumdar and *Mohini Mohan Chatterjee* for the Appellant.

Dr. Rash Behari Ghose and *Joges Chunder Roy* for the Respondent.

A. T. M. *Appeals allowed in part.*

[PRIVY COUNCIL.]

[APPEAL FROM ALLAHBAD.]

LORD SHAW.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.
1912,
Heard, 2, 6, 7 and 8, February.
Judgment, 28, February.

RAJA BALWANT SINGH, since deceased (now represented by The Collector of Etah) Appellant,
v.
(1) THE REVEREND ROCKWELL CLANCY, (2) RAO MAHARAJ SINGH, Respondents.

Hindu Mitakshara joint family—Mortgage of family property executed by adult brother alleging same to be impartible to pay off father's debt—Minor brother signing deed as assenting party, how far bound—Minor, deed executed by, if void or voidable.

Where during the minority of the younger of two Mitakshara co-parceners who were brothers the elder executed a mortgage of the family property falsely declaring the same to be impartible and to have descended to him alone and that his brother was entitled only to an allowance for maintenance, and the infant brother also joined in order that the fact of his having signed the deed might afford evidence that he had assented to the taking of the loan by his brother and the granting of the mortgage:

Held—*That even if it was established that the elder brother had taken the loan for the purpose of discharging a debt contracted by their father the debt could not on the face of the deed be regard as one contracted by the elder brother as manager of a joint family consisting of himself and his younger brother.*

That the deed did not affect the minor or his interest, being, so far as he or his interest was concerned, not merely voidable but void and of no effect.

These were consolidated appeals from two judgments* and decrees of the High Court of Judicature for the North-Western Provinces, Allahabad, dated the 27th March 1906, which modified a decree of the Court of the Subordinate Judge of Aligarh, dated the 14th April 1903.

The principal question raised on the present appeals was the extent of the liability in law of the Respondent Maharaj Singh to discharge a debt evidenced by a bond executed on the 28th October 1892 in favour of the Bank of Upper India.

The facts giving rise to the litigation were as follows :—

The original owner of the property in suit was one Dilsukh Rai, to whom certain villages were granted by Government under *sanads*, dated the 20th May 1859 and 22nd September 1864, in consideration of services rendered by him in the Indian Mutiny, and the title of Raja was also conferred upon him. He died on the 11th March 1880 and was succeeded by his only son Shankar Singh who died on the 24th August 1891 leaving him surviving two sons the elder of whom was Sheoraj Singh and the younger Maharaj Singh, the Respondent. The title of Raja had been conferred on Shankar Singh also.

Shankar Singh died considerably indebted, and on the 28th October 1892 Sheoraj Singh and Maharaj Singh borrowed the sum of three lacs of rupees from the Bank of Upper India, Limited, to discharge existing debts and executed a mortgage bond in favour of the said Bank. The material portion of the bond is set out in their Lordships' judgment. The money so obtained was proved to have been applied in part to the discharge of the debts of Shankar Singh.

On the 2nd August 1897, the said Bank assigned their mortgage to Raja Balwant Singh who instituted the present suit on

* Reported in I. L. R. 28 All. 508 (1906).

the 26th September 1901, in the Court of the Subordinate Judge of Aligarh. The Defendants to the suit were Sheoraj Singh, Maharaj Singh and several persons who were in possession of portions of the mortgaged property. Among the latter was the Respondent, the Reverend Rockwell Clancy, as representing the Mission Board of the Methodist Episcopal Church of India, who on the 28th July 1899 had purchased some lands in the village of Kasgarj from Sheoraj Singh. The plaint claimed payment of the mortgage money, and in default of payment prayed for a sale of the mortgaged property.

Sheoraj Singh filed a written statement in defence and pleaded that the property in suit being a grant from Government was inalienable, and that he had made an oral agreement with the Appellant modifying the terms of the registered mortgage. These defences were negatived by both Courts in India.

Maharaj Singh also filed a written statement. His main defences were that he was a minor, *i.e.*, under the age of 18 years at the time of the execution of the bond in suit and that by the Hindu law he was under no obligation to discharge his father's debts all of which were contracted "for unlawful and immoral purposes." He alleged further that the estate was not impartible; that he was separate from his brother; that he had not consented to the mutation of names in favour of Sheoraj Singh, and that the bond in suit had been signed by him in consequence of the undue influence of his brother and the fraud of the said Bank.

After recording evidence, both oral and documentary, the Subordinate Judge delivered his judgment on the 14th April 1903. He held that the bond in suit was validly executed and attested; that the evidence given by Maharaj Singh and his witnesses as to the time and place of execution was false, and that the evidence as to execution under the pressure of undue influence was equally false. He came to the conclusion that Maharaj Singh had in October 1892 already attained majority, and that the evidence produced by him as to the date of his birth was untrue and unreliable. He found that the whole of the consideration was duly paid and in fact applied to the discharge of previous debts. He was also of opinion that the previous debts were not contracted for immoral or illegal purposes by Raja Shankar Singh, and that by the ordinary Hindu law Maharaj Singh was under a legal obligation to discharge them, whether he had or had not attained majority in October 1892. Lastly, he held that the property sold to the mission was covered by the said mortgage. In accordance with the above findings he made a decree in favour of the Plaintiff.

Against the said decree Maharaj Singh and the Reverend Rockwell Clancy lodged separate appeals in the High Court of Judicature for the North-Western Provinces, Allahabad, and both the said appeals were disposed of by judgments* delivered on the 27th March 1906. The High Court (Sir J. Stanley, C. J., and Sir W. Burkitt, J.) came to the conclusion that Maharaj Singh was under the age of 18 years at the time the mortgage in suit was executed. The High Court also decided that the debts contracted by Raja Shankar Singh were incurred for illegal and immoral purposes creating no liability on Maharaj Singh to discharge them even if a liability under the general Hindu law could be enforced in the present suit. In the result the High Court made

* Reported in I. L. R. 28 All. 508 (1906).

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a decree affirming the liability of Sheoraj Singh alone and directing a sale of his half share in the property mortgaged, while it reversed the decree of the Subordinate Judge *qua* Maharaj Singh and exempted him and his property from all liability in connection with the deed in suit. It also allowed the appeal of Reverend Clancy to the extent of a moiety of the property purchased by the said church.

Hence this appeal.

Mr. L. DeGruyther, K. C., and *Mr. Bhugwandin Dubé* for the Appellant submitted that the conclusions of the Court of first instance were right. The Court had seen and heard the witnesses and its finding that Maharaj Singh was a major was amply supported by documentary evidence and the conduct of Maharaj Singh. The evidence produced by the other side was unreliable. Further, even supposing that Maharaj Singh was a minor he was liable to pay his father's debts under the Hindu law. The debts have not been shown to have been incurred for unlawful or immoral purposes. Sheoraj Singh was the elder brother and was naturally the manager of the joint family. Maharaj Singh was bound by his acts. The debts were binding on the joint family property, and the bond in suit was executed by Sheoraj Singh to pay debts for which both he and his younger brother were liable. The form of the bond was immaterial. It is settled law that Courts in India ought not to give effect to technicalities, but ought to do substantial justice. It is proved here that the assignors of the Appellant discharged the antecedent debts for which the family was liable.

In equity the Appellant ought not to suffer, for what was done in reality was that the bond in suit was executed by the major brother on behalf and for the benefit of the joint family. Reference was made to *Cazee Oahud Buksh* v. *Bindoo Bashinee* (1), *Succaram Moraji* v. *Kalidas Kalianji* (2), *Sayad Muhammad* v. *Fatteh Muhammad* (3), *William McLean* v. *Allexander McKay* (4). And further, onus lies on the son to prove that the debt is immoral. *Bhagbut Pershad* v. *Girja Koer* (5). There was no difference in principle whether the property has passed out of the family or not. What is necessary for the lender is to look at the actual pressure on the estate at the time of the loan. If a purchaser takes without notice the transfer is absolutely good. So also when there is a pending sale and execution and a transfer is made to release the property from sale, the sons cannot set up immorality. In any case mere proof that the father generally led an immoral life was not enough—some connection must be shown between the debt in question and immoral conduct. Reference was made to the following:—*Hunooman Parsaud Pande* v. *Musammat Babooee Munraj* (6), *Girdharee Lall* v. *Kantoo Lall* (7), *Suraj Bunsi Koer* v. *Sheo Prashad* (8), *Nanomi Babuasin* v. *Modun Mohun* (9), *Jamna* v. *Nain Sukh* (10), *Pem Singh* v. *Pertab Singh* (11), *Debi Dat* v. *Jadu Rai* (12), *Chintaman Rav* v. *Kashi Nath* (13). Mayne's Hindu Law, pp. 387, 388 and 589.

(1) 7 Suth. W. R. 298 (1867).
(2) I. L. R. 18 Bom. 631 (1894).
(3) L. R. 22 I. A. 4 (1894).
(4) 5 Privy C. Cas. 327 (1873).
(5) L R. 15 I. A. 99 (1888).
(6) 6 M. I. A. 423 (1856).
(7) L. R. 1 I. A. 321, 322 (1874).
(8) L. R 6 I. A. 88, 100 (1879).
(9) L. R. 13 I. A. 1, 17 (1889).
(10) I. L. R. 9 All. 493 (1887).
(11) I. L. R 14 All. 179 (1892).
(12) I. L. R. 24 All. 459 (1902).
(13) I. L. R. 14 Bom. 320, 327 (1890).

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Sir E. Richards, K. C., and *Mr. Brown* for the Respondent submitted that the minority of Maharaj Singh was established by cogent evidence, and that being so the bond in suit was absolutely void. Sheoraj Singh was throughout endeavouring to set up an exclusive title in himself and in fact he alone executed the bond. He was acting adversely to Maharaj Singh, and could not be said to have been acting as a manager of the joint family on behalf of Maharaj Singh. As to whether Sheoraj Singh was or was not a managing member it was question of fact and was not put in issue before the lower Courts.

Mr. L. DeGruyther replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—These are two consolidated appeals from decrees of the High Court of Judicature for the North-Western Provinces at Allahabad, dated the 27th March 1906, which varied a decree of the Subordinate Judge of Aligarh, dated the 14th April 1903.

The suit in which these appeals have arisen was brought on the 26th September 1901 by the assignee of a mortgage to recover Rs. 5,67,978-8-0 principal and interest, claimed under the deed of mortgage. The mortgage deed, which is dated the 28th October 1892, purports to have been made between Raja Sheoraj Singh Bahadur, mortgagor, of the first part, Maharaj Singh, the only brother of the said Raja Sheoraj Singh, of the second part, and the Bank of Upper India, Limited, of the third part. Sheoraj Singh and Maharaj Singh were, with others, made Defendants to the suit.

Sheoraj Singh was the sole mortgagor, and by the deed of mortgage, Sheoraj Singh, declaring that he was the absolute owner in possession of the several villages, lands, hereditaments, and premises in the deed mentioned, and that there was no sharer in the said property, purported to mortgage the property to the Bank of Upper India, Limited, as security for the repayment with interest of Rs. 3,00,000 lent to him by the Bank. Maharaj Singh was not a mortgagor, nor did it appear by the mortgage deed that he had any proprietary interest in the mortgaged property or was obtaining any benefit from the loan to his brother Sheoraj Singh; Maharaj Singh was made a party to the deed of mortgage in order that the fact of his having signed the deed might afford evidence that he had assented to the taking of the loan by Sheoraj Singh and the granting of the mortgage. The suit is one for sale of the property mentioned in the mortgage deed, and by the suit the Plaintiff sought to make Maharaj Singh personally liable for the mortgage debt and interest, and to bring to sale Maharaj Singh's share in the mortgaged property, which in fact was the ancestral property of the joint Hindu family which at the date of the mortgage consisted of Sheoraj Singh and Maharaj Singh. The mortgage was assigned on the 2nd August 1897 by the Bank of Upper India, Limited, to Raja Balwant Singh, who was the Plaintiff in the suit. Raja Balwant Singh is now dead, and his minor son, Raja Surajpal Singh, is represented in this litigation by the Collector of Etah, who is in charge of his estate.

Sheoraj Singh, the mortgagor, is the elder of the two sons of Raja Shankar Singh, now dead. The younger of the two sons of Raja Shankar Singh is Maharaj Singh, a Defendant in the suit, and the Respondent in one of these two appeals. Raja Shankar Singh was the only

son of Raja Dilsukh Rai, long since dead. At the time of the Indian Mutiny of 1857-58, Dilsukh Rai, who was then a patwari, did good and meritorious service for the Government. In recognition of those services the Government granted to Dilsukh Rai a considerable estate, now said to produce annually some Rs. 50,000 gross income. The lands granted to Dilsukh Rai were not granted as an impartible estate. They are the lands which were mortgaged by Sheoraj Singh to the Bank of Upper India, Limited. In further recognition of his services the Government conferred upon Dilsukh Rai the title of Raja as a personal distinction. Raja Dilsukh Rai was a saving and apparently a penurious man. On his death the estate was unencumbered, and he left a large sum of money which he had accumulated. The Government also conferred upon Shankar Singh the title of Raja as a personal distinction. The title was never made hereditary, and although Sheoraj Singh was described in the mortgage deed as a Raja he was not entitled to be so described. Raja Shankar Singh borrowed considerable sums of money, and died on the 24th August 1891 leaving debts which he had contracted undischarged. It was to discharge those debts of Raja Shankar Singh, and also some debts which had been contracted by Sheoraj Singh, that the mortgage on which this suit has been brought was made by Sheoraj Singh.

Several issues were raised and tried in the Court of the Subordinate Judge. One of those issues arose on a defence of Maharaj Singh that at the date of the mortgage he was under the age of 18 years, and being at that date a minor was legally incapable of entering into any contract or of binding himself or his interest in the estate by his execution of the deed of mortgage as an assenting party to the taking of the loan and the granting of the mortgage by Sheoraj Singh. Another issue which was tried by the Subordinate Judge related to an alternative case which the Plaintiff put forward, by which he sought to make Maharaj Singh and his interest in the estate liable for the payment of the money due under the mortgage, on the alleged ground that it was his duty as a Hindu son to pay with interest the money advanced by the Bank of Upper India, Limited, to Sheoraj Singh, as that money had been lent by the Bank to Sheoraj Singh to discharge the debts which had been contracted by Raja Shankar Singh and had been applied by Sheoraj Singh to the discharge of those debts. On behalf of Maharaj Singh it was alleged in answer to the Plaintiff's alternative case that Raja Shankar Singh had contracted those debts for the purposes of immorality, and it was consequently contended that there was no duty on his sons to discharge them by payment, and that the payment of those debts by Sheoraj Singh out of money lent to him by the Bank of Upper India, Limited, for that purpose, created no liability on Maharaj Singh or his interest in the family estate.

The Subordinate Judge found as a fact that at the date of the mortgage, the 28th October 1892, Maharaj Singh was of full age, and being apparently under the impression that in obtaining the loan from the Bank of Upper India, Limited, and in making the mortgage, Sheoraj Singh might be regarded as having acted as the manager of the joint Hindu family, the Subordinate Judge dealt with the Plaintiff's alternative case and found that it was not proved that the debts which had

been contracted by Raja Shankar Singh had been contracted for the purposes of immorality, and exempting certain portions of the property which were held by persons who are not parties to either of these appeals, made a decree for sale of the rest of the property mentioned in the deed of mortgage. With the portions of the property which were exempted from sale these appeals are not concerned.

From that decree of the Subordinate Judgė Maharaj Singh and another Defendant, the Reverend J. B. Thomas, who is now represented by the Reverend Rockwell Clancy, filed separate appeals in the High Court. The High Court on a careful and exhaustive review of the evidence found as a fact that Maharaj Singh was a minor on the 28th October 1892, and consequently that the mortgage deed as against him and his interest in the estate was void. Although the High Court obviously considered that an inquiry into the origin and nature of the debts which had been contracted by Raja Shankar Singh was irrelevant in this suit, the High Court reluctantly, and only in view of the question possibly becoming material in an appeal from their decree, carefully considered the evidence bearing on that question, and found as a fact that the debts which Raja Shankar Singh had contracted had been contracted by him for the purposes of immorality. The High Court allowed the appeal of Maharaj Singh, dismissed the suit so far as Maharaj Singh and his interests in the estate were concerned, and, by a separate decree allowed the appeal of the Reverend J. B. Thomas to the extent of a moiety of the property claimed by him. From those decrees of the High Court these consolidated appeals have been brought. In support of the appeal in which the Reverend Rockwell Clancy is a Respondent no argument has been addressed to their Lordships to show that the appeal against the decree of the High Court which was passed in the appeal of the Reverend J. B. Thomas could be supported if the appeal against the decree obtained by Maharaj Singh in the High Court should fail.

Some of the questions which had been considered in the Courts below were on behalf of the Appellant argued at considerable length before this Board, and it was also contended on his behalf that in borrowing the Rs. 3,00,000 from the Bank of Upper India, Limited, and in making the mortgage of the 28th October 1892, Sheoraj Singh had acted as the manager of the family, and for the benefit and protection of the estate, and consequently, as it was urged, that it was immaterial whether Maharaj Singh was or was not of full age at the date of the mortgage. It will be convenient to deal with that contention at once. The contention that Sheoraj Singh had acted as the manager of the family in borrowing the Rs. 3,00,000, and in making the mortgage, is unfounded. Evidence, oral and documentary, which their Lordships accept as reliable, proves that Sheoraj Singh, after the death of his father, Raja Shankar Singh, assumed without authority the title of Raja, and asserted that the family estate was impartible, and as an impartible estate had descended to him as the elder son of Raja Shankar Singh, and that his brother Maharaj Singh was entitled only to an allowance for maintenance. It was in that assumed position as the absolute owner of an impartible estate, and not as manager of a joint Hindu family, that he obtained the loan from the Bank of Upper India, Limited, and made the

mortgage in favour of the Bank. The mortgage deed was drawn up by an official of the Bank, and in that deed Sheoraj Singh is described as Raja Sheoraj Singh Bahadur, mortgagor, and it is recited that—

"the said mortgagor is the absolute owner or proprietor of the several villages, lands, hereditaments, and premises hereinafter mentioned, and more particularly described in the schedule hereto attached and intended to be hereby mortgaged in possession free from all incumbrances save and except being mortgaged and under attachment of decrees as mentioned hereinafter . . . and the said Maharaj Singh, brother of the said mortgagor, has been made a party to this Indenture in order to make known his consent and approval to this loan being taken, and the said villages, lands, hereditaments, and premises, being mortgaged as security for the same, and the said mortgagor doth hereby declare that the said property is absolutely his own and he has full power to alienate the same by a mortgage sale or otherwise, and that he has only one brother, the said Maharaj Singh, and no sons or any sharer in the said property."

In face of that deed it cannot be contended that the Bank of Upper India, Limited, lent the money to Sheoraj Singh, or that Sheoraj Singh made the mortgage in favour of the Bank as manager of the joint Hindu family, which consisted of himself and Maharaj Singh. The Bank of Upper India, Limited, made some inefficient enquiries, and lent the Rs. 3,00,000 to Sheoraj Singh, not as the manager or even as a member of a joint Hindu family, but in his assumed position as the absolute owner of an impartible estate. Sheoraj Singh, on his own behalf and in his own interests, and not as representing Maharaj Singh, discharged the debts which Raja Shankar Singh had contracted. It need hardly be observed that Sheoraj Singh was not an ancestor or a predecessor of Maharaj Singh; he was at the date of the mortgage merely a co-sharer with his brother Maharaj Singh in the property of the joint Hindu family of which they were members.

The evidence on the question of Maharaj Singh's age on the 28th October 1892 is partly oral and partly documentary. According to the evidence, oral and documentary, which the High Court considered to be entirely reliable, Maharaj Singh was born on the 20th December 1874, and consequently was under the age of 18 years on the 28th October 1892. The Subordinate Judge had treated the oral evidence that Maharaj Singh had been born on the 28th October 1874, as the false evidence of perjured witnesses, and had treated the documentary evidence as fabricated on behalf of Maharaj Singh for the purposes of his defence to the suit. Before coming to the conclusion that Maharaj Singh was born on the 20th December 1874, the High Court, bearing in mind the adverse comments of the Subordinate Judge on that oral and documentary evidence, and with the object of ascertaining how far, if at all, the comments and findings of the Subordinate Judge were justified, had carefully considered the oral evidence of the witnesses, and had examined the documents and papers which had been put in evidence. There was some other documentary evidence which standing alone and unexplained would suggest that Maharaj Singh had probably arrived at the full age of 18 years before the 28th October 1892.

The oral and documentary evidence upon which the High Court relied for their finding that Maharaj Singh was a minor when he signed the mortgage deed on the 28th October 1892 has been criticised minutely and at length by the learned Counsel who argued these appeals on behalf of the Appellant, but their Lordships are unable to see any reason for

doubting, on the question of the date of birth of Maharaj Singh, the evidence of Pandit Ganesh Ram, Pancham Ram, Jhamman Lah, Ram Prasad, Ganesha Ram, the barber, and the Defendant-Respondent, Maharaj Singh. If the evidence of those witnesses is believed, Maharaj Singh was born on the 20th December 1874. The documentary evidence as to the date of birth of Maharaj Singh is in their Lordships' opinion not open to suspicion. Pandit Ganesh Ram proved that he prepared the *tewa* or abstract horoscope on the day when Maharaj Singh was born, and from it prepared the horoscope which was presented to Raja Dilsukh Rai on the day of the *Daston* ceremony. The *tewa* and the horoscope were put in evidence. The horoscope bears upon it in the writing of Raja Dilsukh Rai the name Maharaj Singh which Raja Dilsukh Rai gave to his grandson at the *Daston*. That horoscope was produced and examined on the occasion of the marriage of Maharaj Singh, and it has been clearly and amply identified as the original horoscope relating to the birth of Maharaj Singh. Ram Prasad, who with other pandits, was called in on the birth of Maharaj Singh to prepare a horoscope, produced the almanac in which at the time he had entered the birth of a son in the house of Kunwar Shankar Singh under the date 12th Aghan Sudi, Sambat 1931, which was the 20th December 1874. Ganesha, who was the family barber, took the news of the birth of a son of Shankar Singh from Bilram to Raja Dilsukh Rai at Etah, and received from him a present of Rs. 2. Ganesha also said in his evidence that on that occasion Raja Dilsukh Rai gave Rs. 50 to Balwant Singh for household expenses. The original accounts of the expenditure of Raja Dilsukh Rai, which according to the evidence bear his signature, on the occasions when he examined them, show that in December 1874 Rs. 2 were given to Ganesha, barber, who brought the news of the birth of a son in the house of Kunwar Sahib, who was Raja Shankar Singh, and which show that Rs. 50 was sent to Bilram on account of the birth of a son in the house of Kunwar Singh, who was Raja Shankar Singh. Ganesha, the barber, proved that that son was Maharaj Singh, and there is no evidence to show that Raja Shankar Singh ever had more than two sons. Their Lordships cannot regard that oral and documentary evidence as false or even as open to suspicion. In their opinion it conclusively proves that Maharaj Singh was a minor when he signed the mortgage deed on the 28th October 1892. There is, however, documentary evidence that prior to the 28th October 1892, Maharaj Singh had acted as if he was of full age. For instance, on the 26th May 1892, Maharaj Singh signed a vakalatnama appointing Muhammad Tahir Husain, a pleader, as his attorney in a suit in which he and Sheoraj Singh were Defendants, and authorising Muhammad Tahir Husain to appear for him, to file documentary evidence, and to refer the matter to arbitrators or to enter into a compromise. In that suit Sheoraj Singh, in his written statement of the 26th May 1892, made an allegation in reference to sec. 444 of the Code of Civil Procedure which can be construed only as meaning that Maharaj Singh was at that date a minor. For another instance, in a suit in which Sheoraj Singh and Maharaj Singh were Plaintiffs, they, on the 13th August 1892, signed a vakalatnama appointing Muhammad Tahir Husain, pleader, their attorney, and authorising him to act for them in the suit. On the other hand, on

the 19th August 1892, a decree was made in a suit which had been instituted on the 14th July 1892, and in which Maharaj Singh had been treated throughout as a minor under the guardianship of his brother, Sheoraj Singh. It is probable that until it became necessary in this suit to ascertain the actual date of the birth of Maharaj Singh, neither he nor Sheoraj Singh knew his precise age. However that may have been, their Lordships find as a fact on the clear and reliable evidence to which they have referred, that Maharaj Singh was a minor under the age of 18 years when he signed the mortgage deed of the 28th October 1892.

Having found as a fact that Maharaj Singh was a minor on the 28th October 1892, it is not necessary for their Lordships to consider any other issue. This suit has been brought on the mortgage deed of the 28th October 1892 by the assignee of that mortgage, and as their Lordships have held that the mortgage was not made by Sheoraj Singh as the manager of the family, or in any respect as representing Maharaj Singh, and as Maharaj Singh was then a minor, the mortgage deed as against him and his interest in the estate was not merely voidable, it was void and of no effect, and must be regarded as a mortgage deed to which he was not even an assenting party and as a mortgage deed which did not affect him or his interest in the estate.

Their Lordships will humbly advise His Majesty that the decrees of the High Court be affirmed and these appeals be dismissed with costs.

Solicitors: *Messrs. Pyke, Parrott & Co.* for the Appellant.

Solicitor: *Mr. D. Grant* for the Respondents.

B. D. *Appeals dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3256 OF 1909.

HARINGTON, J. MOOKERJEE, J. 1912, 7, March.

GOPAL CHANDRA CHUKRABURTTY and anr., Defendants, Appellants, *v.* SURENDRA KUMAR ROY CHOUDHRY and anr., Plaintiffs, Respondents.

Registration Act (XVI of 1908), sec. 23—Registration of mortgage out of time by altering date—Lessee from executant if may question validity of mortgage registered out of time—Estoppel.

Where a mortgage deed had been presented for registration more than four months after the date of its execution and its registration had been secured by the executant altering the date of the instrument,

Held—*That even assuming that the deed had been wrongly registered, there being no fraud, the mortgagor would be estopped from taking the objection.*

Held further, *that lessees from the mortgagor who took their leases after the registration of the mortgage are in the absence of fraud equally estopped with the mortgagor from taking the objection.*

This was an appeal against a decree of Babu Aditya Charan Chukraburtty, Subordinate Judge of Mymensingh, dated the 18th of September 1909, affirming that of Babu Debendra Nath Pal, Munsif of Tangail, dated the 27th of April 1909.

The facts of the case were briefly as follows :—

The Defendant No. 1 in this suit executed a mortgage in favour of the Plaintiffs on the 11th Baisak 1312, in respect of certain properties. The document was not registered in time and after four months had elapsed from the date of execution of the mortgage the mortgagor Defendant

changed the date 11th Baisak into 11th Asarh, and got the document registered on that basis. Subsequently the mortgagor granted a lease and a *putni* to the other Defendants in respect of some of these properties. The mortgagees now sued on the mortgage and the lessee Defendants opposed his suit on the grounds *inter alia* that as the mortgage deed had been presented for registration out of time the Sub-Registrar had no jurisdiction to register it, and the registration by him did not have the effect of binding the mortgaged property. Both the Courts below found against the Defendants on this point. The lower Appellate Court in the course of its judgment observed as follows :—

"I hold that notwithstanding the alteration in the date the document is a valid mortgage bond enforceable against the mortgagor and the subsequent *puttanidars* under him. It is clear from the evidence in the record that the bond was executed by the mortgagor on the 11th Baisak and that it was on that date duly attested by witnesses and that the consideration money stated in the bond did pass. The Plaintiff is an inhabitant of Dacca District. The mortgagor is an inhabitant of Tangail Sub-Division within Mymensingh District. The mortgagor presented the document to the Sub-Registrar for registration of it and he appears to me to have made the alterations in the date adding a *kaifiat* and putting his signature thereunder. It is therefore reasonable to believe as is the case under ordinary course of things that the Defendant No. 1, the mortgagor, obtained the deed from the Registration office after its registration and made it over to Plaintiff's officer. Thus if there was any fraud in altering the date in the bond, the mortgagor did it and he alone is to blame. So the mortgagor and the Appellants who derived their title from the mortgagor about a year after the registration of the deed cannot in equity, justice and good conscience take advantage of that fraud and alterations to the prejudice of the Plaintiffs who are in no way to blame. The Court should not in this case go behind the certificate granted by the registering officer who had full jurisdiction to register the deed. The rulings cited by the learned pleader for the Appellants do not apply to the facts of this case. It is not a case where Sub-Registrar had no jurisdiction as the lands covered by the bond in suit are within his jurisdiction. Had the alteration been made without the knowledge and consent of the mortgagor, then the rulings reported in Indian Law Reports, 33 C. S. 812 and 12 M. S. 239, would apply. But in this case the alteration was made by the mortgagor himself and without the knowledge of the Plaintiff.

The lessee Defendants appealed to the High Court.

Babu Nares Chandra Sen-Gupta for the Appellants.

Babus Harendra Narain Mitter and *Rajendra Chandra Guha* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendants in a mortgage suit. The mortgage was executed by Defendant No. 1 who is not a party to the appeal. The Appellants are two persons, one of whom took a lease of some property comprised in the mortgage and the other took a *putni* lease of properties equally encumbered. The Plaintiffs sued on their mortgage and recovered judgment. The objection taken by the Defendants is that the mortgage deed was

presented for registration more than four months after the execution, that to enable it to be registered under the law the date was altered by the mortgagor and thereby registration was obtained which was not warranted by law. The mortgage was executed on the 24th April 1905. It was registered on the 21st September 1905, the date having been altered to the 25th June 1905. The lease taken by one of the Appellants was not taken till September 1906, and the other some time after. The result therefore is that the leases were taken long after the registration of the mortgage deed. Now no question of fraud of any kind arises in the case because the mortgagor wrote on the deed an explanation pointing out that this change in the date of the deed had been made. The mortgagee accepted the deed with the altered date; so it must be taken that as between the mortgagor and the mortgagee the alteration was consented to; and as between them the mortgage would take effect only from the later date to which the document had been altered. That being the state of things, in our opinion it is not open to the Defendants, the lessees, to complain. Supposing it be assumed for the purposes of argument that the deed was wrongly registered, there being no fraud, the mortgagor would be estopped from setting up this alteration in the deed as an answer to the claim of the mortgagee. In our view, the Appellants having taken their leases subsequent to the alteration, in the absence of any fraud, cannot stand in any better position than the mortgagor and are equally estopped from taking the objection which they rely upon. The matter would have been different if in any way the Appellants had been defrauded. As prudent men they ought to have enquired at the registration office to see whether there was any encumbrance. If they had done so they would have discovered that there was this mortgage before their leases. Under these circumstances we must affirm the judgment of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 448 OF 1909.

STEPHEN, J. CHATTERJEE, J. 1912, Heard, 7, March. Judgment, 11, March.	BILAS CHANDRA MUKERJEE and others, Plaintiffs, Appellants, *v.* AKSHOY KUMAR DAS and others, Defendants, Respondents.

Revenue Sale Law (Act XI of 1859), sec. 54—Purchaser of share of revenue-paying estate—Suit to recover from person in wrongful possession from before sale—Limitation.

A purchaser at a revenue sale of a share in a revenue-paying estate is not a person claiming from or through the defaulter but rather adversely to him and under a paramount title.

A person who has not acquired title as against the defaulter by adverse possession for the full statutory period, cannot resist the purchaser's suit for recovery unless his possession has been adverse to the purchaser's for the statutory period.

KALANAND SINGH *v.* SARAFAT HOSEIN (1) *not followed.*

This was an appeal preferred on the 14th of January 1909 against the decree of Mr. A. H. Cuming, District Judge of Zillah Tipperah, dated the 12th of December 1908, affirming that of Babu Hari Lal

(1) 12 C. W. N. 528 (1908).

BILAS CHANDRA MUKERJEE *v.* AKSHOY KUMAR DAS.

Mukerjee, Subordinate Judge of Commillah, dated the 19th of June 1907.

The facts of the case will appear from the judgment.

Mr. B. Chuckerbutty, *Babus Hem Chandra Sen* and *Ambika Charan Das* for the Appellants.

Dr. Rash Behari Ghose, *Babus Girija Prosunno Ray Choudhury* and *Biraj Mohan Majumdar* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

Taluk Hari Narayan was originally one property. It was subsequently divided into three separate taluks. Taluk Hari Narayan T. N. 75, Taluk Gouripriya T. N 76, Taluk Rampriya T. N. 77. These three taluks lay to the east, north and west of a Government khas mehal named Uddamdi No. 37. There was a river named Goomti or Titas between the khas mehal and these taluks. This river shifted northwards and cut away the lands of the three taluks and as the river receded these diluviated lands have reformed and the present suit is in respect of lands reformed *in situ* of the three taluks 75, 76 and 77.

The Government khas mehal No. 37 was from time to time settled temporarily with the proprietors of the three taluks until 1885, when it was sold for arrears of revenue and purchased by one Bango Chandra Gope as the *benamdar* of the contesting Defendants who in return for his services gave him an one anna share in the purchase. We may take it as the result of the findings as admitted at the Bar that the possession of the contesting Defendants became adverse to the owners of taluks 75, 76 and 77 in respect of the disputed lands which they claimed as parts of their newly-purchased mehal, khas mehal No. 37, from the year 1885. In this state of things the residuary share of Taluk Hari Narayan No. 75 was sold for arrears of revenue in 1892, and purchased by the predecessor-in-title of the Plaintiffs who subsequently purchased the entire Taluks Gouripriya and Rampriya in 1894.

The present suit was brought just within 12 years of the purchase of the residuary share of Taluk Hari Narayan by the predecessor-in-title of the Plaintiffs and the main question in this appeal is whether the suit so far as that taluk is concerned is barred by limitation. It is admitted that the sale was under sec. 54 of Act XI of 1859. The section says the purchaser shall acquire the share or shares subject to all encumbrances and shall not acquire any rights which were not possessed by the previous owner or owners. The learned Judge has held that on the principle laid down in the case of *Kalanand Singh* v. *Sarafat Hosein* (1), the purchaser "becomes entitled to recover possession of the share in the same manner in which the former owner would have have done" . . . . . *i.e.*, "the time of adverse possession which has run against the former owner counts against him also." If this view of the law were correct, the adverse possession commencing from 1885, had run for about 7 years up to the date of sale in 1892 and the Plaintiffs would have about 5 years more to bring this suit and the suit would be barred as it was not brought within that time. It is necessary therefore to examine whether that view of the law is correct.

The case of *Kalanand Singh* v. *Sarafat Hosein* (1) does not lay down the rule derived from it by the learned Judge. There is an observation that the purchaser steps into the shoes of the former owner

(1) 12 C. W. N. 528 (1908).

BILAS CHANDRA MUKERJEE *v.* AKSHOY KUMAR DAS.

and becomes entitled to recover possession in the same manner in which the former owner would have done, but the next observation is—"It follows therefore that whether the adverse possession is completed before or whether it is completed after the date of default the purchaser at the revenue sale in either case becomes entitled to the possession of the share." It does not lay down that if time has begun to run against the former owner it will continue running against the purchaser and it could not lay down such a rule as the adverse possession had in that case been completed before the sale.

It is contended that the last part of sec. 54 indicates that the purchaser can get no rights not possessed by the defaulter at the time of the sale. That part of the section has been interpreted however in the case of *Annoda Pershad Ghose* v. *Rajendra Kumar Ghose* (2), as meaning that the purchaser shall not acquire any right not possessed by the previous owner at any time. The same view was held in the case of *Bhowani Koer* v. *Mathura Proshad* (3). The purchaser purchases the share and not the right, title and interest of the defaulter. In the case of a sale of a share in the possession of a Hindu widow it was contended that only the life-interest passed, this contention was however overruled; see *Debi Das* v. *Bipro Churn* (4), *Banalata Dasi* v. *Monmotha Nath Goswami* (5). It is not contended that possession for less than 12 years is an encumbrance but that as the sale was admittedly subject to encumbrances the Plaintiff claims from or through the defaulter and the adverse possession against the defaulter was adverse against the Plaintiff within the meaning of Art. 144 of the Second Schedule to the Limitation Act. We do not find any authority for this proposition. In respect of sales of entire estates and tenures free of encumbrances under the sale laws it has been held that the purchaser does not claim from or through the defaulter and is bound neither by his acts nor by his laches: *Munshi Bazlool Rahman* v. *Prandhun Dutt* (6) and see *Watson & Co.* v. *Nobin Mohun Baboo* (7), *Nuffar Chandra Pal Choudhury* v. *Rajendra Lal Goswami* (8); nor is he bound by any judgments binding on him: *Radha Gobinda Koer* v. *Rakhal Das Mukherji* (9), *Gadadhar Bose* v. *Radha Charan Poddar* (10). If the purchaser of an estate free from encumbrances under sec. 37 is not a person claiming from or through the defaulter the person who purchases a share subject to encumbrances under sec. 54 is also not a person claiming from or through the defaulter. Subject to the restrictions imposed by the statute each of them purchases the property sold by the Collector and claims under a paramount title not derived from the defaulter but obtained so to say adversely to him. In a suit for possession by him, when he has never been in possession after his purchase the Defendant must show that his possession has been adverse to him for more than 12 years. This the Defendants have admittedly not shown. In this view of the law the suit of the Plaintiff is not barred by limitation and the appeal must be allowed and the suit of the Plaintiffs decreed with costs in both Courts. They will recover the lands

(2) 6 C. W. N. 375 (1901).
(3) 7 C. L. J. 1 (1907).
(4) I. L. R. 22 Cal. 641 (1895).
(5) 11 C. W. N. 821 (1907).
(6) 8 W. R. 222 (1867).
(7) 10 W. R. 72 (1868).
(8) I. L. R. 25 Cal. 167 (1897).
(9) I. L. R. 12 Cal. 82 (1885).
(10) I. L. R. 34 Cal. 868 (1907).

in suit according to the boundaries laid down by the Commissioner except the 5 kanis covered by the amaldari.

The Defendants' appeal No. 546 has not been pressed and is dismissed without costs.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 95 OF 1909.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard, 8 and 15, August
Judgment, 28, August.

LAL MOHAR THAKUR and another, Plaintiffs, Appellants,
v.
SHEW GOLAM LAL and others, Defendants, Respondents.

Contribution, suit for—Revenue-paying estate—Owner of specific villages paying entire revenue—Proportion in which other owners should contribute—Assets as basis of calculation, if those at revenue settlement or those at the date of default to be considered—Collectorate Registers, admissibility—Public document.

Where Government revenue payable in respect of an estate was fixed in perpetuity on the basis of assets as they stood at the time of the settlement, and the assets were at that time determined village by village and revenue proportionate to the assets of each village was also calculated, although the proprietor of the entire estate was made liable for the aggregate amount of revenue,

Held—*That as between persons in whom in course of time different villages in the mehal became vested the liability to contribute towards the revenue was to be fixed on the basis of the assets of the villages as determined at the settlement and not as found on valuation at the date of default.*

Collectorate Registers giving details as to the areas of the different villages and the Government revenue chargeable thereon at the time of the settlement were admissible in evidence as public documents, although it might not be possible to specify with absolute certainty for what purpose the measurements had been made and the registers prepared.

This was an appeal preferred on the 21st of January 1909 against the decrees of M. Smither, Esq., District Judge of Zillah Shahabad, dated the 26th of August 1908, reversing the decree of Babu Atul Chandra Banerjee, Munsif, 1st Court at Arrah, dated the 31st of March 1908.

The facts of the case will appear from the judgment.

Babus Umakali Mukherjee and *Upendra Nath Chatterjee* for the Appellants.

Moulvi Shamsul Huda and *Babu Raghu Nath Singh* for the Defendants Nos. 2 and 3, Respondents.

Babus Ram Charan Mitra and *Srish Chandra Choudhuri* for the Defendants Nos. 5 and 6, Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal is directed against a decree by which the District Judge, in reversal of the decree of the Court of first instance, has dismissed a suit for contribution. The Plaintiffs and second and third Defendants are the joint-proprietors of the residuary share of an estate Sahia which bears No. 1211 on the Revenue Roll of the Collector of Shahabad. This residuary share comprises several villages and the aggregate Government revenue payable in respect thereof is Rs. 564-10 as. 6 p. annually together with road and public works cesses to the extent of Rs. 76-5. The Plaintiffs allege that the Defendants made default in the payment of revenue and cesses, with the result that they were driven to pay the same so as to save the

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property from inevitable sale. They now seek contribution from the Defendants. The substantial question in controversy between the parties upon which the two Courts below have differed, relates to the principle upon which the respective liability of the parties is to be determined. It is necessary to mention at this stage that the different villages comprised in the residuary estate have become vested in different persons who are parties to this suit. As they are not in possession each of the same share in all the villages, their respective liability to pay the Government revenue cannot be specified as a defined share of the total revenue. The liability of each, it is not disputed, must be proportionate to the assets of the land allotted to him. The question in dispute relates to the point of time with reference to which the assets are to be determined. The Plaintiffs contend that the assets to be taken as the basis of contribution are the assets upon which the Government revenue was fixed. The Defendants contend, on the other hand, that the assets to be accepted as the basis of calculation, are the assets as they stand at the time of default in payment of Government revenue. The contention of the Plaintiffs found favour with the original Court, while that of the Defendants met with acceptance from the District Judge. In our opinion, the contention of the Plaintiffs is well-founded and must prevail.

The Government revenue is fixed in perpetuity and was based upon the assets as they stood at the time of settlement. In the case before us, the assets were determined, village by village, and the revenue proportionate to the assets of each village was also calculated, although the proprietor of the entire estate was made liable for the aggregate amount of revenue. The villages, as already stated, have, in course of time, become vested in different individuals. The question arises, if default is made by one of these persons, and the sale is averted by another, is the extent of the liability to be determined with reference to the assets on the basis whereof the revenue was calculated or upon the assets at the time of the default. It is obvious that if the present assets be adopted as the basis of calculation, grave injustice may be done to those amongst the proprietors who have improved the condition of the properties, vested in them, by their skill, capital or labour. According to the Defendants, the liability of the proprietors *inter se* must be adjusted from year to year. If a proprietor has by successful litigation increased his rent-roll, another proprietor who has been less diligent or possibly less adventurous, at once becomes entitled, on this theory, to bear a smaller share of the burden of the Government revenue. Again, if one proprietor judiciously lays out his capital, and thereby increases the assets of his village, his fellow-proprietor, who has taken no risks, finds himself in a position to transfer a portion of his burden to the other. To take another illustration, if the proprietor of one of the villages has the misfortune to lose a portion of his lands by diluvion (as has possibly happened in the case before us) or if part of his land has become sandy and unculturable or has relapsed into jungle, he can claim to throw the burden of revenue upon his fellow-proprietors who have in no way profited by the calamity which has befallen him and whose assets have remained unaltered from year to year. If the contention of the Defendants be adopted, it would thus furnish an inducement to the less prosperous and successful pro-

prietor systematically to make default in the payment of revenue, with the result, that his honest fellow-proprietor must save the estate with his own money and then establish the extent of his right of contribution by proof of assets of villages which are not in his possession and of the condition whereof he has *primâ facie* no knowledge. This process must be repeated from year to year, and in every successive suit for contribution there must be an elaborate enquiry as to the assets during the particular year in which the default has been made. We are unable to hold that the principle thus put forward by the Defendants is consistent with justice, equity and good conscience which, after all, must guide the Court in adjusting the respective liabilities of joint-owners of properties in contribution suits. On the other hand, the view maintained on behalf of the Plaintiffs does not lead to any injustice. The assets of every village, with reference to which the revenue, fixed in perpetuity, was originally assessed, is known. The person into whose hands a particular village passes, knows definitely the amount of revenue, which as between himself and his fellow-proprietors, he may be called upon to contribute. If by his diligence, skill, foresight or capital, he successfuly increases the assets of the village vested in him, he does not on the mere ground of increase of assets, become liable to contribute a larger share of the revenue than before. In the same manner, if to his misfortune his assets are diminished, he cannot justly call upon the other proprietors to bear a portion of the burden which hitherto had been justly borne by him. But it has been suggested by the learned Vakil for the Defendants that sec. 10 of Reg. I of 1793, as also secs. 5 and 9 of the Estates Partition Act (V of 1897, B. C.) militate against this view. The statutory provisions mentioned are, however, of no real assistance to the Defendants, for no question of permanent separation or apportionment of the revenue arises in the case before us. Nor do the decisions in *Poorna Chandra* v. *Kishen Chandra* (1) and *Jugobundoo Roy* v. *Fyez Buksh* (2), to which reference was made at the bar, throw any light upon the matter; the Court was not called upon in these cases to consider the point of time with reference to which the assets are to be determined for purposes of contribution. For the reasons we have explained, we are of opinion that, whenever as here, information is available, the assets accepted as the basis for assessment of the revenue, should also be adopted as the basis for purposes of contribution. We are not now called upon to consider what basis should be adopted in cases where such information is not forthcoming; in cases of that description, the Court may possibly assume, in the absence of evidence to the contrary, that the assets have remained unaltered and thus base the calculations upon the present assets.

We may add that a question appears to have been raised in the primary Court, and possibly also in the Court of Appeal below, as to the admissibility of Registers produced from the Collectorate. We are satisfied that there is no substance in the objection. The Registers are public documents, and give details as to the areas of the different villages and the Government revenue chargeable thereon at the time of the settlement though it may not be possible to specify with absolute certainty the purpose for which the measure-

(1) 5 W. R. 112 (1866).
(2) 8 W. R. 166 (1867).

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ments were made and the Registers prepared.

The result, therefore, is that this appeal must be allowed, and the decree of the District Judge discharged. The case will be remitted to the District Judge in order that he may re-hear the appeals preferred to him by the Plaintiffs as well as by the Defendants on the basis of the information contained in the Registers. The Appellants are entitled to their costs in this Court, to be paid by the second and third Defendants. The other parties to the appeal will bear their own costs in this Court. The costs in the Court of first instance, as also the costs on the Court of Appeal below, both before and after this remand, will be in the discretion of the learned Judge who will re-hear the appeals.

Case remanded.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 35 OF 1911.

JENKINS, C. J.
WOODROFFE, J.
1912,
13, February.

M. S. E. ANGULIA & Co.
v.
E. D. SASOON & Co.

Contract of sale—Bought note signed by agent of trader residing out of jurisdiction, agent carrying on business within jurisdiction on behalf of principal—Breach of contract—Suit if lies—Letters Patent, sec. 12—Suit against firm—Civil Procedure Code (Act V of 1908), Or. 30, r. 10—Agent's authority—Failure to take delivery—Power of re-sale—Contract Act (IX of 1872), sec. 83—Appropriation of goods to fulfilment of contract—Measure of damages—Pleadings.

Where the Defendants by a power-of-attorney authorised their agent to carry on their business on their behalf with a limitation in the power that nothing therein contained should authorise the attorney to speculate in gunnies, opium, shares or exchange, and the agent under the power signed a bought note for the purchase of sugar from the Plaintiff on behalf of the Defendants:

Held—*That the transaction was outside the express prohibition on speculation and that the mere imprudence of an act did not make it unauthorised.*

Where in the contract power to resell was reserved in default of the buyer taking delivery on a certain date, but the seller on that date had in stock a much larger quantity of the goods in bulk than was required for the purpose of the contract, and the goods agreed to be sold had not been separated and made ready for delivery to the buyer at the time the buyer was asked to take delivery, and the buyer not having taken delivery of the greater portion of the goods the seller by virtue of the power of sale gave notice and resold the goods about a month after due date and claimed as damages the difference between the contract price and the resale price:

Held—*That as the sellers had not appropriated the goods for the purpose of the contract, there were no goods to which the power of resale applied and the seller was not entitled to recover the difference between the contract price and the price at which the goods were resold.*

MOLL SCHUTTE & CO. *v.* LUCHMI CHAND (1) *distinguished.*

Per HARINGTON, J.—*Sec. 12 of the Letters Patent gives the High Court in its Original Side express jurisdiction over persons who carry on business within its local limits and a suit for damages for breach of contract would lie against a person not residing within such local limits when he has been carrying on business within those*

(1) I. L. R. 25 Cal. 505 (1898).

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limits through an agent. Or. XXX, r. 10 which says nothing about residence either within or without the jurisdiction does not curtail the Court's power over persons carrying on business within its local limits.

In respect of a firm transaction, the Defendant was properly sued under Or. XXX, r. 10 under the name in which he traded.

This was an action by sellers against buyers for damages for breach of contract to take delivery of certain bags of Java sugar. The contract was made on the 28th of February 1910. By it the Defendant purchased 750 tons of Java sugar, delivery to be made in five equal shipments in August, September, October, November and December 1910. Notice was given in September of the arrival of the August shipment amounting to 150 tons. After some pressure, the Defendant took delivery of 25 tons, but in spite of repeated notices, he failed to take delivery of the balance of the 125 tons. After due notice that they would resell the 125 tons the Plaintiff advertised and held a sale. The 125 tons were sold at a loss of Rs. 2,341-14-9 and to recover that sum together with the expenses of the sale and the charges made by the Port Commissioners and other items, making it up to a total of Rs. 2,745-12-6 this action was brought.

The contract in question was signed by a man named Misree *per pro.* Misree was the manager of the Defendant's business in Calcutta, the Defendant himself being a resident of Singapur.

The defence set up was, *first*, the Court had no jurisdiction over the Defendant a resident out of its jurisdiction, *secondly*, that Misree had no authority to enter into the contract sued upon, and, *thirdly*, that no goods had been appropriated to the fulfilment of this contract and that, therefore, the Plaintiffs have no right to resell and charge the Defendant for the difference between the contract price and the price at which they sold certain bags of sugar.

The case came on for hearing before Harington, J. His Lordship by his judgment, dated the 21st March 1911, overruled the first and the second pleas taken as above-mentioned by the Defendant, but upheld the third. His Lordship nevertheless was of opinion that the suit should not be dismissed inasmuch as the Plaintiff would have a right to recover the difference between the market price and the contract price of sugar at the date of the breach, assuming that the market had gone against the Defendant. The latest date as disclosed in the correspondence, on which the Defendants could have delivered was, his Lordship found, October 20th. His Lordship accordingly directed a reference to ascertain the market price of the undelivered portion of the 150 tons on October 20th and ordered that the Plaintiff would recover judgment for the difference as stated above if the market price fell below the contract price. The material portions of his Lordship's judgment were as follows :—

HARINGTON, J.—On the first point, a number of cases decided in English Courts have been cited for the purpose of showing that the Court would not seek to exercise jurisdiction over a single trader residing out of its jurisdiction notwithstanding the fact that he had an office within the local limits of the jurisdiction of the Court. In my view those are cases which are not applicable in this country. The jurisdiction of this Court with regard to persons who are liable to be sued in it is derived from cl. 12 of the Charter. That clause gives the Court express jurisdiction over persons

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who carry on business within the local limits of its jurisdiction. In the present case, in two documents which have been put in, namely, in the power-of-attorney and in the printed notice circulated by the Defendant repudiating certain contracts, the Defendant describes himself as carrying on business in Calcutta. He brings himself thus within the express provision of cl. 12 of the Charter. It is true that he is sued in the firm's name instead of in his own name but the Plaintiffs are entitled in respect of a firm transaction to sue the Defendant under the name in which he traded by virtue of Or. XXX, r. 10. There is nothing in that Rule which says anything about residence either within or without the jurisdiction and it certainly has not the effect of curtailing the powers which this Court derives from the Charter under which it has jurisdiction over persons who carry on business within its local limits. In my view, therefore, the first point raised by the Defendant fails.

The second issue is as to the authority exercised by Misree. Now it is contended by the Defendant that, inasmuch as the contract was signed *per pro.* the Plaintiffs had notice that Misree was acting under the authority of a Power of Attorney. They were, therefore, put upon an enquiry as to what the limits of Misree's authority were. Then it is said that the Power of Attorney only entitled Misree to carry on business in the same way in which the Defendant carries on his business in Singapore and that, therefore, to show that the contract was one which Misree had authority to make it is necessary to show that a forward contract of this nature could be made in the ordinary course of business by the Defendant at Singapore. Now the Power of Attorney empowers two persons, namely, Faiz Ali Fazul Husen Kassim Ali of Singapore and Kassim Misree of Bankok, jointly or severally "to contract, superintend, manage and control and carry on in Calcutta aforesaid in the name of M. S. E. Angullia and Company the business of General Merchants as now carried on by me (the Defendant) in Singapore and elsewhere under the style and firm aforesaid" and *inter alia* it authorises them to contract, buy or sell goods and merchandise, and then, after reciting many powers which he places in the hands of attorneys, there is a proviso limiting their powers in these terms: "nothing herein contained shall be deemed to authorise my said attorneys or attorney to speculate in gunnies, opium, shares or exchange or to become sureties or surety for or in any way guarantee the debt or liabilities of any person or firm." Now, in the present case, there is evidence to the effect that the entering into forward contracts in the sugar trade is part of the business of the general merchants. There is evidence that, in fact, the Defendant's firm was accustomed in Calcutta at any rate, to enter into such contracts. There is the evidence of the present manager that, with respect to forward contracts made by Misree which resulted in a gain, he has been endeavouring to realise for the benefit of the Defendant that gain. It is only apparently with respect to those dealings which resulted in the loss that the Defendant's firm has repudiated the authority of Misree. It is true that there is no evidence as to whether the Defendant usually makes forward contracts in his trade at Singapore but it is a very significant fact that Kassim Ali, the manager sent to Calcutta, it is stated, to succeed Misree, is unable to say what the course of business

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at Singapore is, and if the Power of Attorney is construed in the way in which the Defendant says it ought to be construed, it results in this absurdity that although Kassim Ali is sent to Calcutta with authority to carry on business as it is carried on at Singapore, he is not given any intimation as to the way in which the business at Singapore is carried on. That, in my view, reduces the matter to an absurdity and I have no doubt that the managers appointed under the Power of Attorney were authorised to carry on the business of general merchants in the way in which it was actually carried on in Calcutta and in course of that business they were authorised to make contracts such as that in the present suit. The second contention therefore, that the contract was made without the Defendant's authority fails.

Now the third question is one which, to my mind, is rather more difficult. The evidence is that the Plaintiffs called upon the Defendant to take delivery of 150 tons of sugar from the Port Commissioners' warehouse. At that warehouse, the Plaintiffs had a large quantity of sugar in bags, a great deal more than sufficient to satisfy the contract which they had with the Defendant. It is admitted that no particular bags were selected for delivery to the Defendant but that the course of business was for the Defendant to pay for the sugar he was prepared to take, and on payment to obtain a delivery order. On presentation of the delivery order at the warehouse, sufficient bags to meet the delivery order would be taken out of the bulk lying in the warehouse and then and there delivered to the Defendant. It is conceded that in this case no particular bags were selected from the bulk because the Defendant failed to pay for and obtain a delivery order for the balance of 125 tons as he was bound to do. The Plaintiffs sold off 135 tons out of the bulk and now claim to charge as against the Defendant the difference in the price at which they sold this quantity and the price the Defendant contracted to give. On one side, it is contended that the circumstance that no goods had been appropriated to the contract makes no difference, the sale being held under the condition in the contract. On the other side, it is contended that as no bags had ever been tendered or set apart for the purpose of satisfying this particular contract there is nothing to show that the bags sold by the Plaintiffs were the actual bags that the Defendant ought to have taken and, that being so, the Defendant says that the Plaintiffs are not entitled to recover the difference between the two sales but they say the measure of damages is the difference between the market price on the date of the breach and the contract price.

The cases which have been cited during the argument do not bear on the question because in each case the goods of which the buyer had refused to take delivery had been ascertained; in this particular case they had not been ascertained. If they had been ascertained or if there had been a tender of a particular parcel of goods to satisfy the contract no difficulty would have arisen.

On the whole I have come to the conclusion that the Defendant's contention on this point is the correct one. The clause in the contract giving a power of resale refers to the goods covered by the contract and until the particular goods to be delivered in accordance with the contract have been ascertained there is nothing to which the power of resale under the contract can attach.

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The Plaintiffs will get their costs of action on Scale No. II.

[The Defendants appealed].

Mr. Knight (with him *Mr. Pugh*) for the Defendants-Appellants.

Mr. Sinha (with him *Messrs. S. R. Das* and *N. Sarkar*) for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This litigation has been occasioned by the alleged breach of a contract for the sale of sugar. The terms of the contract are set forth in the bought note, Ex. A to the plaint.

This document is dated the 28th February 1910 and is signed by M. C. Misry on behalf of the Defendants' firm.

By it the Defendants' firm purports to buy from the Plaintiff 750 tons of white cane Java sugar, the shipments to be made during August, September, October, November, December, equally. The price was Rs. 7-14-9 per bazar maund ex-jetty or docks. Delivery was to be taken by the buyer ex-jetty or dock within 3 days and it was expressly provided as follows :—

"The goods to be at the buyer's risk and peril from the time of landing of the sugar until they be removed from jetty, dock, ghat or godown, and should the buyers fail to take delivery of the sugar the sellers will have the option of reselling the same in the open market by private sale or by public auction and hold the buyers responsible for all consequences."

On the 14th September the Plaintiffs wrote to the Defendants' firms in reference to 150 tons of sugar on board the *S. S. Okora*, being the August shipment under the contract, and gave notice of the expected arrival of the steamer on or about that day. The steamer arrived on the 15th, and on the 6th of October delivery was taken of 25 tons under the contract, but beyond this no delivery was taken.

On the 8th of November the Plaintiffs sold the balance of 125 tons, and it is their case that this was done in exercise of the power of resale vested in them by the contract. On this footing they demanded from the Defendants' firm a sum of Rs. 2,341-14-9 as representing the difference between the contract price and the amount realised on the resale ; and further sums for interest and charges, which brought the whole of their demand up to Rs. 2,745-12-6.

The claim was resisted by the Defendants' firm, and so this suit was brought.

The case came for trial before Harington, J., and the three following issues were raised : (1) whether the suit lies under Or. XXX, (2) whether the manager Misry had authority and (3) there could be no resale of unascertained goods. The learned Judge decided the first and second issues in the Plaintiffs' favour, and on the third against them. He, however, directed an enquiry as to damages.

From this decree the Defendants' firm have appealed. The objection of want of jurisdiction embodied in the first issue has been abandoned, and the points made before us are these.

First, it is said that the contract was unauthorized, and, *secondly*, that as the Judge decided against the Plaintiffs' contention that the price on the resale furnished the measure of damages, he should have dismissed the suit and not directed a reference.

For the Respondent it has been contended that the Judge was in error in deciding adversely to his contention as to the resale, and though no cross-appeal or

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cross-objections have been filed, it is urged that Or. XLI, r. 33 empowers the Court to give effect to the Defendants' contention as to the resale.

First, I will deal with the Defendants' contention that the contract was unauthorized.

I do not propose to deal with this at length for I am in complete agreement with Harington, J, on this point.

True it is that the contract was signed not by the Defendant but by Misry, his agent; but Misry was acting under a power-of-attorney which authorized him to direct, superintend, manage, and control and carry on in Calcutta in the name of Mr. S. E. Angullia & Co. the business of general merchants as then carried on by the Defendant in Singapur and elsewhere. For that purpose the widest powers were vested in Misry, followed no doubt by the gratification that nothing therein contained should be deemed to authorize the attorney to speculate in gunnies, opium, shares or exchange.

It is urged that the transaction in suit was a speculation and so in contravention of the power-of-attorney.

But even if it was a speculation—and this is a view that has not been established—it is outside the terms of the [illegible] prohibition on speculation.

[illegible] the transaction is not [illegible] in which business [illegible] Defendant at [illegible] De- [illegible] for [illegible] been issued, [illegible] would have enabled him to prove this point. In my opinion there is no force in this contention, and I am confirmed in this view by the fact that at the hearing the request for a commission was not advanced.

And I think there was very good reason for this. The words "as now carried on by me in Singapur and elsewhere," are merely descriptive of the general character of the business and were not intended to limit the articles in which business was to be done or to define the terms on which it was to be conducted. It is not suggested that the agent could not purchase sugar, or that a forward contract could not be made; the objection when analysed is as to the prudence of the transaction and its mere imprudence would not render it unauthorized. Then it is contended that as the Plaintiffs claim the damages as formulated in the plaint and the issues rests on the resale the Court should not have directed a reference as to damages on a totally different basis. I think this contention is entitled to great weight, and all the more in view of the fact that the Plaintiffs when challenged by the Defendant refused to amend their plaint so as to make a case of damages on the difference between the contract price and the market price at due date and was supported in this refusal by the Court. And there is yet another circumstance which lends strength to the Defendants' contention.

The due date under the contract is the 21st September, and there is no evidence of damage on that date, on the contrary, the evidence, such as it is, points the other way.

To evade this difficulty it is suggested that the due date was postponed, and in fact the learned Judge treats the [illegible] October as the day of breach.

But postponement was not pleaded, nor was it made the subject of an issue.

Nor does the matter rest there, for Mr. Sinha, when challenged, could not point to any agreement, or clear indication,

M. S. E. ANGULLIA & Co. *v.* E. D. SASOON & Co.

that the due date should be postponed; all he could contend was that it might be inferred from the fact that late delivery was taken of 25 tons.

In my opinion it would be wrong in view of the case made by pleadings and issues, and of the mode in which the Plaintiffs' case was conducted, to hold that there was a postponement of the due date or to direct a reference as to damages.

But then the Plaintiffs claim that they were entitled to have the damages estimated on the footing of the resale. Harington, J., decided this against the Plaintiffs, holding there was nothing to which the power of resale under the contract could attach. For the Plaintiffs it was contended that the learned Judge in so deciding failed to follow the decision of the Full Bench in *Moll Schutte & Co.* v. *Luchmi Chand* (1).

But when the essential facts of that case and the present are contrasted, they present significant differences.

In *Moll Schutte & Co.'s* case (1), the Plaintiffs sold to the Defendants under an Indent Contract 10 cases of tobacco to be shipped by steamer to Calcutta. The Plaintiffs ordered ten cases only of tobacco and caused them to be shipped and consigned to themselves for the purpose of fulfilling this contract.

The goods duly arrived but the Defendant refused to pay for and take delivery of the goods on the ground that they were not the goods contracted for.

The goods were tendered to the Defendants, and were in accordance with the contract. Now, to use the phraseology of the Contract Act, the goods had been appropriated but possibly not ascertained, I say possibly not ascertained, because it seems to have been thought by the Full Bench that the property in the goods had not passed (see sec. 83).

The position then was that the vendors had done all in their power to make the specific goods the subject-matter of the contract.

Now in this case it is otherwise; here there was neither ascertainment nor even appropriation. The sugar was in bulk, and the vendors had not even appropriated the goods for the purposes of the agreement. That condition of affairs continued until after the resale.

Can it be then said that there even were goods to which the power of resale applied so as to make the result of that resale the measure of damages? Now the answer to this depends on the construction of the agreement between the parties as did the decision in *Moll Schutte's & Co.'s* case (1) turn on the construction of the agreement there under consideration.

Neither in that case, nor in this, was any general principle or rule of law involved.

What then is the scope of his power of resale the words of which I have already read? The goods would have come within its operation if they had been ascertained or even if they had been appropriated for the purpose of the agreement. But in my opinion it would be going beyond the true meaning of the words to extend the operation of the clause to goods which had not even been appropriated and thus had in no sense become the subject-matter of the contract.

I do not say that a clause could not have been so framed as to have this extended operation: there would be nothing illegal in it. But I do hold that the clause as it has actually been framed cannot have this operation.

(1) I. L. R. 25 Cal. 505 (1898).

(1) I. L. R. 25 Cal. 505 (1898).

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This is the view taken by Harington, J., and he too arrived at this conclusion by the same process of reasoning. I think he used the word "ascertained" not in the technical sense in which it is employed in the Contract Act but in the sense of appropriated, for I feel very sure the learned Judge had no intention of disregarding the Full Bench decision.

The result then is that while I agree with the view of the learned Judge as to the scope of Misry's authority and the interpretation of the power of resale, I think, for reasons I have already stated, that a reference as to damages should not have been granted, as this was opposed to the Plaintiffs' own case.

The appeal must therefore be allowed and the suit dismissed with costs throughout.

Woodroffe, J.—I agree.

Messrs. Pugh & Co., Attorneys for the Defendants-Appellants.

Mr. N. C. Bose, Attorney for the Plaintiffs-Respondents.

A. K. G. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 1449 AND 1526 OF 1911.

HOLMWOOD, J.
SHARFUDDIN, J.
1912.
17, January.

GIRWAR NARAIN, Petitioner,
v.
THE KING-EMPEROR, Opposite Party.

Charges, misjoinder of—Criminal Procedure Code (Act V of 1898), secs. 222, 234 and 239—Criminal misappropriation or breach of trust, charge how to be framed where several persons are implicated—Joint charge, illegality of.

Where in a case more than one person were jointly charged with the offence of criminal breach of trust under sec. 408, I. P. C., with respect to a sum of money:

Held—*That there was a misjoinder of charges in the case.*

The wording of sec. 222, Cr. P. C., refers to a single accused; and it must be so because it is impossible to hold that two persons can be guilty of misappropriation of the same parcel of money. Sec. 239 therefore has no application to such a case.

When two persons are implicated in a case of criminal misappropriation or breach of trust with respect to a certain sum of money, the charges against them must be of misappropriation in one case and of abetment in the other. It is also open to the Court to frame the charges against each of them in the alternative, i.e., *of misappropriator of abetment.*

Rule No. 1449 was granted on the 27th of November 1911 against the order of Mr. A. F. Sharling, District Magistrate of Bhagalpur, dated the 20th of October 1911, convicting the Petitioner under sec. 408, I. P. C., and sentencing him to 3 months' rigorous imprisonment; which order was, on appeal, affirmed by Mr. J. C. Twidell, Sessions Judge of Bhagalpur, on the 11th of November 1914.

Rule No. 1526 was obtained by the Petitioner's co-accused Jhontu Lal Mitter against the same order.

The facts material to the report were briefly as follows:—

The Petitioners in these two revision cases were charged with another in the Court of the Magistrate at Bhagalpur in the following terms:—

"I, A. F. Sharling, Magistrate 1st class, hereby charge you

(1) Girwar Narayan Singh.

(2) Jhontu Lal.

(3) Shoshi Bhusan Das as follows:

That you between October 1909, and September 1910, at Baijudit, whilst working

THE

Calcutta Weekly Notes.

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NOTES.

THE SECOND CALCUTTA CRIMINAL SESSIONS WILL commence its sittings from date, the Chief Justice presiding.

THE RESTRICTIONS IMPOSED BY THE INNS OF Courts in respect of the call of Indian students to the Bar were coincident with the outburst of political unrest in India. It is a fact much to be deplored that some Indian law-students at the Inns of Court, with immature and unbalanced minds, had thrown in their lot with some designing men of extreme views But these raw youths have paid sufficient penalty for their indiscretion in England as well as in India by either being refused to be called to the Bar or being punished by Courts of law. It is quite well-known that it is for political reasons that the Secretary of State for India moved by the Government of this country induced the Benchers of the Inns of Courts to impose special restrictions with regard to the admittance of Indian students to the Inns of Courts. The Benchers following up the suggestion of the Indian executive made it a rule that no Indian student, unless he was a graduate of an Indian University or an undergraduate of any of the Universities in Great Britain, will be entitled to join the Inns of Courts. While students from the Colonies are being freely admitted to the Inns of Courts, such restrictions imposed on Indian students are legitimately regarded in this country as most unjust and invidious. It is also considered unworthy of the honourable Societies of the Inns of Courts, with the noble traditions of the English Bar behind them, to make such invidious distinction between one class of His Majesty's subjects and another. Their action in this matter has been therefore strongly resented both by the youths and their guardians in India.

THE INDIAN UNIVERSITIES ARE THE MOST EXACTing educational institutions on the face of the earth both in the matter of attendance and examination. They have little regard for the severe physical and mental strain that their regulations impose on the youths of this country. It is a well-known fact that Indian youths, after they have passed through the exacting system of University education in India, lack much of the vigour of health and fund of energy which are so essential for their success in the hard struggle of life. It has been a practice amongst parents and guardians of youths in this country, when they find that any of their boys or wards are unfitted by reason of health or disinclination for the omnibus and exacting system of studies at our Universities, to send them to England for study at the Bar. The most eminent and respected leaders of the Calcutta Bar have hailed from this class and type of men. It is no disparagement to any member of the Calcutta Bar to say that the places left vacant by Mr. W. C. Bonnerjee, Mr. Manamohan Ghose and Mr. T. Palit have not been filled to this day. So it is widely believed in this country that the restrictions imposed against Indian youths getting called to the English Bar are due more to a short-sighted policy of the Indian executive than to any real or supposed interests of the legal profession in India. The feeling in the country is that if we are to be regarded as citizens of the British Empire, as it has been affirmed by repeated Royal pledges that we are, no difference should be made between our youths and youths from other parts of the Empire either at the Inns of Courts or any other educational institutions in the United Kingdom.

WE MAY, THEREFORE, REASONABLY EXPECT THAT the High Courts in India should at any rate frame regulations for the admission of advocates which should obviate the invidious distinction between Indians and non-Indians. For instance, an Australian and a South African may at present go to

England, pass the Matriculation, attend the Inns of Court, get called to the Bar, come out to India and get admitted as an advocate of the Calcutta High Court under conditions very different from those that have been or are about to be imposed in respect of the children of the soil. There is no reason why an Indian should be less favoured in his own country and privileges should be reserved for outsiders alone. We have, therefore, been painfully surprised that the High Court of Calcutta instead of exercising its influence for doing away with the restrictions imposed at the instance of the Indian executive is about to forge further restrictions against Indian youths getting admitted as advocates of the High Court.

Before considering the new High Court Regulations in detail we must point out generally the mischief of imposing such restrictions as would surely mean a denial of an honourable career to many people in this country. It should be remembered that almost all the avenues of employment such as the army, the higher grades of the Police, the Customs, the Public Works Department, the Forests and in fact all the fat berths in the gift of the Government are practically closed to the educated youths of this country. The Anglo Indian theory that education does not confer on our youths a preferential claim to be employed in Government service has long since been exploded. In Germany the enormous expense of education is justified on the ground that it enables the Government to train and select the best men for public service. It is our misfortune, however, that the very opposite practice is in the ascendency to this day in India. In disregard of these facts it has become quite a fashion now-a-days to deplore the growth of lawyers in this country and also to decry them. But these critics would not go to the root cause of the congestion in the different branches of the legal profession. They would not move their little finger to open out other avenues of employment for them but are always too eager to close up the ranks of the only independent career that is available to them. Indian barristers who got called to the English Bar under the old conditions have held their own against odds and have thoroughly maintained the high traditions of the English Bar. We therefore see no occasion or reason for the framing of any further restrictive rules regarding the admission of members of the English Bar as advocates of the High Court of Calcutta.

We are indeed not a little pained to find that the High Court of Calcutta has framed some draft rules imposing additional restrictions in respect of the admission of the members of the English Bar as advocates of the High Court. The draft rules are as follows :—

"78. Any person may be admitted as an advocate of the High Court who is entitled to practise as a barrister in England or Ireland or as a member of the Faculty of Advocates in Scotland and intends to practise in the High Court or the Courts subordinate thereto:

Provided that he has (unless he is a member of the said Faculty) read for not less than one year in the chambers of a practising barrister in England and that he has also either—

(a) been educated in the United Kingdom for not less than three years exclusive of the year prescribed for reading in chambers as aforesaid, or

(b) taken a degree in a University in the United Kingdom, or

(c) taken a degree in law in the University of Calcutta, Madras, Bombay, Allahabad or the Punjab.

"79. Every applicant for admission as an advocate of the High Court shall submit his application in the form of a letter addressed to the Registrar on the Original Side and accompained by certificates showing that he is qualified under rule 78; and the Registrar shall circulate the letter, with its enclosures, to the Chief Justice and Puisne Judges.

"80. The High Court may, in any particular case, relax the foregoing rules 78 and 79 to such extent as it may think fit."

The first restriction imposed is that one must have read for not less than one year in the chambers of a practising barrister in England to be entitled to be admitted as an advocate here. This means the levying of a tax of 100 guineas on every Indian student in addition to the 100 that he has to pay to the Inns of Court for qualifying himself to practise as a barrister. This is sure to prove very burdensome to most of the Indian parents and may be prohibitive to many. Then it is no secret that many of the practising barristers who take pupils in England feel happy if their pupils do not trouble them at all after the payment of a fee of 100 guineas to them. The rule will give rise to a practice of colourable compliance with it in other ways, which we are afraid would be more demoralising than educative in its effect.

The above rule is coupled with the further condition that for persons other than graduates of any University in the United Kingdom or graduates in law of any of the Indian Universities it would be enough if they have been "educated in the United Kingdom for not less than three years exclusive of the year prescribed for reading in Chambers." With reference to this rule we do not quite understand whether by the three years' education is meant legal education or general education. If it is the latter, it is to be regretted that this rule may also be said to be to the special advantage of non-Indians. For under this rule any one from the United Kingdom or the Colonies who has read in any sort or description of private school in the United

Kingdom for three years, will on coming out to India be admissible as an advocate, whereas an Indian under the recent Inns of Court regulations must be either a graduate of an Indian University or an under-graduate of any of the Universities of the United Kingdom to be entitled to get called to the Bar. If any privilege should be reserved for any community, in common fairness it should be reserved for the people of the country. In any case we have a right to insist that none of the rules should be invidious. If it be the policy of the Government of India that none but graduates or University men should be allowed to practise as barristers in India, the High Court should insist on the same condition being observed in the case of Indians and non-Indians alike.

THE EXCEPTION MADE IN FAVOUR OF LAW GRADUATES of the Indian Universities under draft rule 78 (*c*) deserves special consideration. Ordinary Indian graduates in law are required to complete three years' term at the Inns of Court before getting called. But a practice has of late grown up under which a Vakil of the High Court can go to England at the fag end of the Trinity term, eat 12 dinners and thereby keep 2 terms and then in another 4 terms he can get called to the Bar. To do so he must take honours and attend a barrister's chambers. Thus his fourteen months' stay in England is fully occupied in cramming for the Bar final examination. He can, under the circumstances, hardly get any opportunity of associating with the English people, assimilating their thoughts and ideals either in respect of the administration of justice or in respect of professional conduct. Unless a man has resided in England or in any part of the United Kingdom for at least three years and mixed freely with the people, it is physically impossible for him to visit, much less study, their time-honoured institutions, familiarise himself with their ideas and sentiments, follow their trend of thought or grasp the unwritten code of honour and self-respect that prevail amongst the profession and the cultured people at large.

THE PASSING OF THE BAR EXAMINATION PLAYS practically no part in the educational outfit of our young men in England. We are accustomed to pass much stiffer examinations in our own country. The chief value that we attach to the education of our youths in England is that it serves to widen their views, discard the narrow interests associated with caste, creed and social life in India, develop healthy and noble ideals of humanity, engender a robust sense of honour and self-respect, and that it enables them to assimilate and appreciate the modern outlook of life and of the world. It follows therefore, that the present system under which Vakils may pass examinations at the Bar in about a year's time of their arrival in England deprives them of the opportunities of assimilating what we consider the most valuable assets of English education. We are of opinion therefore that whatever facilities may be offered to them by the Inns of Court to pass examinations and get called to the Bar, the High Court here should, except in the case of men of assured position and standing in this branch of the profession, insist on their completing a three years' course of education in England before admitting them as advocates. This is all the more necessary because as Vakils the conditions of their practice are very different from those of counsel. After they have had direct connection with clients, witnesses, mukhtears and other law-agents for some time, a sufficient time should elapse under very different environments to enable them to develop in themselves a different ideal of professional duties as advocates or counsel. We are therefore decidedly of opinion that the conditions of admission of Vakil-barristers should be the same as for those who are specially trained for the English Bar.

AS WE HAVE SAID THE CONDITION FOR READING in chambers of a barrister would inflict a penalty on Indian students studying for the Bar in England without conferring on them any substantial advantage. This would be all the more serious for ordinary students, for besides the 100 guineas fee it would require an additional year's residence in England which would in any event cost him not less than £150 more. We fail to see any occasion or reason for imposing this toll of £250 on every Indian student desirous of study at the Bar. Neither in England nor in the Colonies a fourth year's study in chambers is insisted on as a condition precedent for enrolment. Why should then this restrictive clause be imposed on India alone? If it is for preventing congestion, we might say India is a vast country and Indian barristers for a long time yet to come will find a decent amount of work or honourable employment if they would spread over the country. It cannot be seriously urged that the Indian barristers are in any way a less honourable body of men than their brethren in any other part of the world. If any individual members offend against professional etiquette, the Bar here resent it as much as any Bar in the world. It is therefore highly desirable that every facility should be given to barristers to enlist themselves as advocates of the High Court so that they may keep in view the standard of their brethren practising in the High Court.

WE WOULD THEREFORE SUGGEST THAT IF READING in chambers is made a condition precedent for enrolment, liberty should be given to read in

chambers either in England or in this country before enrolment. If a junior barrister works with a senior member of the Bar here for a year before enrolment he may also attend Court with him and that would benefit him more than reading in chambers in England. We must also say in conclusion that we do not at all approve of the draft rule 80 which leaves wide powers in the judges to make exceptions to the above rules. The rules for admission, whatever they may be, should be uniform for all and no loophole should be left for conferring special favour on particular individuals.

IN *Raimoni* v. *Mathura Mohan*, REPORTED AT p. 606 of this issue, their Lordships D. Chatterjee and N. R. Chatterjea, JJ., have, after a review of authorities, re-affirmed a proposition of law which before the decision of the Calcutta High Court in *Nilmamud* v. *Boul Das*, 14 C. W. N 73, has never been questioned in these provinces, that a *kabuliyat* by itself may create a valid lease provided it is assented to by the landlord and, in cases requiring the lease to be registered, is registered, according to law. In *Nilmamud Sirkar's* case, however, the learned Judges purported to follow the decision of the Madras High Court in *Turof Saheb* v. *Esuf Saheb*, I. L. R 30 Mad. 322. There has undoubtedly been a considerable amount of authority both in Madras and in Allahabad supporting the view adopted in *Nilmamud's* case that the lease should be executed by the lessor. It is satisfactory to note however that the Madras High Court in a recent Full Bench case, *Syed Ajam Saheb* v. *Madura Sree Menatchi*, I. L. R. 35 Mad. 95, has resiled from this view and affirmed in unmistakable language that a lease may be created by a registered instrument signed by the lessee and accepted by the lessor; whilst judging from the language of the Full Bench of the Allahabad High Court in *Sheokaran Singh* v. *Maharaja Purbhu Narain Singh*, I. L. R. 31 All. 276, which did not actually decide the point, it may be presumed that that High Court also is not unprepared to review its previous decisions and come to the same conclusion as the Madras and Calcutta High Courts.

IN ARRIVING AT THE DECISION THAT A *pottah* executed by the lessor is not essential to the creation of a valid lease, the learned Judges of both the Madras and the Calcutta High Courts have laid stress on the fact that secs. 105 and 107 of the Transfer of Property Act do not in terms require the lease to be executed by the lessor. But the same observations would seem to apply to the case of sales (sec. 54). Their Lordships have had therefore to call in aid the provisions of sec. 4 of the Transfer of Property Act and sec. 3 of the Registration Act. The former requires that the registration sections of the Transfer of Property Act should be read as supplemental to the provisions of the Registration Act which in sec. 3 lays down that a "lease" includes a *kabuliyat*, and it is argued that this clearly indicates the intention of the Legislature to give effect as leases to *kabuliyats* executed by the tenants only. With due deference to their Lordships we confess our inability to assent to this reasoning. The Registration Act only lays down that certain written instruments should not be allowed to be proved unless registered. These provisions of the Act were not intended to affect or modify the substantive law relating to the creation, transfer or termination of interests in property, moveable or immoveable, or of other rights. For instance, the Registration Act requires "agreements for leases" if executed in writing (sec. 3) and "authorities to adopt" if embodied in a document other than a will (sec. 17) to be registered but an agreement for a lease and an authority to adopt may be oral and quite effective as such, in spite of the provisions of secs. 3 and 17 of the Registration Act.

HOWEVER THAT MAY BE, THE BEST JUSTIFICATION for the decisions of the Calcutta and Madras High Courts is to be found in the fact, as noticed by N. R. Chatterjea, J., that it is a common practice in this country where no *pottah* is executed to treat a *kabuliyat* accepted by the lessor as a lease, that this had been the practice in all parts of India before the Transfer of Property Act (Krishnaswami Ayyar, J., I. L R. 35 Mad. p. 102), and that the Transfer of Property Act which does not specifically require a lease to be executed by the lessor ought not to be construed as interfering with this practice. Sec. 58 of the Registration Act which is referred to in the judgment of the Madras High Court does no more than require the executant of a registered lease to admit its execution, implying thereby that a written lease which requires registration must be executed by somebody, either the lessor or the lessee, who must admit its execution. The same implication arises with reference to a sale-deed which accordingly must also be signed by a party to the sale-deed, but as there is no practice in this or any other country of sale deeds being executed by vendees, it may be inferred that a registered sale-deed must be executed by the vendor. On the other hand, instruments of sales and leases which do not need registration would not, on the same reasoning, seem to require execution by either party to the deed.

HIS LORDSHIP WHITE, C. J., OF THE MADRAS High Court whose judgment in *Syed Ajam Sahib*

v. *Madura Stee Menatchi*, I. L. R. 35 Cal. 95, contains a clear exposition of the law on this point, confesses that he at first found the proposition that there could be a lease enforcible against the lessor which had not been signed by him to be somewhat startling, and this in spite of the fact that according to the English law of deeds signature is not an essential in the case of a lease under seal. No such difficulty need, in any event, be felt by an Indian, whether lawyer or layman, and we do not feel the necessity of calling in aid the analogy drawn from the English law relating to deeds which, the Madras Full Bench rightly holds, should not be applied to this country.

Reviews.

BUTTERWORTH'S YEARLY DIGEST, 1911. *Edited by Harry Clover. Price Rs. 11-4, Rs. 9 for cash. London: Butterworth & Co, 12, Bell Yard, Temple Bar. Calcutta: Butterworth & Co., (India) Ld, 8/2, Hastings Street.*

This is the fourth yearly supplement to Butterworth's Ten Years' Digest and is compiled on a plan similar to that of that work. The value of a digest lies in its arrangement and in this respect this volume is inferior to no other work of a like nature. The copious cross-references also add to the value of the work. Besides the cases fully reported in the Law Reports this volume also refers to all cases of 1911 which have been reported in the *Times* or noted in other publications. So far as we have been able to examine this work we have found it to be quite up-to-date. There are a number of Indian cases decided by the Privy Council referred to in this volume but the references given are not to the easily accessible and familiar Indian Appeals Series of the Law Reports but to the *Times Law Reports*. We hope that in future editions the editor will give references to the Indian Appeals Series.

TRIAL OF WILLIAM PALMER: NOTABLE ENGLISH TRIALS SERIES. *Edited by George H. Knott. London: Butterworth & Co., 12, Bell Yard, Temple Bar. Calcutta: Butterworth & Co., (India) Ld., 8/2, Hastings Street. Price Rs. 4-8.*

This is the fourth volume of the series and perhaps more interesting to the student of law than any other. The trial of William Palmer was one of the earliest cases of strychnine poisoning known and came on at a time when very little was known of the effect of strychnine and less of strychnoid poisons like bruchsia, which the editor supposes was used by Palmer in poisoning his victim. The greatest importance therefore attaches to the trial from the point of view of Medical Jurisprudence and the vast body of medical evidence adduced on both sides forms by far the most important and, to the medical jurist, the most interesting portion of the record printed in this volume. Some of the foremost medical men such as Sir Benjamin Brodie, Dr. Taylor, the author of the "Medical Jurisprudence" and Mr. Rees his colleague in his researches on poisons, were examined in this case and the student of this subject will find considerable light and food for thought in the evidence given by them. The editor has done his work with great care and judgment and his able introduction and the table of principal dates is of great assistance in following the evidence which has been recorded in this volume.

The trial of Palmer was, as Sir James Stephen observes, one of the greatest trials in the history of English Law and eminently deserving of the attention of the students of law. It was one of the longest and most sensational trials of the day and the excitement over it was certainly not less intense than over the Crippen case in more recent times. The feeling against Palmer was so great that his case had to be removed from the assizes to London to give Palmer the chance of a fair trial. The statute which was passed by Parliament for that purpose has since been availed of in many cases. The trial is brimful of interest and the speech of Mr. Sergeant Shee for the defence is a fine specimen of the type of forensic eloquence which has now grown out of fashion. In the course of his address he stated his own conviction of the innocence of his client—a breach of the rules of advocacy which Lord Campbell sharply rebuked. The prosecution was conducted by Sir Alexander Cockburn as Attorney-General and his examination and cross-examination of witnesses as well as his final speech would be well worth perusal by a lawyer aspiring to distinction. We do not doubt that this volume would be read with considerable interest by the lawyer no less than by the lay public interested in the study of human nature.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL.—*Rex* v. *Seddon*. Before JUSTICES DARLING, CHANNELL AND COLERIDGE. 2nd April 1912.

Jury's verdict—"Not guilty," meaning of—Circumstantial evidence—Misdirection—Omission to place points before the jury—Counsel's arguments, supplementing defect.

The report of the trial of the prisoner before Mr. Justice Bucknill and a Jury appeared at p. cxlvii of this volume.

On appeal the verdict and sentence passed on Seddon was affirmed. In the course of his judg-

ment dismissing the appeal MR. JUSTICE DARLING said :—

Various points had been taken in the case. *First*, it was said that there was not sufficient evidence that Miss Barrow died from acute arsenical poisoning. It was sufficient to say that in their opinion there was ample evidence, and they might say conclusive evidence. *Secondly*, that there was no evidence that the Appellant ever was in possession of arsenic, or that he administered it to the deceased. It was true that there was no such evidence. But such evidence as that was not essential. If that kind of evidence had been forthcoming, this would not be a case of circumstantial but of direct evidence. Then it was said that the evidence of the identification of Maggie Seddon in buying the flypapers was insufficient and untrustworthy. They could only say that the evidence was fairly left to the jury, and that the jury had decided the question, and that their decision appeared by no means unreasonable and the Court could not interfere with their finding. *Fourthly*, it was contended that the evidence as to the wife's having cashed bank-notes was inadmissible, and that the Judge omitted to point that out to the jury.

It was sufficient to say that a sufficient connexion between the wife and the husband as to the affairs of Miss Barrow had been shown to make the evidence admissible, and that the wife had been called as a witness, not in the usual way as a prisoner on her own behalf, but as a witness for the Appellant, and she could be asked any questions that could be asked of any other witness. The questions asked were perfectly legitimate. It was then said that the Appellant and his wife had been jointly charged with murder, and that the evidence was directed equally against them both, and that there was no evidence which could enable the jury to discriminate between them, and that, therefore, the verdict was unreasonable. It was said that the Judge omitted to point out that she was called as a witness for the Appellant, and that her evidence went to establish his innocence as well as hers. On that (said the learned Judge) it was necessary to consider the logical effect of the verdict.

The Appellant was found guilty. That meant that he, either by his own hand or that of another, administered poison to Miss Barrow, so that she should die. It meant as to Mrs. Seddon that she did not administer the poison, or that if she did so she did so not knowing it was poison. It was a mistake to suppose that "not guilty" meant "had nothing to do with the affair." In this country there were no means of expressing in a verdict the difference between innocence and not proven. The fallacy that it meant anything else was shown by this: that over and over again it was insisted on during the course of this trial that the Crown were bound to prove their case. If that was so, the verdict of not guilty of necessity meant that the Crown had not proved their case—"not proven"—and it might mean more. It must therefore be apparent that there was nothing illogical in acquitting the wife for want of proof, and it did not follow that the Appellant should be acquitted.

With regard to the wife's being called for the defence, they had no means of knowing how much of her evidence the jury believed. It was very seldom that a witness with a very strong interest told the whole truth. Therefore there was no logical dilemma involved in the acquittal of the wife and the conviction of the husband.

A further contention was that the Judge did not caution the jury that the Appellant's conduct after the death pointed to larceny and not to murder. In their opinion that would have been a misdirection; for it would be untrue. The evidence showed that he wanted to conceal something, and the jury found that it was murder he wanted to conceal. Taking his conduct with regard to the relatives of the deceased, it was not conceivable that the jury could believe that he ever sent the letter he spoke of. Then the fact that he did not publish the death in the paper was enough to make any one believe that he desired to conceal the death.

Another circumstance was the hurried way in which the funeral was arranged. If Miss Barrow died of arsenical poisoning it was not a natural death, and the sooner the body was put out of the way the better. All this pointed to a concealment of murder, not of larceny. There was no point of law upon which any wrong decision was given. The only point taken was that there was no evidence against the Appellant at the close of the case for the prosecution. They were of opinion that there was ample evidence. It was true that the case was much strengthened after the defence had closed, the case having been fairly left to the jury, and they found the Appellant guilty. It did not necessarily follow that because a Judge did not put a point to the jury that point was not before their minds, for counsel had addressed them several times.

It was true there were points in the case which ought to have been in the minds of the jury which were not alluded to in the summing-up; but they were quite satisfied that those points were not absent from their consideration. They must, for example, have had it in their minds that when Mrs. Seddon was giving evidence she was saying things which they must consider in deciding on the Appellant's case. It often happened that a Judge did not mention points in summing-up because it was absolutely unnecessary to do so. They saw no reason whatever for thinking that the jury was wrong in coming to their conclusion. That being

so, they had to ask themselves if the verdict was unreasonable. They could not say so.

The main point which distinguished this from other cases of circumstantial evidence was that no poison was traced into the manual possession of the Appellant. That it was traced into his house was amply proved. But the mere absence of that evidence did not justify them in saying that the jury were unreasonable in giving the verdict they did. Miss Barrow died of poison: the Appellant had a strong motive for killing her. He had, by means which could not be described as commendable, become possessed of all her property except some £200 in gold. He had given her nothing for it in return except his promise to pay her £1 a week for life. The fact that that was at a higher rate than the market rate made the motive still stronger for killing her. His conduct on the night of her death was that of a man anticipating it; and the facts that he did not do the natural thing and go for a doctor: that immediately death occurred and before the body was cold he was searching about her room for all that she had left; that he had made a will for her constituting him her executor, and therefore, in control of her property; that he never notified her death; that he used extreme hurry in getting her buried, and interred her, not in the natural way in her vault, but in a common grave, and that he invited no one to the funeral; all these were grounds for saying that the verdict was not unreasonable.

No other person had been suggested as having any interest in poisoning Miss Barrow. The suggestion that she committed suicide or accidentally drank the arsenic was not seriously maintained. The jury came to the conclusion that the case was proved, and there was evidence upon which they could come to that conclusion, and the Court did not wish to indicate that they would have come to any other conclusion.

Messrs. Marshall Hall, K. C., Dunstan and Orr for the Appellant.

The Attorney-General, Mr. Muir, Mr. Rowlatt and *Mr. Humphreys* for the Crown.

B. D. *Appeal dismissed.*

COURT OF APPEAL.—*London County Council* v. *Jackson.* Before LORDS JUSTICES WILLIAMS, FARWELL AND KENNEDY. 1st April 1912.

Liability of the County Council as managers of a school for injury caused to a pupil by the negligence of a contractor.

This was an appeal from a judgment of Mr. Justice Bray who tried the case with a jury. The Defendant London County Council were managers of a school of which the Plaintiff, a boy of 13, was a pupil. Chappel was a contractor for certain repairs of the school building. He sent certain materials, sand, lime, etc., in a truck which was left on the boys' play ground. The headmaster noticed the truck and thought it was dangerous, but Chappel, although asked, did not remove it. The Plaintiff played snow balls with the lime, etc., and his eye was hurt by his playmate throwing a snow ball. He sued Chappel and the Council for damages. The jury found in answer to questions left to them (1) That the boys were on the school premises when the accident happened; (2) that the London County Council were, by their servants, guilty of negligence, which was the cause of the accident; (3) that Chappell, by himself or his servants, was guilty of negligence, which was the cause of the accident. They found £50 damages against both Defendants, of which they apportioned £25 against each Defendant.

The Defendant appealed, but the Court dismissed the appeal. In the course of his judgment LORD JUSTICE VAUGHAN WILLIAMS said:—

The jury had in substance found, in the first place, that the accident was one which might have been anticipated from the mere fact of leaving the barrow where it was. But that, in itself, would not be enough; it would only be the first step. It would only mean that the barrow was something that the boys would be likely to play with. The next step, however, was this, that it was dangerous when it was left where it might be a convenient plaything for the boys. The jury, by their answers, had found that both Defendants were negligent.

The jury must have found that this barrow was a dangerous thing to leave where it was left. He (the Lord Justice) did not know whether the jury were influenced by sentimental sympathy in favour of the boy. The evidence against the schoolmaster was that he recognized this barrow as a source of danger, and with regard to the contractor it was clear from the evidence that he was told to take some steps to remove the barrow, but that he had not acted sufficiently.

Messrs. Rawlinson, K. C., Cairns and Mathew for the Appellants.

Messrs. Saunderson and Rhys for the Respondent.

B. D. *Appeal dismissed.*

CHANCERY DIVISION.—*In re Cardwell.* Before MR. JUSTICE WARRINGTON. 6th March 1912.

Is an Attorney-General entitled to costs?

This case raised the question whether an Attorney-General who had taken out a summons for ascertaining the meaning and construction of a testator's will, was entitled to recover his costs. The learned Judge decided that he was. In the course of his judgment he said:—

An Attorney-General's position was as stated in Tudor on Charities and Mortmain (Fourth edition), p. 376:—"The Attorney-General, as representing the Crown, is the protector of all the persons interested in the charity funds. He represents the beneficial interest; consequently in all cases in which the beneficial interest requires to be before the Court the Attorney-General must be a party to the proceedings. In this capacity he represents all the objects of the charity, who are thus in effect Plaintiffs through him." What was his position in regard to costs so incurred? There was no question that if a summons was taken out, not by the trustees, but by the beneficiaries, if the litigation was for the purpose of ascertaining the true construction of the testator's will, and was not in any way a hostile proceeding, the Plaintiffs as a general rule received their costs as between solicitor and client out of the fund the subject of the litigation. What reasons were there for putting the Attorney-General in a different position from any other Plaintiff?

It was said that inasmuch as the Attorney-General could not be ordered to pay costs, so he ought not to receive costs. That rule did not apply to a case like the present; it did apply to hostile litigation, but not to proceedings like these in a Court of first instance.

Mr. Beaumont for the Attorney-General.

Messrs Cave, K. C. and Mc Swinney for the other side.

B. D.

CALCUTTA HIGH COURT

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CIVIL APPELLATE JURISDICTION. Before D. CHATTERJEE and N. R. CHATTERJEA, JJ. APPEAL FROM APPELLATE DECREE NO. 1471 OF 1909. ABDUL KADER, Appellant *v.* ALI MEA AND OTHERS, Respondents. Heard, 29th February. Judgment, 22nd April 1912.

Civil Procedure Code (Act XIV of 1882), sec. 283, scope of—Transfer of Property Act (IV of 1882), sec. 53—Plea, if can be taken in defence—Judgment-creditor, if can bring a suit for declaration—Execution-purchaser, to what extent may object.

During the pendency of a suit on a handnote by the Defendant No. 1 against Defendant No. 2, the latter sold his homestead with a tank to the Plaintiff for a consideration of Rs. 700. The Defendant No. 1 subsequently obtained a decree on the handnote and attached the said land. The Plaintiff put in a claim under sec. 278 of the Code of Civil Procedure and it was disallowed and the property was sold and purchased by Defendant No. 1 for Rs. 40 only, his decree being for Rs. 348 odd. The Plaintiff brought this suit under sec. 283 of the Civil Procedure Code for declaration of title and confirmation of possession. The Defendant pleaded that the purchase of the Plaintiff was *benami* for the debtor and fraudulent.

The first Court held that the purchase was not *benami*, and that there was no evidence that the Plaintiff knew of the decree or the suit and decreed the Plaintiff's suit.

On appeal, the Subordinate Judge set aside the decree of the first Court holding that although consideration had been paid and Plaintiff was in possession, the Defendant No. 2 living on some other land, the Defendant No. 2 made the sale with the object of defeating the claim made by Defendant No. 1, that the Plaintiff was aware of the fraudulent motive of Defendant No. 2 in selling the property to him and helped him in carrying out the fraudulent object.

Held—That the purchase of the Defendant No. 1 was made after the present suit of the Plaintiff and was therefore subject to the result of the present suit.

A suit under sec. 283 was essentially a suit for the review of a summary decision. The summary decision in a claim case is confined to a consideration of the possession of the judgment-debtor at the time of the attachment; any other discussion in such a decision is material only so far as it is relevant to the determination of that essential matter.

As the finding in the present case was that the Plaintiff was in possession after a purchase for valuable consideration and not the judgment-debtor, Defendant No. 2, the present suit under sec. 283 should have been decreed unless there was anything in the pleadings outside the scope of sec. 283 to restrain or restrict such a result.

A judgment-creditor can have a declaration that the conveyance was void as against his own claim.

If there are more creditors and the particular creditor impleaded as a Defendant stands on the same footing as other creditors, he must plead for all and may perhaps be allowed to do so even as a Defendant if the Court has jurisdiction to entertain a claim or claims of all the creditors.

A plea under sec. 53 of the Transfer of Property Act by way of defence was competent.

That the Defendant's claim being only for Rs. 348 odd under his decree, the Plaintiff's purchase could be impeached only to the extent of Rs. 348.

Dr. Rash Behari Ghose and *Babu Dhirendra Lal Kastgir* for the Appellant.

Moulvi Syed Shamsul Huda and *Babu Kshitish Chandra Sen* for the Respondents.

A. T. M. *Appeal allowed.*

GIRWAR NARAIN *v.* THE KING-EMPEROR.

as a Tehsildar, Patwari and Naib Patwari respectively in the employ of Babu Pran Mohan Thakur and in such capacity entrusted with the collection of rent committed criminal breach of trust with respect to Rs. 53-11-4½ p. out of the rents realised from Karu Mandar, Munshi Mandar and Dwarka Mandar as stated below, and thereby committed an offence punishable under sec. 408 of the Indian Penal Code and within my cognizance.

* * * *

		Rs.	A.	P.
Karu Mandar	3rd April 1910	10	0	0
	27th Sep. „	16	10	6
Munshi Mandar	29th Sep. „	17	0	10½
Dwarka Mandar	16th Sep. „	10	0	0
		Rs. 53	11	4½"

The accused Nos. 1 and 2 were convicted and sentenced to three months' rigorous imprisonment, while the accused No. 3 was acquitted in the first Court with these observations :—

"I am of opinion that he cannot be strictly speaking called a clerk or servant of this estate and that the charge under sec. 408, I. P. C., would not be legal against him. Coupled with this is the fact that he is about 16 years of age and the rent receipts and counterfoil receipts and the entries in the Rokar books proved to be made by him were made at the instigation of accused No. 2, Jhontu Lal Mitter. He is not paid by the estate like the other two accused and is said to be learning the work of patwari. He stands therefore in a different position to the other two accused."

On appeals being preferred by the two accused, the Appellate Court found that the evidence showed beyond doubt that there had been misappropriation of collection money. The question that arose in the appeal was whether the Appellants were or either of them was guilty. The Appellate Court mainly agreed with the findings of the first Court and the appeals were dismissed. The question of law that arose in revision in the High Court were also urged in the Appellate Court which disposed of them by the following observations :—

"Some questions of law were raised by this Appellant (accused No. 1). He urged that 4 separate items could not be included in one charge. But although the charge specifies items, it is a charge of a general deficiency under sec. 222, C. Cr. P., even though the items can be separately proved, such a charge is legal. There is much authority on this. The latest case appears to be XXXIII All. 36. The second contention is that the two Appellants ought not to have been tried together. But this depends on the first point, the contention being that sec. 234 only applies to a single accused. But this is not a case to which sec. 234 has application."

Both the Rules were granted on the same ground.

Babus Krishna Proshad Sarbadhikary and *Monmatha Nath Roy* for the Petitioner in 1449.

Babu Narendra Nath Sett for the Petitioner in 1526.

Babu Nares Chandra Sinha, for the Opposite Party in both.

The JUDGMENT OF THE COURT was as follows :—

This was a Rule calling upon the District Magistrate of Bhagalpur to shew cause why the conviction and sentence passed on the Petitioner should not be set aside on the grounds, *firstly*, that there has been misjoinder of charges, and, *secondly*, that the findings on the evidence do not

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show that there was specific misappropriation of any portion of the money by either of the accused persons, or that there was complicity between them.

We have heard the learned Vakil in showing cause and we have carefully considered the explanation given by the District Magistrate; but we are still of opinion that having regard to the provisions of sec. 222, cl. (2), there has been a misjoinder of charges in this case. It is unnecessary to refer, as the learned Judge does, to sec. 234. It is enough to point out that in sec. 222 also the wording of the section refers to a single accused; and it must be so, because it is impossible to hold that two persons can be guilty of misappropriation of the same parcel of money. One may be guilty of misappropriating a portion of it or one may be guilty of abetting the other. The misappropriation of the actual money must be the act of a single person, and therefore sec. 239 has no application, because more than one person could not be charged with this particular offence of misappropriation of a single sum. This really covers the second ground of the Rule, which show how easily an accused may be prejudiced by a charge drawn up in this vague manner.

As far as the finding that there was complicity between the two Petitioners goes that would only amount to a finding that one of them abetted the other. It is extremely difficult upon the judgment of either of the Courts below to discover which of the accused was in their opinion the principal and which was the abettor. Ordinarily speaking the person into whose hands the money came and who was bound to account for it and who has not accounted for it is the person who would be liable to be charged with misappropriation. Now if the patwari was bound to account to the estate through the *tahsildar* for moneys collected by him, and the *tahsildar* made false entries and thereby facilitated misappropriation of the money the *tahsildar* would be liable to be charged with abetment, but the specific act of misappropriation in the absence of any evidence that the money passed into the hands of the *tahsildar* would lie against the *patwari* alone. The difficulty in this case is that there is no finding that the actual money passed into the hands of the *tahsildar*. If the patwari handed over the money he collected to the *tahsildar* and the *tahsildar* falsified the accounts then of course the *tahsildar* alone would be responsible for the misappropriation, and there would then have to be a clear finding on evidence that the patwari abetted him. But be that as it may the charges against these two persons must be of misappropriation in one case and of abetment in the other. It is open of course to the Court to frame charges in the alternative; *firstly*, that the patwari received money and misappropriated it, the *tahsildar* being the abettor; or, *secondly*, that the patwari handed over the money to the *tahsildar* who misappropriated it and that the patwari abetted him in such misappropriation. But if it is found necessary to draw up such charges in the alternative clearly the different items will have to be distinguished, because the evidence as regards the receipt and credit of each item is different.

In setting aside the conviction and sentence and directing a new trial we therefore leave it to the District Magistrate to decide which items should be charged as misappropriated by the *tahsildar* or by the *patwari* with or without abetment of the other. But if these two persons are

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tried together the charge against one must be of misappropriating a sum of money and the charge against the other must be of abetting him in so doing. The materials before us are not sufficient to give any more specific directions.

The Rule is made absolute, the conviction and sentence are set aside and there will be a retrial according to law.

The Petitioner will remain on the same bail pending the re-hearing.

This judgment will govern both the Rules.

B. C. *Rules made absolute.*

[PRIVY COUNCIL.]

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN.	DURGA PRASAD LAHIRI CHOWDHURI and another, Appellants,
LORD ROBSON.	*v.*
SIR JOHN EDGE.	SRIMATI SASHIBALA DEBI and others, Respondents.
MR. AMEER ALI.	
1911, 21, November.	

Civil Procedure Code (Act XIV of 1882), sec. 13—Res judicata—*Maintenance, successive suits for*—Brittipatra, *held not binding in previous suit —Claim based on same document in later suit if maintainable.*

Where a previous suit of the Plaintiff for recovery of maintenance alleged to have been charged on property in the hands of the Defendants by a **brittipatra** ***was dismissed upon the finding that the document had as between the parties no effectual binding power over the estate and did not affect it in any way, a second suit by the Plaintiff for a declaration of his right to receive maintenance under the*** **brittipatra** ***and of the same being a charge on the property and for recovery of arrears of maintenance was barred by the rule of*** **res judicata.**

This was an appeal from a judgment and decree of the High Court at Calcutta, dated the 26th of July 1904, which affirmed a decree of the Subordinate Judge of Zillah Rajshahye in Bengal.

The appeal had been filed in the ordinary course and the main question for decision in it was whether the claim of the Appellants was barred by the rule of *res judicata.*

The litigation between the parties arose in the following manner: In the year 1795 the son of one Ram Kanta Lahiri, the predecessor in title of the Appellants, married a daughter of Raja Binode Ram Roy Chowdhuri. At that time the Raja executed a *brittipatra* upon which the Appellants based their claim. It was a deed of maintenance in favour of the said Ram Kanta Lahiri and his heirs for ever, and it purported to be granted for the benefit, or support, of the Raja's daughter, and to create a charge upon a portion of the estate of the grantor, to the amount of Rs. 301 per annum in favour of the grantees.

In 1894 the Appellants brought a suit, 346 of 1934, in the Court of the Subordinate Judge of Rajshahye against four of the present Respondents, in which they prayed for a decree for the recovery of Rs. 3,210-1-6 being the balance of the said maintenance allowance and for other relief. The defence was that the *brittipatra* was not a genuine document and was never acted upon and that it created no lien upon the property.

The Subordinate Judge decreed the claim in part and declared that the Plaintiffs should have a lien to sell the property which purported to be charged in the *brittipatra.*

On appeal, the High Court at Calcutta set aide the decree of the Subordinate

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Judge, and dismissed the suit of the Plaintiffs. The finding of the Court was :—

"The utmost, therefore, that the Plaintiff has been able to prove, is, that he and perhaps his father received some allowance from the Defendant's family, an allowance which varied from time to time, and the amount of which depended entirely upon the good-will of the Raj representatives. He has entirely failed to prove that he ever received, either in full or in part, any allowance which he claimed, and which was acknowledged as his right by reason of its being due under the *brittipatra* upon which he bases his claim.

"We are forced, therefore, to the conclusion, judging from the absence of proof of any act done under this *brittipatra* or referable to it, that it was not intended to be and was not in effect, a grant creating a perpetual charge on the Defendant's estate in favour of the alleged grantee and his heirs. In other words the Plaintiff has failed to establish his claim."

The judgment and decree of the High Court were dated the 6th of September 1897, and the contention of the Respondents in the present appeal was that they operated as a bar to the claim of the Appellants by reason of the doctrine of *res judicata*.

On the 4th of September 1900 the Appellants, as Plaintiffs, brought the present suit against five Defendants, three of whom (Nos. 1, 3 and 4) in the first Court entered into a compromise with the Plaintiffs. The Defendant No. 2 was a descendant of one of the original grantors of the maintenance allowance who had a one-sixth share in the property; and Defendant No. 5 acquired that share by purchase from Defendant No. 2.

The suit after a certain stage was contested by the fifth Defendant alone.

In their plaint, dated the 4th of September 1900, the Plaintiffs sought to obtain a declaration that under the said *brittipatra*, dated 17th Magh 1201 (January 1795), executed by the said Raja, the predecessor of the Defendants Nos. 1 to 4, they were entitled to maintenance at the rate of Rs. 301 per annum, and to have their maintenance declared a charge upon the zemindari of the Defendants. They also sued to obtain arrears of maintenance for the years 1296 to 1306 with interest.

The fifth Defendant in her written statement pleaded by way of defence to the suit *inter alia* that the Plaintiffs' claim was barred by *res judicata*, as in the previous suit, brought on the same cause of action by the Plaintiff in 1894, their claim had been finally dismissed by the High Court.

The principal issues framed for trial were :—

"1st. Is the suit barred as *res judicata* ?

3rd. Whether the Tankapatra propounded by the Plaintiffs is genuine, and has it ever been acted upon ?

5th. Is the Plaintiff's maintenance a charge on the property mentioned in the plaint ?"

By his decree, dated the 10th of March 1902, the Subordinate Judge dismissed the suit with costs as against the second and fifth Defendants, and, as against the first and fourth Defendants, he disposed of it in accordance with the terms of the compromise above-mentioned.

The Plaintiffs appealed from the said decree of the Subordinate Judge to the High Court at Calcutta. The appeal was heard by a Division Court consisting of Brett and Woodroffe, JJ., who on the 26th of July 1904 gave judgment and by their decree of that date dismissed the appeal with costs.

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They observed: "The Plaintiffs have appealed, and the point urged in support of the appeal has been that the effect of the judgment of this Court in the previous suit decided on the 6th of September 1897 was not to decide that the *brittipatra* was not an invalid document, and not genuine, but merely to decide that it had not been acted upon, and that, therefore, the Plaintiffs in that suit were not entitled to recover the maintenance for the years for which it was claimed."

The learned Judges, however, after considering the language of the said judgment, dated the 6th of September, were of opinion that the High Court intended to decide that the *brittipatra* was not only inoperative, but that it was not a genuine document, and that the claim of the Plaintiffs for maintenance, so far as it was based on that document, failed.

They concluded their judgment as follows:—

"In the present case the main issue on which the suit was tried was whether the Plaintiffs had a right to recover the maintenance claimed for the years in suit on the basis of the same *brittipatra*.

"It was contended in this case as in the previous case that the *brittipatra* was a valid and genuine document, that it created a recurring right in favour of the Plaintiffs, and that they were entitled to recover the maintenance under it. The title on which they claim in this case is the same as that under which they claimed in the previous case, and the issue which the Court had to decide in order to come to a conclusion on the claim in the present suit was the same as that which this Court had to decide in the previous case in 1897. In our opinion, therefore, the plea of the Defendants in this case was a good one, and the claim of the Plaintiffs, based as it was on a title which they alleged they had under the *brittipatra* was barred by the doctrine of *res judicata* by reason of the previous judgment of this Court in appeal, dated the 6th September 1897.

"We, therefore, agree with the Subordinate Judge that the Plaintiffs' suit should be dismissed with costs as against Defendants Nos. 2 and 5 who alone contested the suit in the Court of first instance and who alone have appealed to this Court. So far as the other Defendants are concerned the decree of the Subordinate Judge will also stand.

"This appeal is accordingly dismissed with costs."

Hence this appeal.

Mr. Ross for the Appellants submitted that the Plaintiffs' claim was not barred by *res judicata*. The previous judgment of the High Court only decided that the *brittipatra* was not acted upon for sometime. It did not hold that it was not a genuine document.

Messrs. L. DeGruyther, K. C., and Kyffin for the Respondents were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—The High Court having decided in the former suit that the document in question has no effectual binding power over the estate, and does not affect it in any way as between the parties, that issue must be considered to be decided, and the suit fails.

That being so, their Lordships will humbly advise His Majesty to dismiss the appeal, and the Appellants must pay the costs.

Solicitors: *Messrs. Withers, Pollock and Crow* for the Appellants.

Solicitors: *Messrs. W. W. Box & Co.* for the Respondents.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 1411 OF 1909.

D. CHATTERJEE, J.
N. R. CHATTERJEA, J.
1912,
Heard, 27, February.
Judgment, 2, April.

RAIMONI DASSI and others, Plaintiffs, Appellants,
v.
MATHURA MOHON DEY, Defendant, Respondent.

Transfer of Property Act (IV of 1882), secs. 107, 4—Registration Act (III of 1877), sec. 3— Kabuliyat *alone, if constitutes a lease—Acceptance by lessor and registration—Mistake, mutual, inclusion in lease of lands not belonging to lessor, by—Remedy—Specific Relief Act (I of 1872), secs. 26, 28.*

If the lessor and the lessee agree that the lessee is to have a right to enjoy a property on certain terms and that the fact of the transfer of such right is to be embodied in an instrument to be executed by the lessee only and accepted by the lessor, the lease can be effected by such an instrument provided it is registered as required by sec. 107, Transfer of Property Act.

A valid lease may, therefore, be created by a kabuliyat *only, which is accepted by the lessor and registered according to law.*

NILMAMUD SARKAR *v.* BOUL DAS (8) *explained.*

AKRAM ALI *v.* DURGA PRASANNA ROY CHOWDHURI (1), SHEO KARAN SINGH *v.* MAHARAJA PARBHU NARAIN SINGH (4) and AJAM SAHIB *v.* MADURA (7) *referred to.*

Where a comparatively small portion of the demised lands was found to have originally belonged to the lessee and to have been included in the lease by mutual mistake,

Held—*That the whole lease should not be set aside but that there should be an apportionment of rent for the remaining land.*

This was an appeal preferred on the 18th of July 1909 against a decree of Mr. J. E. Phillimore, District Judge of Zillah Sylhet, dated the 16th of March 1909, confirming the decree of Babu Adaitya Chandra Chakravarti, Subordinate Judge of Sylhet, dated the 5th of October 1907.

The Appellants who were the Plaintiffs in the suit out of which the present appeal arose sued to recover Rs. 2,100 from the Defendant as being arrears of rent due by the Defendant upon the basis of a registered *kabuliyat* executed by the latter in favour of the predecessor in interest of the Appellant. The Defendant *inter alia* objected that there was no completed lease in the case, as no *pattah* had ever been executed by the alleged lessor, that the *kabuliyat* was a fraudulent document inasmuch as 9 plots of lands belonging to the Defendant in his own right had been included in it without Defendant's knowledge, that the Defendant was never allowed to take possession of the demised land, and that the Defendant had shortly after the execution of the *kabuliyat* relinquished the lease on the ground of the lessor's failure to correct the error alluded to in the *kabuliyat*.

The Subordinate Judge before whom the case came on for trial in the first instance held that the lessor had failed to execute a *pattah* and thus act up to the contract between the parties, that 9 plots as alleged by the Defendant had been included in the *kabuliyat* through the fraud and misrepresentation of the lessor's agent, that the Defendant had executed the *kabuliyat* without reading the contents thereof, that the *kabuliyat* was never

(1) 14 C. L. J. 614 (1910).
(4) I. L. R. 31 All. 276 (1909).
(7) 21 Mad. L. J. 202 (1910).
(8) 14 C. W. N. 78 (1909).

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acted upon and had in fact been rescinded by the Defendant. Upon these findings he dismissed the suit.

Upon appeal the District Judge held that the absence of a *pattah* did not invalidate the transaction, and that the registration of the *kabuliyat* was a sufficient compliance with the terms of sec. 107, Transfer of Property Act, that the inclusion of the 9 plots which already belonged to the Defendant was due neither to fraud nor to misrepresentation but to mutual mistake; that the mistake was regarding a matter of fact essential to the agreement and that in consequence the whole agreement was void and the Plaintiff was therefore not entitled to recover rent. In this view he dismissed the appeal.

Plaintiffs preferred this second appeal.

Babus Provash Chandra Mitter and *Susil Madhub Mallik* for the Appellants.

Babus Harendrà Narayan Mitter and *Narendra Nath Sett* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

N. R. CHATTERJEA, J.—This appeal arises out of a suit for recovery of *ijara* rent, based upon an *ijara kabuliyat* executed by the Defendant in favour of the predecessor in interest of the Plaintiffs, whereby the Defendant undertook to collect rent of 48 and odd *hals* of lands for 4 years and agreed to pay to the lessor Rs. 400 a year.

The defence was that the contract was not completed as no *pattah* was granted by the lessor, that the lessor never allowed the Defendant to take possession of the lands, that one *hal* of land (nine plots) which really belonged to the Defendant had been fraudulently included in the *kabuliyat* which was executed without full knowledge of its contents and that as the *kabuliyat* was not corrected the Defendant surrendered the lease, that the *kabuliyat* was never acted upon and that the Defendant was not therefore liable to pay anything.

The Court of first instance finding all the above pleas in favour of the Defendant dismissed the suit. On appeal the lower Appellate Court held that the registration of the *kabuliyat* was a sufficient compliance with the provisions of sec. 107 of the Transfer of Property Act, that the absence of a *pattah* does not invalidate the contract, that the *kabuliyat* was duly executed and there was no fraud or misrepresentation practised on the Defendant to secure its execution.

As regards the nine plots of land the lower Appellate Court held that there was some difficulty in ascertaining the actual facts as there had been no local investigation but that he agreed with the Subordinate Judge who had gone into the question incidentally in holding that the nine plots were in possession of the Defendant and his co-sharers from long before the date of the *kabuliyat* as *maliks*. The lower Appellate Court, however, held that an agreement to pay rent for land already in the lessee's possession as owner is void and that the mistake in including the nine plots of land was regarding a matter of fact essential to the agreement and therefore the agreement was altogether void and Plaintiff was not entitled to recover rent.

The Plaintiffs have appealed to this Court and it has been contended on their behalf that the lower Appellate Court having held that the *kabuliyat* constituted the contract of lease and was duly executed, and the case of fraudulent misrepresentation having been found against the

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Defendant, the lower Appellate Court ought to have decided the question whether as a matter of fact the nine plots really belonged to the Defendant, and even if they belonged to the Defendant, the Plaintiffs ought to have been given a decree for proportionate rent for the remaining lands.

On behalf of the Defendant-Respondent it has been contended that in the absence of a *pattah*, the *kabuliyat* could not constitute a lease within the meaning of sec. 107 of the Transfer of Property Act. It has been further contended that even if the *kabuliyat* operated as a lease and if the case should be remanded at all there was a number of questions raised in the case which were decided by the Court of first instance, but was not decided by the lower Appellate Court and that the latter should be directed to decide the said questions.

So the first question for consideration is whether a registered *kabuliyat* executed by the lessee and accepted by the lessor operates as a lease within the meaning of sec. 107 of the Transfer of Property Act.

There can be no question in this case that the *kabuliyat* was accepted by the lessor, as the suit has been based upon it.

Sec. 105 of the Transfer of Property Act defines a lease of immoveable property as a transfer of a right to enjoy such property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised or of money, a share of crops, service or any other thing of value to be rendered periodically or on specified occasions to the transferor by the transferee who accepts the transfer on such terms. The section does not prescribe how the transfer is to be effected. Sec. 107 prescribes the mode in which a lease is to be effected and provides that a lease of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument. Sec. 4 of the Transfer of Property Act provides that sec. 107 and certain other sections shall be read as supplemental to the Indian Registration Act, 1877, which means that it is to be read as supplemental to all the provisions of the Registration Act. Under sec. 3 of the Registration Act of 1877 a lease includes a *kabuliyat*. Reading secs. 4 and 107 of the Transfer of Property Act together with sec. 3 of the Registration Act of 1877 it would appear that a lease in sec. 107 includes a *kabuliyat*. Sec. 107 of the Transfer of Property Act does not require that the instrument shall be signed by the lessor. The only thing required by it is that the lease (*i.e.*, the transfer of a right to enjoy property) should be effected by a registered instrument. Now if the parties to a lease, *viz.*, the lessor and the lessee, agree that the lessee is to have a right to enjoy a property on certain terms and that the fact of the transfer of such right is to be embodied in an instrument, to be executed by the lessee only and accepted by the lessor, there is no reason why a lease cannot be effected by such an instrument provided it is registered which is the only condition required by sec. 107 of the Transfer of Property Act. The argument that in order to constitute a lease there must be a *pattah*, *i.e.*, a writing signed by the lessor, proceeds upon the assumption that the *kabuliyat* is only an unilateral expression of intention on the part of the lessee only, but it is, as I have said above, the embodiment of the whole contract between the lessor and the lessee, *viz.*, the transfer by the lessor

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of the right to enjoy the property on certain terms and the acceptance by the lessee of the right on those terms.

The case of a sale does not stand on the same footing as there is no provision in the Registration Act relating to sales such as is contained in sec. 3 relating to a lease, *viz.*, that it includes a *kabuliyat.*

It is a common practice in this country where no *pattah* is executed to treat a *kabuliyat*, accepted by the lessor, as the instrument creating a tenancy and there can be no question that before the passing of the Transfer of Property Act a lease could be effected by an instrument signed by the lessee only and registered in cases where registration was compulsory. Under sec. 3 of the Registration Act, 1877, a lease includes a *kabuliyat.* So that before the passing of the Transfer of Property Act in cases where a registered instrument was necessary under the Registration Act, a *kabuliyat* executed by the lessee if registered was legally sufficient to constitute a lease. It was not necessary for the creation of a lease that the landlord should grant a *pattah.* It was sufficient if the tenant executed a *kabuliyat* which was accepted by the landlord. See *Akram Ali* v. *Durga Prasanna Roy Chowdhuri* (1). Sec. 105 of the Transfer of Property Act does not introduce any change in the legal conception of a lease which before the passing of that Act could be effected by a registered instrument signed by the lessee only. The provisions in sec. 4 of the Transfer of Property Act that sec. 107 and certain other sections of that Act shall be read as supplemental to the Indian Registration Act, 1877, was introduced into that Act by the Amending Act of 1885 (Act III of 1885). So far therefore from laying down that an instrument of lease does not include a *kabuliyat* and therefore must be an instrument signed by the lessor, it makes sec. 107 supplemental to all the provisions of the Registration Act including sec. 3 and the provision in sec. 3 of the Registration Act III of 1877 that a lease includes a *kabuliyat* has been re-enacted without any modification in sec. 2 (7) of the Registration Act of 1908.

The Legislature has prescribed no form for a lease and in the absence of any provision in the Transfer of Property Act that a lease in order to be valid must be signed by the lessor, I am unable to hold that a registered *kabuliyat* which is accepted by the lessor is not a lease within the meaning of sec. 107 of the Transfer of Property Act.

As to the authorities on the point the earlier cases in the Allahabad High Court were in favour of the view that a *kabuliyat* cannot be considered as a lease within the meaning of sec. 107, Transfer of Property Act. In *Nand Lal* v. *Hanuman Das* (2), Blair, J., followed an earlier decision of Edge, C. J., and Burkitt, J., in which the learned Judges held that a *kabuliyat* is merely an agreement executed by a tenant to take the tenancy and that in itself it contains no agreement of the landlord on his part to lease the land. It does not appear whether in that case there was acceptance of the *kabuliyat* by the landlord. Blair, J., was of opinion that the word 'instrument' in sec. 107 shows that the document must be one which must have certain executive force and that upon its execution the lease is completed. Banerji, J., did not desire to express any opinion on the question having regard to the fact that it is a common practice in these provinces to treat a *kabuliyat* as the

(1) 14 C. L. J. 614 (1910).

(2) I. L. R. 26 All. 368 (1904).

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instrument creating a tenancy and that a ruling upholding the contrary view may unsettle titles. The case of *Kashi Gir* v. *Jogendra Nath Ghose* (3) was heard by Blair, J., sitting singly and he followed his judgment in *Nand Lal* v. *Hanuman Das* (2).

The question was raised before a Full Bench of the Allahabad High Court in the case of *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh* (4), but the Full Bench expressed no opinion on the point inasmuch as they found that under the circumstances of the case the Plaintiff was clearly entitled to recover compensation for use and occupation. The Full Bench seem to have been in doubt as to the correctness of the earlier decisions as they declined to express any opinion as to their correctness.

In the Madras High Court, Benson and Wallis, JJ., held in *Turof Sahib* v. *Esuf Sahib* (5), that a lease must be an instrument bearing the signature of the lessor, and that case was followed by Benson and Miller, JJ., in *Kaki Subbanadri* v. *Muthu Rangayya* (6). In none of the cases cited above except in the last case was any reference made to sec. 4 of the Transfer of Property Act. It is not necessary to consider however the cases in the Madras High Court in detail because in the recent case of *Ajam Sahib* v. *Madura* (7), a Full Bench of that Court held after an exhaustive discussion of the matter that the registered instrument referred to in sec. 107 of the Transfer of Property Act in order to be valid need not be signed by the lessor.

(2) I. L. R. 26 All. 368 (1904).
(3) I. L. R. 27 All. 186 (1904).
(4) I. L. R. 31 All. 276 (1909).
(5) I. L. R. 30 Mad. 322 (1907).
(6) I. L. R. 32 Mad. 532 (1909).
(7) 21 Mad. L. J. 202 (1910).

In our Court in the case of *Nilmamud Sarkar* v. *Boul Das* (8), the learned Judges (Chitty and Carnduff, JJ.), agreeing with the cases of *Nand Lal* v. *Hanuman Das* (2), *Kashi Gir* v. *Jogendra Nath Ghose* (3), *Turof Sahib* v. *Esuf Sahib* (5), held that a *kabuliyat* which is only an undertaking by the prospective tenant to take the tenancy is not a lease. Of course a *kabuliyat* executed by a lessee in itself does not create a lease unless it is accepted by the landlord; and that case is distinguishable as in that case one of the landlords at any rate did not accept the lease.

In a later case, *Akram Ali* v. *Durga Prasanna Roy Chowdhuri* (1), Mookerjee and Coxe, JJ., held that it was impossible to maintain the view that for the creation of a permanent lease before the Transfer of Property Act it was necessary that the landlords should grant a *pattah*. The *kabuliyat* in that case was executed before the Transfer of Property Act but the learned Judges with reference to the case of *Nilmamud* v. *Boul Das* (8) observed "we need not therefore decide whether under the Transfer of Property Act the law is different, but we observe that a Full Bench of the Madras High Court in *Ajam* v. *Madura* (7) has assigned weighty reasons in support of the view contrary to that maintained in *Nilmamud* v. *Boul Das* (8).

The result of the authorities therefore is this :—In the Madras High Court the earlier cases which held the contrary view must now be taken to have been overruled by the recent Full Bench which supports

(1) 14 C. L. J. 614 (1910).
(2) I. L. R. 26 All. 368 (1904).
(3) I. L. R. 27 All. 186 (1904).
(5) I. L. R. 30 Mad. 322 (1907).
(7) 21 Mad. L. J. 202 (1910).
(8) 14 C. W. N. 78 (1909).

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our view. In the Allahabad High Court although the earlier cases took a contrary view, a Full Bench of that Court declined to express any opinion as to the correctness of the earlier rulings and in our own Court though in one case the learned Judges agreed with the earlier Allahabad cases and one of the Madras cases, the case is distinguishable on the ground that one of the landlords did not accept the *kabuliyat*, and in the latest case, *Akram Ali* v. *Durga Prasanna* (1), the learned Judges observed that the reasons given by the Full Bench of the Madras High Court were weighty though the observation was by way of *obiter dictum.*

The weight of authority therefore appears to be rather in favour of the view I take than against i and I am of opinion that a registered *kabuliyat* signed by the lessee and accepted by the lessor is sufficient to constitute a lease within the meaning of sec. 107 of the Transfer of Property Act.

The first contention raised on behalf of the Respondent, therefore, must be overruled.

The next question is whether the inclusion of the 9 plots of land in the possession of the Defendant in the *kabuliyat* renders it void. The lower Appellate Court has found that there was no fraud or misrepresentation in the matter and that there was only a mistake, but held that the mistake was regarding a matter of fact essential to the agreement and therefore the agreement was void.

I cannot agree to this view. In the present case the lands in the possession of the Defendant which are included in the *kabuliyat* are small in comparison with the total lands demised and I am unable to hold that in the absence of any fraud or misrepresentation the mere inclusion by mistake of some lands in the possession of the Defendant or belonging to him in the *kabuliyat* renders it altogether void. In such a case, I think, there should be an apportionment of the rent for the remaining lands.

I am of opinion that the lower Appellate Court should come to proper findings upon the following questions :—

First, whether the Plaintiffs had a title to the 9 plots (one *hal*) of land of which the Defendant was already in possession? How long was Defendant in possession and whether he had acquired any title by such possession?

Second, whether the Plaintiff failed to deliver possession of the remaining 47 *hals* of land and failed to supply the Defendant with the touzi and collection papers in order to enable the Defendant to collect rent?

Third, whether the *kabuliyat* was acted upon?

Fourth, whether the Defendant surrendered the *ijara* and was there a valid surrender?

If the last three questions are found in favour of the Plaintiffs, and the first question against them, the lower Appellate Court will apportion the rent with respect to the remaining lands. If the last three questions are found against the Plaintiffs the first question need not be gone into. The decree of the lower Appellate Court is accordingly set aside and the case sent back to that Court for a decision of the case in accordance with the observations made above.

Costs to abide the result.

D. CHATTERJEE, J.—I agree.

Appeal allowed;
Case remanded.

(1) 14 C. L. J. 614 (1910).

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE No. 1917 OF 1909.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard, 4, 21 & 22, August.
Judgment, 24, August.

JADUNANDAN PROSAD SINGH, Plaintiff, Appellant,
v.
DEO NARAIN SINGH and others, Defendants, Respondents.

Civil Procedure Code (Act V of 1908), Or. 41, r. 22, sub-r. (1)—Cross-objections against co-Respondent, when may be entertained—Registration Act (III of 1877), sec. 47—Mortgage, execution—Collateral agreement postponing operation till fulfilment of conditions—Fulfilment of conditions—Operation as from date of execution—Delivery, if essential.

The language of Or. XLI, r. 22, sub-r. (1) of the Civil Procedure Code is comprehensive enough to admit of a cross-objection being preferred by one Respondent against another.

As a general rule, the right of any Respondent to urge a cross-objection should be limited to his urging it only against the Appellant, and it is only by way of exception to this general rule that one Respondent may urge a cross-objection as against another Respondent; but as to this no exhaustive rule can be formulated and the entertainment of cross-objections against co-Respondents cannot be limited to those cases only where the appeal opens up questions which cannot be disposed of completely without matters being allowed to be re-opened as between the co-Respondents. The true test ought to be whether for the ends of justice it is necessary upon the appeal of one party that the matter should be re-opened so far only as he is concerned or whether the whole case should be reviewed and some of the Respondents allowed to urge a cross-objection against their co-Respondents.

Where a mortgage is executed but there is a collateral agreement that no obligation should attach under the instrument till payment of money on the one hand and delivery to the registering officer on the other, the moment the condition is fulfilled, obligation attaches with effect from the date of execution and attestation of the document.

There is no analogy between a common law deed in England and a mortgagee deed in this country in this respect.

This was an appeal preferred on the 12th of September 1909 against the decree of Babu Durgadas Bose, Subordinate Judge, 1st Court of Zillah Patna, dated the 10th of July 1909, modifying the decree of Babu Raj Kishore, Munsif of Behar, dated the 14th of December 1908.

The facts of the case will appear from the judgment.

Babus Mohendra Nath Roy and *Joy Gopal Ghosha* for the Appellant.

Babus Jogesh Chandra Roy and *Siva Nand Roy* for the Defendants Nos. 3 and 4, Respondents.

Babus Jnanendra Nath Bose and *Biraj Mohun Majumdar* for the Defendant No. 5, Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal is directed against the decree in a suit to enforce a mortgage security executed by the first Defendant in favour of the Plaintiff. The second Defendant is alleged to have subsequently acquired an interest in the equity of redemption and has been joined as a party in that character. The third and fourth Defendants claim to be mortgagees under an instrument, dated the 21st January 1908: the fifth Defendant sets up a mortgage alleged to have been granted on the 13th January 1908. The sixth De-

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fendant holds a mortgage executed on the 14th September 1907, and the seventh Defendant sets up a mortgage granted on the 6th January 1908. The date of the mortgage bond which the Plaintiff seeks to enforce is the 19th January 1908, but it appears on the face of it to have been altered to the 23rd January 1908. In the Court of first instance, there were two matters substantially in controversy between the parties, namely, *first*, whether the mortgage of the Plaintiff took effect from the 19th January 1908, *i.e.*, whether it was entitled to priority over the mortgage of the third and fourth Defendants: and, *secondly*, whether the mortgage set up by the fifth Defendant represented a genuine transaction. The Court held upon the first question in favour of the Plaintiff, and upon the second question against the fifth Defendant. The fifth Defendant thereupon appealed to the Subordinate Judge, and he joined as parties Respondents the Plaintiff and the remaining Defendants. Of the latter the third and fourth Defendants preferred a cross-objection, under Rule 22 of Or. 41 of the Civil Procedure Code, to the effect that the mortgage set up by the Plaintiff took effect only from the 23rd January 1908, and was not entitled to priority over their security. The Subordinate Judge allowed the appeal as also the cross-objection. He found upon the evidence that the mortgage set up by the fifth Defendant was not a collusive transaction, and that the mortgage sought to be enforced by the Plaintiff took effect from the altered date, the 23rd January 1908. The Plaintiff has now appealed to this Court, and on his behalf the decision of the Subordinate Judge has been assailed on three grounds, namely, *first*, that the mortgage of the fifth Defendant is collusive, and the finding of the Subordinate Judge to the contrary is not supported by the reasons assigned by him, *secondly*, that it was not competent to the third and fourth Defendants to prefer a cross-objection against the Plaintiff upon an appeal preferred by the fifth Defendant, and, *thirdly*, that, upon the facts found, the mortgage of the Plaintiff took effect from the date of execution and not from any subsequent period.

In so far as the first ground is concerned, it cannot be supported. We have examined the reasons assigned by the Subordinate Judge in support of his conclusion as to the true character of the mortgage set up by the fifth Defendant. These grounds do not involve any error of law, and it is not open to this Court to consider whether the Subordinate Judge has taken a correct view of the facts. The first ground, therefore, fails.

In so far as the second ground is concerned, it raises an important question which was not suggested in the Court below. No objection appears to have been taken before the Subordinate Judge as to the competency of the cross-objection by the third and fourth Defendants: that, however, does not preclude a consideration of the point by this Court: if the cross-objection was really incompetent, the omission of the Plaintiff to take exception to it could not possibly validate the same. Now it is not disputed that Or. 41, r. 22, sub-r. (1) of the Code of 1908 is comprehensive enough so far as its language in concerned, to admit of a cross-objection by one Respondent against another. But it has been urged that the reason of the rule requires that some limitation should be put upon its scope and application. Reference has been made to judicial decisions under the Codes of 1859

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(Act VIII of 1859, sec. 348) and 1882 (Act XIV of 1882, sec. 561) to show that such restriction is justifiable on principle. [*Anwar Jan* v. *Azmat Ali* (1), *Bishun Chandra* v. *Jogendra Nath* (2), *Shabiuddin* v. *Deomoorat* (3) and *Kallu* v. *Munni* (4)]. That principle is that, as a general rule, the right of any Respondent to urge a cross-objection should be limited to his urging it only against the Appellant: and it is only by way of exception to this general rule that one Respondent may urge a cross-objection as against another Respondent: the exception, it is said, holds good in those cases where the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co-Respondents. This may be accepted as a sound principle, but, as was pointed out by Mr. Justice Banerjee in *Bissen Chandra* v. *Jogendra Nath* (2), no exhaustive rule on the subject can be formulated, and the true test ought to be, whether for the ends of justice, it is necessary that upon the appeal of one of the parties the matter should be reopened only so far as he is concerned or the whole case should be reviewed and some of the Respondents allowed the opportunity to urge a cross-objection against their co-Respondents. One test of a negative character is sometimes useful: if the party, against whom a cross-objection is sought to be urged by his fellow Respondents, is not a necessary party to the appeal, the cross-objection can hardly be allowed to be urged. But if he is a necessary and proper party Respondent to the appeal, the answer to the question whether the cross-objection should be allowed to be urged must depend upon the circumstances of the case. The test to be applied is whether the questions which arise between the several sets of parties are so connected that one of them ought not to be allowed to re-open matters so far as he is concerned without opportunity allowed, in the interests of justice, to another to protect himself by urging his objections, even though they be directed, not against Appellant, but against a co-Respondent. Cases of the type of *Abdul Ghani* v. *Muhammud* (5) are fairly simple: if the Defendants have a common ground, upon an appeal by one of them, the Plaintiff may very well be allowed to urge a cross-objection against a Defendant-Respondent. The case before us, however, is of a special character, and is unlike any of those to be found in the books. Here the Plaintiff and third and fourth Defendants were so far united that their common interest was to defeat the fifth Defendant, who set up a heavy prior charge, which if real was entitled to precedence over both of them. If the fifth Defendant was defeated the question of priority as between themselves might be immaterial if the property was of sufficient value to satisfy the claim of both of them. (Sec. 48, Transfer of Property Act). Good reasons might therefore be assigned as to why the third and fourth Defendants did not prefer an appeal against the Plaintiff, although the first Court had overruled their contention that they were entitled to priority. But when they found that the fifth Defendant had preferred an appeal, they might in justice, contend that, if the appeal was successful, if would be material for them to urge

(1) 15 W. R. 26 (1871).
(2) I. L. R. 26 Cal. 114 (1898).
(3) I. L. R. 30 Cal. 655 (1903).
(4) I. L. R. 23 All. 93 (1900).
(5) I. L. R. 28 All. 95 (1905).

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that the decree of the first Court was erroneous in so far as it gave the Plaintiff a priority over them. To put the matter briefly, as soon as the Plaintiff and the third and fourth Defendants became unsuccessful against their common enemy, the 5th Defendant, the conflict of interest between them became important from a practical point of view. We are therefore not prepared to accept the contention that the rule on the subject should be narrowly defined and that a cross-objection should not be allowed unless the appeal directly opens up a question between co-Respondents. In our opinion the principle ought to be liberally applied and the case before us under the circumstances stated falls rather within the exception than within the rule. We may point out that Or. 41, Rule 22, sub-rule (3) introduces a modification of the rule as embodied in sec. 561 of the Code of 1882: the effect of the alteration is to leave no doubt that a Respondent may prefer a cross-objection against a co-Respondent: the limits of the rule, however, are not attempted to be defined, and sub-rule (4) which has been added in the Code of 1908 may possibly create a difficulty in some cases. The present case, however, is reasonably free from difficulty, and we must hold that the cross-objection was competent. If the contrary view were maintained, the result would have followed that the first and fourth Defendants would have been driven to prefer a separate appeal, although if the fifth Defendant did not prefer any appeal it might be wholly unnecessary for the third and fourth Defendants to proceed with their appeal for the protection of their own interest. The second ground urged by the Appellant therefore fails.

The third ground on which the judgment of the Subordinate Judge is assailed raises a question of some nicety. It has been found that the mortgage in favour of the Plaintiff was duly executed and attested on the 19th January 1908. The mortgagee however would naturally not part with his money till the deed was registered, and the mortgagor was also apparently unwilling to part with the document till he had got the money. The money was paid and the deed was registered on the 23rd January 1908. As we have already stated the mortgagor altered the date from the 19th to the 23rd January. The Subordinate Judge has found that this was done before registration, and was known to the mortgagee but it has not been found and the circumstances negative any possible suggestion—that the mortgagee agreed that the deed would take effect from the 23rd January. Under sec. 47 of the Registration Act, upon registration the deed would take effect from the time it would have taken effect if registration had not been necessary. The question therefore arises from what date the deed took effect. The learned Vakil for the third and fourth Defendants has relied upon the cases of *Sheo Narain* v. *Darbari* (6), *Mouladan* v. *Raghunandan* (7) and the *Ramalinga* v. *Ayyadorai* (8) to show that the deed would not take effect till it was delivered and the mortgage money paid. These cases, however, are of no real assistance to the Respondents. They merely show that the parties may intend that no obligation should attach under the deed unless a condition precedent had been fulfilled. Secs. 58 and 59 of the Transfer of Property Act show that a valid mortgage may be creat-

(6) 2 C. W. N. 207 (1897).
(7) I. L. R. 27 Cal. 7 (1899).
(8) I. L. R. 28 Mad. 124 (1904).

ed to secure money to be advanced on a future debt. The case of *Amrithatham-mal* v. *Periasami* (9) shows further that valid title may pass even if no consideration is paid at the time of the conveyance. On the other hand, the third proviso to sec. 92 of the Indian Evidence Act indicates that the existence of a separate oral agreement constituting a condition precedent to the attaching of any obligation under a contract grant or disposition of property which has been reduced to the form of a document may be proved. In fact, the cases mentioned by the learned Vakil for the Respondents show that although a conveyance or a mortgage deed has been duly executed and attested, no obligation may attach thereunder, if the parties so agree, till certain conditions have been fulfilled. They do not show that upon fufilment of the condition precedent, the obligation attaches with effect from that date and not from the date of execution of the instrument. It may be assumed, therefore, that in the case before us, the conduct of the parties shows that no obligation was intended to attach under the mortgage deed till the money was paid by the mortgagee and the document presented to the proper officer for registration by the mortgagor although we are by no means satisfied that this inference may legitimately be drawn from the mere circumstance that the mortgagor did not, upon execution of the document, deliver the same to the mortgagee. We are not prepared to hold that upon fulfilment of the condition the obligation attached with effect from the date of registration. As already explained sec. 47 of the Registration Act does not by any means support this view. We are not unmindful that under the law of England a common law deed, to be effective, must be delivered as the act and deed of the party expressed to be bound thereby as well as sealed (Laws of England, Ed. Halsbury, Vol. X, p. 385); but there is, in our opinion, no analogy between a common law deed in England and mortgage deed in this country. In the former case, delivery is essential for the validity of the deed : in the latter case, delivery is not essential although absence of delivery may serve to indicate that the parties intended that no obligation should attach under the instrument till a condition precedent had been fulfilled. There are, again, other points of fundamental difference, for instance, a common law deed is said to import consideration (Laws of England, Ed. Halsbury, Vol. X, p. 357) whereas if a suit was brought to enforce a mortgage security, the claim could be defeated on proof that there was no consideration. It must further be remembered, that even in England, in the case of deeds, the tendency of the Courts has been to interpret the term delivery rather liberally so as not to defeat the intention of the parties [*Xenos* v. *Wickham* (10) and *Exton* v. *Scott* (11) as to which see, however, *Cracknoll* v. *Janson* (12)]. Although, therefore, in England in the case of a common law deed title passes at the time of its delivery, we are not prepared to apply that rule to a case like the present where the instrument is valid in law without delivery, and where the delivery is postponed to secure the performance of mutual conditions, namely, registration of the document by the mortgagor and payment of the money by the mortgagee. No useful analogy can be drawn from another

(9) I. L. R. 32 Mad. 325 (1907).

(10) L. R. 2 H. L. 296, 309, 312, 320, 328 (1867).

(11) 6 Simon 31 (1833).

(12) 11 Ch. D. 2 (1879).

class of cases to which reference was made by the learned Vakil for the Respondents, namely, *Hopkinson* v. *Rolt* (13) and *West* v. *Williams* (14). These cases discuss the question of priority of mortgages to secure future advances, dealt with in sec. 79 of the Transfer of Property Act. The doctrine that a first mortgagee should be postponed in respect of any advances made by him after notice of a subsequent incumbrance is plainly of no assistance to the Respondents. Although the mortgage of the Plaintiff was not registered till the 23rd January 1908, and that of the third and fourth Defendants had been registered on the day previous, each took effect from the date, when it would have taken if registration had not been necessary, that is *primâ facie* from the date of its execution. The sole question is whether the operation of the mortgage instrument of the Plaintiff did not commence till the 23rd January, because it was not delivered till that date. For reasons already explained, we think this question ought to be answered in the negative. The alteration of the date by the mortgagor from the 19th January to the 23rd January did not clearly alter the position of the mortgagee. He plainly intended to take the property as security upon the title as it stood on the 19th January. No reasonable man of ordinary prudence would consent to take the property as it may stand on some uncertain future date, with the inevitable risk that the intending mortgagor may be at liberty meanwhile not merely to create encumbrances on the property, but even transfer it absolutely. If such was the intention of the parties, it is inconceivable why the document was at all executed and attested on the 19th January 1908, the execution and attestation might very well have been postponed to the date of the actual payment of the consideration money. The obvious intention of the parties was to fix the security on the title as it stood on the 19th January, and they effectively did so, even though there was a collateral agreement that no obligation should attach under the instrument till payment of money on the one hand and delivery to the registering officer on the other The moment the condition was fulfilled obligation attached with effect from the date of execution and attestation of the document, notwithstanding the execution and registration of another mortgage instrument by the mortgagor in the interval. There is no special hardship on the subsequent encumbrancer, because as in this country documents do not take effect from the date of registration, every person who acquires property takes it subject to the risk that there may be a prior title created within the preceding four months or in some instances, even eight months (secs. 23 and 24 of the Registration Act). We must consequently hold that the mortgage set up by the Plaintiff took effect from the 19th January 1908 and was entitled to priority over that of the third and fourth Defendants executed on the 21st January 1908.

The result, therefore, is that this appeal must be allowed in part and the decree of the Subordinate Judge modified. The Plaintiff will have a decree on his mortgage in the usual form. It will be declared that he is entitled to priority over the mortgage of the third and fourth Defendants, but not over that of the fifth Defendant. The Plaintiff will pay the costs of the fifth Defendant in all the Courts, but will receive all his costs from

(13) 9 H. L. C. 514 (1861).
(14) [illegible] 1 Ch. 132.

the first, third and fourth Defendants. The suit is dismissed as against the second Defendant who was unnecessarily made a party and who will have his costs in the first Court only, but no pleader's fees, from the Plaintiff.

A self-contained decree will be drawn up in this Court in supersession of the decree of the Subordinate Judge.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1040 OF 1909.

MOOKERJEE, J. CARNDUFF, J. 1911, 14, July.

ABDUL KARIM PATWARI, Plaintiff, Appellant, *v.* ABDUL RAHAMAN and ors., Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 49, 182—Sub-lease of homestead by raiyat—Permanent under-raiyati lease if valid—Construction of lease.

A sub-lease by a raiyat of the homestead portion of his holding is governed by the Bengal Tenancy Act.

BABURAM ROY *v.* MOHENDRA NATH SAMANTA (1) *followed.*

A permanent sub-lease by a raiyat is binding as between the parties to the contract.

BASARATULLA *v.* KASIRUNNESSA (5) *doubted.*

Where an under-raiyati lease provided that the tenant was at no time to be ejected from the land but that after the expiry of 9 years a fresh settlement would be made and until it was made the conditions of the kabuliyat *were to remain in force:*

Held—*That the lease was intended to be a permanent lease.*

(1) 8 C. W. N. 454 (1904).
(5) 11 C. W. N. 190 (1906).

This was an appeal preferred on the 24th of May 1909 against the decree of Babu Jogendra Nath Bose, Subordinate Judge of Zillah Noakhali, dated the 20th of February 1909, reversing the decree of Babu Norendra Kumar Mukherjee, Officiating Munsif of Lakshmipur dated the 11th of August 1908.

The facts of the case will appear from the judgment.

Babu Prokash Chandra Majumdar for *Babu Romesh Chandra Sen* for the Appellant.

Babu Jyotis Chandra Sarkar for *Moulvi Serajul Islam* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal on behalf of the Plaintiff in a suit commenced by him for ejectment of the Defendant under sec. 49 of the Bengal Tenancy Act on the ground that he held under a lease, the term whereof had expired. It appears that three persons, by name, Zahiruddi, Abdur Rahim and Samiruddin were tenants of a raiyati holding. Samiruddin transferred his one-third interest in the holding to the Plaintiff on the 9th May 1898, and took from him a sub-lease of the homestead for a term of 9 years. The case for the Plaintiff is that although the term has expired the Defendant has not vacated the land. The Defendant resists the claim on the ground that under the terms of the lease he is entitled to continue in occupation even after the expiry of the term thereof.

The Court of first instance held that the incidents of the tenancy were regulated by the provisions of the Bengal Tenancy Act and that under sec. 49, cl. (*a*), the Defendant was liable to be evicted. Upon appeal the Subordinate Judge has held

that the incidents of the tenancy are regulated by the provisions of the Transfer of Property Act and the Defendant is consequently not liable to be ejected.

In the present appeal it has been contended on behalf of the Plaintiff that the view taken by the Subordinate Judge as to the applicability of the provisions of the Transfer of Property Act is erroneous and that the Defendant is liable to be ejected under sec. 49, cl. (*a*) of the Bengal Tenancy Act. In our opinion the view taken by the Subordinate Judge as to the applicability of the provisions of the Transfer of Property Act cannot be supported but the decree he has made is correct and ought to be affirmed.

The Subordinate Judge has held that the holding which belonged to the three persons named was an agricultural holding and that as the Defendant has taken a sub-lease only of the homestead portion of the holding the incidents of the sub-tenancy are governed by the provisions of the Transfer of Property Act. This position is clearly untenable. Sec. 182 of the Bengal Tenancy Act provides that when a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local custom or usage; and subject to local custon or usage, by the provisions of the Bengal Tenancy Act applicable to land held by a raiyat. No suggestion was made by either of the parties to the present suit that there was any local custom or usage applicable to this matter. Consequently, the homestead portion of the holding is governed by the provisions of the Bengal Tenancy Act precisely in the same manner as the portion under actual cultivation. The view we take is supported by the decision in *Baburam Roy* v. *Mohendra Nath Samanta* (1). It was ruled in that case that where the land included in the holding of an agricultural raiyati consists partly of agricultural and partly of homestead lands and the portion which is used as homestead is let out for use as homestead, the under-tenant is an under-raiyat within the Bengal Tenancy Act and the provisions of the Transfer of Property Act have no application. Mr. Justice Mitra pointed out that the Bengal Tenancy Act was passed for the protection of raiyats as well as under-raiyats and if a raiyat holds lands partly agricultural and partly homestead the incidents of the holding will regulate the incidents of the sub-lease created by the raiyat. The Transfer of Property Act is not applicable to lands used for agricultural purposes and in considering whether the one act or the other would apply, we have to look to the nature of the original tenancy and not the nature of the sub-tenancy with reference to a particular piece of land within the holding. If the contrary view were maintained considerable anomaly might result. It follows, therefore, that the incidents of the tenancy of the Defendant must be determined with reference to the provisions of the Bengal Tenancy Act.

Now it has been argued on behalf of the Plaintiff that as the sub-lease of the 19th May 1908 was for a period of 9 years he is entitled to eject the Defendant upon the expiry of the term. This contention, however, is not supported by the terms of the instrument. The lease provides in one portion that the sub-tenant could not at any time be ejected from the raiyati holding of the landlord. In another portion, it provides that upon the expiry of the term of the *kabuliyat*, a fresh

(1) 8 C. W. N. 454 (1904).

ABDUL KARIM PATWARI *v.* ABDUL RAHAMAN.

settlement would be made and till a fresh settlement was made the condition of the *kabuliyat* would continue in force. These two clauses taken together plainly indicate that the intention of the parties was not to have the tenancy terminable upon the expiry of the period of 9 years. The lease in fact was permanent; the true intention of the parties was that upon the expiration of the first nine years of the tenancy a new settlement of rent would be made and till such settlement was made, rent would continue to be paid at the rate mentioned in the contract. That a contract of tenancy of this description between a raiyat and an under-raiyat is valid in law, so far as the contracting parties are concerned, cannot be disputed in view of the decisions of this Court in the cases of *Tamijuddi* v. *Ajgar Howladar* (2), *Bepin Behari Hati* v. *Amrita Lal Bhattacherji* (3) and *Manik Borai* v. *Beni Charan Mandal* (4). The contrary view taken in *Basaratulla* v. *Kasirunnessa* (5) cannot be supported, upon a true interpretation of the terms of sec. 85 of the Bengal Tenancy Act. That decision is inconsistent with at least two previous decisions of this Court and, so far as we have been able to discover, it has not been followed in any subsequent decision. We may further point out that the effect of the clause for the grant of a new lease upon the expiry of the term was to prevent the landlord from seeking to eject the Defendant upon the expiry of nine years. This is conclusively shown by the decision of this Court in the case of *Ali Mahammad Bepari* v. *Nayan Rajah Bhuiya*,* decided by Rampini and Handley, JJ., we are con-

(2) I. L. R. 36 Cal. 256: s. c. 13 C. W. N. 183 (1908).
(3) 9 C. L. J. 76 (1908).
(4) 13 C. L. J. 649 (1910).
(5) 11 C. W. N. 190 (1906).

*[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE No. 906 OF 1900.

RAMPINI, J. HANDLEY, J. 1903. 20, April.

ALI MAHAMMAD BEPARI, Plaintiff, Appellant,
v.
NAYAN RAJAH BHUIYA, Defendant, Respondent.

This was an appeal preferred on the 2nd of June 1900 against the decree of A. Pennell, Esq., District Judge of Zillah Noakhali, dated the 1st of March 1900, affirming the decree of Babu Upendra Nath Roy, Munsif, Lakhipur, dated the 7th of August 1899.

Babus Surendra Nath Guha and *Girija Prosonno Roy Chaudhuri* for the Appellant.

Babu Priya Nath Sen for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The suit out of which this appeal arises, is a suit brought by a raiyat to eject an under-raiyat. The raiyat gave the under-raiyat a lease for nine years and it was stipulated that, after the expiry of the term of nine years, the raiyat would give the under-raiyat a fresh lease of the land. Now, the raiyat seeks to eject the under-raiyat, and, in the lower Appellate Court it was argued that, this lease was in contravention of the terms of sec. 85 of the Bengal Tenancy Act; but the learned District Judge has pointed out that the section only lays down that a lease in favour of an under-raiyat for more than nine years should not be valid as against the landlord, that is, the raiyat's landlord. But it does not mean to lay down that such a stipulation as the parties to their case entered into shall be null and void. We think on this point the learned Judge's judgment is quite correct. Then the learned Vakil for the Appellant has raised another plea before us, namely, that although in the Defendant's lease it is agreed that the Defendant is entitled to a fresh settlement on a fair rent after the expiry of the lease, yet as he has not taken such settlement, the Plaintiff is entitled to eject him. We find the Plaintiff has never offered him a lease on a fair rent and has brought this suit to eject the Defendant without giving him the option to take a fresh lease at any rent at all. Under these circumstances, we think, the decision of the lower Appellate Court is perfectly right and the Plaintiff is not in any way entitled to eject the Defendant.

We, therefore, dismiss the appeal with costs.

ABDUL KARIM PATWARI *v.* ABDUL RAHAMAN.

sequently of opinion that although the incidents of the tenancy of the Defendants are regulated by the provisions of the Bengal Tenancy Act, under the terms of the contract between the parties, the Plaintiff is not entitled to a decree for ejectment.

The result is that the decree made by the Subordinate Judge is affirmed but not on the ground stated by him and the appeal is dismissed with costs.

Appeal dismissed.

CIVIL APPELLATE JURISDICTION.

APPEALS FROM ORDERS
NOS. 606 AND 647 OF 1911.

COXE, J.
IMAM, J.
1912,
Heard,
4, March.
Judgment,
11, March.

BAIJ NATH GOENKA, Defendant, Appellant,
v.
PUDMANUND SINGH, Judgment-debtor, Respondent.

Res judicata—*Execution proceeding—Attachment of allowance—Erroneous decision on a point of law, if can have the force of* res judicata—*Cause of action—Civil Procedure Code (Act V of 1908), secs. 11 and 100.*

Where a decision lays down what the law is and is found to be erroneous it cannot have the force of* res judicata *in a subsequent proceeding for a different relief.

AGHORE NATH MUKERJEE *v.* KAMINI DEBI (2), PURNA CHANDRA *v.* RASIK CHANDRA (3) *folllowed.*

***But if it is a decision that is contrary to law when that expression is used in the wide sense attributed to it for example in sec. 100 of the Civil Procedure Code, it may or may not have the force of a* res judicata.**

A decision cannot alter the law of the land.

RAI CHURN GHOSH *v.* KUMUD MOHON DUTT (4) and BISHNU PRIYA *v.* BHABA SUNDARI (5) *referred to.*

This was an appeal preferred on the 12th of November 1911 against an order of Babu K. M. Sikdar, Subordinate Judge of Bhagalpur and Monghyr, dated the 14th of September 1911.

The facts of the case will appear from the judgment.

Dr. Rash Behari Ghose and *Babu Kshetra Mohun Sen* for the Appellant.

Mr. B. Chuckerbutty, *Babus Ram Chandra Mitter*, *Bepin Behary Ghosh* and *D. N. Bagchi* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The Appellant in this case in a former execution proceeding attached an allowance payable to the Respondent. The attachment was contested but it was decided against the Respondent and the decision was not appealed against. It is clear that what was sought to be attached in that case was not any particular instalments but the whole allowance as it fell due. Subsequently it has been held in a case between the Respondent and another creditor, to which the Appellant was not a party, that this allowance could not be attached in this general way, and that instalments could not be attached before they respectively fell due. The Appellant again took out execution and the Respondent again pleaded that this attachment could not be made. This plea was accepted by the Subordinate Judge and the decree-holder accordingly appeals.

(2) 11 C. L. J. 461 (1909).
(3) 13 C. L. J. 119 (1910).
(4) 1 C. W. N. 687 (1897).
(5) I. L. R. 28 Cal. 318 (1901).

BAIJ NATH GOENKA *v.* PUDMANUND SINGH.

The only point that really arises in the appeal is whether the liability of the allowance to attachment is or is not a *res judicata* between the parties The former proceeding was an execution in the same suit and was not a former suit so that sec. 11 of the Code has no application and the matter must be decided on the principles laid down in *Ram Kirpal* v. *Rup Kuari* (1). The question however whether an erroneous decision of law can have the force of a *res judicata* must necessarily be decided on the same principles, whether it arises under sec. 11 of the Code or in successive execution proceedings. There is considerable divergence of judicial opinion on the point and we have been referred to numerous cases, of which all the most important are cited in *Aghore Nath Mukerjee* v. *Kamini Debi* (2). The learned Judges there held that an erroneous decision on a point of pure law cannot have the force of a *res judicata* in a subsequent case in which the cause of action is not the same. This decision was followed in *Purna Chandra* v. *Rasik Chandra* (3). It appears to us that so long as the former decision merely lays down what the law is it cannot have the force of *res judicata* in a subsequent proceeding to recover a different relief. But if it is a decision that is contrary to law, when that expression is used in the wide sense attributed to it for example in sec. 100 of the Civil Procedure Code, it may or may not have the force of a *res judicata*. For instance, in the case of *Ram Kirpal* v. *Rup Kuari* (1) cited above, the two proceedings did not relate to the same mesne profits and in the first the proper construction of the decree of which execution was sought was decided. This would be a question of law under sec. 100 of the Civil Procedure Code, but the decision did not profess to lay down what the law on the subject was. But when a decision does lay down what the law is and is found to be erroneous, it cannot, in our opinion, have the force of *res judicata* in a subsequent proceeding for a different relief. A decision cannot alter the law of the land. [*Rai Chun Ghosh* v. *Kumud Mohun Dutt* (4) and *Bishnu Priya* v. *Bhaba Sundari* (5)].

We think, therefore, that although it was decided between the parties in a previous execution proceeding that the allowance could be attached, the Subordinate Judge has no more power now, than he really had then, to attach the allowance before it was due; and that the former decision cannot alter the law in this respect or give the Subordinate Judge a jurisdiction that he would not otherwise possess.

It has been argued that the judgment-debtor is precluded from attacking the attachment, because in the former proceeding he accepted benefits under it. But we think that there is nothing in this contention. The decree-holders sought to attach the whole allowance, but the executing Court, moved apparently by compassion, permitted the attachment of three quarters only and kept the rest for the judgment-debtor to enjoy. The judgment-debtor may have received this indulgence, which in the view taken by the executing Court, was quite unjustifiable; but it certainly cannot preclude him from contesting the whole attachment.

The appeal is accordingly dismissed with costs, two gold mohurs.

(1) I. L. R. 6 All. 169 (1883).
(2) 11 C. L. J. 461 (1909).
(3) 12 C. L. J. 119 (1910).
(4) 1 C. W. N. 687 (1897).
(5) I. L. R. 28 Cal. 318 (1901).

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Appeal No. 606.

This appeal is analogous to appeal No. 647 and will also be dismissed with costs, two gold mohurs.

H. C. S. *Appeals dismissed.*

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 579 OF 1911.

HARINGTON, J.
BRETT, J.
1911,
Heard,
21, November.
Judgment,
22, November.

RATE JHA, Appellant, *v.* THE KING-EMPEROR.

Indian Penal Code (Act XLV of 1860), sec. 471—Using a forged document, whether handing a document to a muktear who then makes it over to a witness and asks him whether it is genuine—Criminal Procedure Code (Act V of 1898), sec. 195—Sanction granted to the agent of a landlord whose seal was counterfeited, whether valid—Sanction by successor of trying Magistrate if valid—Sentence, mitigating circumstances.

The Appellant in the course of the hearing of a criminal case against him had made over a receipt for rent to his muktear who then handed it to a witness asking him whether it was a receipt for rent granted by the landlord in favour of the Appellant. On the witness saying it was not genuine, the trying Magistrate initialled it and kept it on the record as one of the documents produced on behalf of the defence :

Held—***That the Appellant was guilty under sec. 471, I. P. C., as in the circumstances of the case what he did constituted user within the meaning of that section.***

AMBIKA PROSAD *v.* EMPEROR (1) *distin-*

The sanction for the prosecution of the Appellant granted to the agent of the landlord whose seal was counterfeited on the forged receipt was a valid sanction according to law, and the fact that this sanction was granted by the successor in office of the Magistrate who had tried the criminal case against the Appellant, did not invalidate it.

The fact that the primary object of the Appellant in using the forged receipt was to get out of the difficulty in which he was put by the criminal case and that he did not support the document by production of perjured evidence, may be taken into account in mitigation of punishment.

This was an appeal preferred on the 7th of July 1911 against an order of Mr. W. H. Vincent, Sessions Judge of Mozufferpur, dated the 10th of May 1910, convicting the Appellant under sec. 471, I. P. C., and sentencing him to rigorous imprisonment for five years.

The facts material to the report will appear from the judgment.

Babu Gour Chandra Pal for *Babu Ambika Charan Das* for the Appellant.

Mr. Sultan Ahmed (*Deputy Legal Remembrancer*) for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The Appellant in this case was convicted of an offence under sec. 471 of the Indian Penal Code and sentenced to five years' rigorous imprisonment. The document on which the charge of using a a forged document was founded was a receipt for rent and the occasion on which the Appellant used it was at a trial in which he was one of the Defendants on a charge of rioting. The land in respect of which the riot took place was a piece of land of which he wished to take possession and, in the course of the hearing of the criminal case against him, the

(1) I. L. R. 35 Cal. 820 (1908).

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receipt for rent in question was produced by him and handed to his muktear who then handed it to a witness who was asked whether it was a receipt for rent granted by the landlord in favour of the present Appellant who was then one of the prisoners at the trial. The witness said it was not genuine; but notwithstanding that, the document was initialled by the Magistrate who was trying the case and was filed as one of the documents produced on behalf of the Defendant. On these facts, the Appellant was convicted, as has been stated, under sec. 471 of the Indian Penal Code.

The learned Vakil who appeared on behalf of the Appellant in this Court took four points on behalf of his client: *first*, that the trial was bad because the sanction on which it was held was invalid; *secondly*, that there was nothing to show that the receipt was a forgery; *thirdly*, that the receipt was not used within the meaning of the Code; and, *lastly*, that the sentence was too severe.

With regard to the first point, the sanction was granted to the agent of the landlord whose seal was alleged to have been counterfeited on the rent receipt. The learned Vakil argued that the sanction ought to have been granted to a person who was one of the parties to the case in which the receipt was produced, namely, the rioting case. That contention finds no support from any of the provisions of the Code of Criminal Procedure and we do not agree with it. It appears to us that the landlord whose seal had been counterfeited was perfectly entitled to authorise his agent to obtain sanction to prosecute, and to prosecute in respect of the wrong which was done to him in counterfeiting his seal.

Then, it is said that the sanction was invalid on another ground because it was not granted by Mr. Davidson who heard the rioting case but by his successor. But it has been decided by the Courts that a sanction is valid if granted by the successor in office of the Judge or Magistrate before whom the offence was committed. The first point taken, therefore, fails.

The second point taken is that there is nothing to show that the receipt was forged. The evidence as to that is that of the zemindar himself who comes into the box and pledges his oath that the seal which appears on the rent receipt is not the seal used in his office. A specimen of his own seal has been produced and a comparison shows that the seal on the rent receipt produced by the Appellant, though it resembles that used by the landlord differs from it in some small but material points. Further the landlord says that the genuine receipts granted in his zemindari were on printed forms and this one was a receipt on plain paper. It is argued by the learned Vakil that there was another seal which was in use before 1905 and that that seal was affixed on the rent receipt in question by a deceased Karpardaz of the landlord for the purpose of cheating the Appellant. Not only is there no evidence that any such seal ever existed but it is in evidence that there was no seal at all in the zemindari at that time because the landlord deposes that there was no seal before 1905 when the present seal was procured and, further, the contention of the learned Vakil is open to this observation that, if any other seal was ever used previous to 1905, it was quite easy for the Appellant who was before 1905 a tenant of the land to produce receipts bearing the seal which he alleged was in existence then. But no

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NOTES.

WE UNDERSTAND THAT OUR OBSERVATIONS WITH regard to the Inns of Court rule that enables Vakils to be called to the Bar in 14 months' time have been misunderstood. This rule is unfair to the Vakils of standing as also to barristers. We do not object to Vakils of standing and assured position being admitted as advocates. If they are, they should be by virtue of their forensic talents. It is not fair to them that a junior member of the profession should be entitled to the privilege by simply passing some examinations in a year's time. In this respect Barristers who have qualified themselves for the privilege by a prolonged stay in England and considerable expenditure have also a grievance. The rule in question is also very invidious as it places ordinary B. L's. and M. A's. who may go to England for qualifying themselves for the Bar on a different footing. Further when Vakils of standing in Bombay have to go out of practice for a year before they are enrolled as advocates, it is only reasonable that a junior Vakil after passing the Inns of Court examinations in England should serve out a period of probational training, as the members of the Indian Civil Service do. The object of the Bombay rule regarding enlistment of advocates from Vakils is that in changing from one branch of the profession to the other he must be out of touch with his clients for some time. When this rule is insisted on in the case of senior Vakils a larger period of training for junior Vakils would seem to be only reasonable.

WHATEVER MAY HAVE BEEN THE GENERAL educational qualifications of Indian barristers in the past, it cannot be gainsaid now that they have produced men of such towering personality, ability and independence as are seldom to be met to-day. Be that as it may, it should be remembered that under the present regulations of the Inns of Court Indian barristers would ordinarily have to be Indian graduates. Under the proposed rules of the High Court whe her they be B. A.'s, M. A.'s, B. L.'s, or even Judge's Court pleaders, they would all have to be educated in England for three years besides studying in a barrister's Chambers in England for another year to qualify themselves for the Bar. But a B. L. student who may nominally be articled to a Vakil of the High Court for two years may be enrolled as a Vakil of the High Court even in the course of the first year after passing his B. L. examination. It seems to us to be highly invidious and unfair that he should, by virtue of a colourable compliance of serving out a period of articled clerkship, be exempted from the stringent and onerous rules and regulations that would apply to all other Indian graduates and under-graduates. We also believe that it would not be to the advantage of junior Vakils to proceed to England simply for passing some examinations and returning to India within the shortest time possible.

IT WOULD BE TO THE DISTINCT ADVANTAGE OF all Indian students, Vakils or otherwise, to attend one or other of the English Universities either before or after they have qualified themselves for the Bar. During the vacations they would find it both pleasurable and educative to study the people and the great institutions of the West. As for knowing the people one can never know them unless one has lived with the better class of people. We would therefore venture to suggest that if every Indian youth be required to produce some certificates, before enrolment as a member of Bar here, that he has either resided for a period at some University or in the family of a gentleman belonging to any of the learned professions or men of general culture, it would serve a far more wholesome purpose than requiring him to study in a barrister's Chambers which he can avoid doing

by arrangement. We would go so far as to maintain that even those who may join the Universities should be required to produce some certificates that they have lived for some period in the families of some men of education and culture in vacations during their residence in England. Living in London lodging-houses is far from educative to our young men. One sees little of English life unless one has lived in English families.

THE GOVERNMENT OF INDIA HAS ISSUED PRESS communique with reference to the vetoing of the Orissa Tenancy Bill in reply to some statements which were made about the matter at a meeting of the Bengal Chamber of Commerce. The action of the Viceroy was due, says the communique, "to obvious political and administrative considerations." It then proceeds to state the circumstances under which the Bill was vetoed as follows :—

The Bill was passed by the Bengal Legislative Council at 1 P.M. on the 27th March, and was brought on the same day for his Excellency's assent immediately before his departure from Calcutta. In view of the contentious nature of the Orissa Tenancy Bill, of the opposition raised to it in Council by the representatives of Bihar and Orissa and in view of the fact that in four days' time the Province of Orissa would be separated from Bengal and would become incorporated in a Province that is shortly to have a Legislative Council of its own capable of dealing with its own provincial legislation in accordance with requirements, the Viceroy in consultation with his constitutional advisers decided to withhold his assent to the Bill and to leave to the newly formed Government of Bihar and Orissa the task of passing such legislation as might be necessary to meet the local needs. The decision of the Viceroy was at once communicated verbally to the Lieutenant-Governor of Bengal with the reasons on which it was based. The action of the Viceroy in this matter is not without precedent.

OBVIOUSLY THE VICEROY REFUSED TO BE HURRIED into giving assent to an important and contentious measure passed in the greatest possible haste by an expiring Council. As we observed before, a Viceroy with a proper appreciation of his responsibility in such matters could not, in the circumstances, have done otherwise. And we are now assured that in this matter the Viceroy did not act without consulting his constitutional advisers.

TWO CRITICISMS WHICH ARE MORE INGENIOUS THAN plausible have been offered on this communique. The first is that the Bill as a whole was not a contentious measure but that the entire opposition was directed against a particular chapter and that a very important chapter of the Bill. We do not pretend to understand the drift of this criticism. A Bill is a contentious measure no matter whether criticism is directed against the whole of the Bill or only against a part. If it is suggested that as there was opposition, which was undeniably well-founded, to a portion of the Bill, the Viceroy should not have vetoed the Bill, the argument is obviously unsound. If cannot on the other hand be suggested that the Viceroy could have assented to the Bill with the exception of the portion opposed, for there is no constitutional power for adopting such a course. The only alternative to assent was to send back the Bill with the Viceroy's suggestions. But in that case the Bill would have to be passed again with amendments by the Bengal Council. With four days of life before it, the Bengal Council could not possibly have done the work and the Bill would have to go as it must now go to the Behar Council.

THE OTHER CRITICISM IS DIRECTED TO THE verbal communication of the vetoing to the Lieutenant-Governor. Sec. 40 of the Indian Councils Act (24 and 25 Vict. c. 67) requires that when the Governor-General withholds his assent from a Bill passed by a Provincial Council "he shall signify in writing his reason for so withholding his assent." It is therefore said that the action of the Viceroy was illegal. Now there was certainly an irregularity in this act, and perhaps the communication of the Viceroy's veto being not in compliance with sec. 40 was a nullity. As the Viceroy was leaving on that very day it was probably not possible to communicate the reasons for withholding the assent in the regular official way on that day. That being so, in the eye of law the Bill still remains awaiting the Governor-General's assent.

IN THE MEANTIME THE GOVERNMENT WHICH PASSED the Bill has ceased to exist and there is no authority which can publish the Bill and otherwise make it law ; so that, so far as law and constitution are concerned, the Bill dies without any act of the Viceroy at all. The law does not fix any time limit to the Viceroy's signification of his decision and so far as the effect goes there is no difference in this case between a regular veto under sec. 40 of the Councils Act and a mere delay in taking steps on the Bill. If the Viceroy intended his verbal communication to operate as a veto he was evidently wrong. But whatever he may have thought, the Bill expired not by his withholding of assent but by mere efflux of time. And the mention of a verbal communication in the communique makes no difference to the legal aspect of the matter and for all that we know, the Viceroy may have meant that communication as a mere matter of courtesy while he let the Bill die a natural death by merely staying his hand.

WE PUBLISH IN ANOTHER COLUMN THE FULL TEXT of the Government of India Bill now before the Parliament. It will be observed that the preamble of the Bill specifically mentions the several acts of the Governor-General in constituting the Provinces of Bengal and Behar and Assam and tacitly gives Parliamentary recognition to these acts thus removing doubts as to the regularity or legality of the proclamations. The first section gives the Governor and Governor in Council of Bengal the same powers as the Governors and Councils of the other Presidencies subject to certain provisos of which the most important is the power of the Governor-General to reserve any powers that he exercised till now over Bengal. The second section gives an Executive Council to Behar and Orissa. The third section empowers the Governor-General by proclamation to create Legislative Councils for Chief Commissionerships, evidently contemplating Assam and possibly the Central Provinces. It is clear that the effect of these sections would be to enable the Government of India to right any wrongs that might be done to any Province as a result of these changes. It would be unfair to deprive Behar of the advantages of an Executive Council or Assam of the benefits of a Legislative Council, which they have had under the old regime. These provisions would enable the Government to remove all complaints on these matters.

SUB SEC. (2) OF THE FOURTH SECTION MAINtains the power of the Governor-General to make redistribution of territories between different Provinces and declares that this power extends to territories under Lieutenant-Governors as well as to territories under Chief-Commissioners. We have pointed out before that the existence of these powers of the Governor-General in Council under the existing Statutes is more than doubtful, but this section is meant to be a Parliamentary declaration of the fact that such power has always existed. This seems to have the effect of establishing the validity of all the acts of the Governor-General in partitioning and re-partitioning Bengal. So far as this is concerned we are glad that the constitution of the Provinces has thus been placed on stable and indubitable foundations. But for reasons stated before, we do not appreciate the vesting of such large powers in the Governor-General.

SOME TIME AGO WE DREW ATTENTION TO THE evils of cotton figure gambling in Calcutta. In response to the public feeling on the matter the Calcutta Police raided some of these gambling dens, arresting several persons who were prosecuted. The trial of one of these cases in the Police Court has now been concluded and Mr. Keays, the Second Presidency Magistrate, in a careful and elaborate judgment has discussed the legal aspect of the question and held that these houses came within the mischief of sec. 44 of the Calcutta Police Act as public gaming houses. The High Court has issued a rule in the matter and as the judgment of Mr. Keays is now pending consideration we shall not for the present comment on the legal aspects of the case or on the points raised by the Magistrate's judgment. We are glad, however, to note that the Government has been moved to take vigorous steps for the suppression of the evil and we hope that whatever view the High Court may take of the law on the subject, the Government will take adequate steps to eradicate the evil from the city.

THE GOVERNMENT OF INDIA BILL.

Whereas His Majesty has been pleased to appoint a Governor of the Presidency of Fort William in Bengal as delimited by a proclamation made by the Governor-General in Council and dated the twenty-second day of March, nineteen hundred and twelve:

And whereas the Governor-General in Council by two further proclamations of the same date has constituted a new Province under a Lieutenant-Governor, styled the Province of Behar and Orissa, and has taken the Province of Assam under the immediate authority and management of the Governor-General in Council:

And whereas it is expedient to declare what powers are exercisable by the Governor and Governor in Council of the Presidency of Fort William in Bengal and to make other provisions with respect to the administrative changes effected as aforesaid:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:—

Powers of Governor of Fort William in Bengal.

1. (1) It is hereby declared that the Governor and Governor in Council of the Presidency of Fort William in Bengal shall, within that Presidency as so delimited as aforesaid, have all the rights, duties, functions, and immunities which the Governors and Governors in Council of the Presidencies of Fort St. George and Bombay respectively possess, and all enactments relating to the Governors of those Presidencies and the Councils (whether for executive or legislative proposes) thereof and the members of those Councils shall apply accordingly to the Governor of the Presidency of Fort William in Bengal, and his Council and the members of that Council,

Provided that—

(a) if the Governor-General in Council reserves to himself any powers now exercisable by him in relation to the Presidency of Fort William in Bengal, those powers shall continue to be exercisable by the Governor-General in Council in the like manner and to the like extent as heretofore; and

(b) it shall not be obligatory to nominate the Advocate-General of the Presidency of Fort William in Bengal or any officer acting in that capacity to be a member of the Legislative Council of the Governor of that Presidency.

(2) The power of the Governor-General in Council under sec. 1 of the Indian Presidency Towns Act, 1815, to extend the limits of the town of Calcutta shall be transferred to the Governor in Council of the Presidency of Fort William in Bengal.

Provisions as to the Province of Bihar.

2. The Provisions of sub-sec. (1) of section 3 of the Indian Councils Act, 1909 (which relate to the constitution of provincial executive councils), shall apply to the province of Bihar and Orissa in like manner as they applied to the province of the Bengal division of the Presidency of Fort William.

Creation of Legislative Councils of Chief-Commissioners.

3. It shall be lawful for the Governor-General in Council by proclamation to extend, subject to such modifications and adaptations as he may consider necessary, the provisions of the Indian Councils Act, 1861 to 1909, touching the making of laws and regulations for the peace and good government of provinces under Lieutenant-Governors (including the provisions as to the constitution of Legislative Councils for such provinces and the business to be transacted therein) to any territories for the time being under a Chief-Commissioner, and where such provisions have been applied to any such territories the proviso to sec. 3 of the Government of India Act, 1854 (which relates to the alteration of laws and regulations in such territories) shall not apply to those territories.

Amendment and Repeal of Acts and Saving.

4.—(1) The enactments mentioned in Part I of the Schedule to this Act shall have effect subject to the amendments therein specified, and sec. 57 of the East India Act, 1793, and sec. 71 of the Government of India Act, 1833 (which relate to the filling up of vacancies in the Indian Civil Service), and the other enactments mentioned in Part II of the Schedule are hereby repealed.

(2) Nothing in this Act nor in the said recited declaration or proclamation shall affect the power of the Governor-General in Council of making new distributions and arrangements of territories into and among the various presidencies and Lieutenant-Governorships, and it is hereby declared that the said power extends to territories under the immediate authority and management of the Governor-General in Council as well as to territories subject to the several presidencies and Lieutenant-Governorships

Short Title and Commencement

5. This Act may be cited as the Government of India Act, 1912, and shall come into operation on such day as the Governor-General in Council, with the approval of the Secretary of State in Council, may appoint.

SCHEDULE.

PART I.

Amendments.

In sec. 50 of the Indian Councils Act, 1861 (24 and 25 Vict. c. 67), after the words "then and in every such case," there shall be inserted the words "the Governor of the Presidency of Fort William in Bengal"

In the First Schedule to the Indian Councils Act, 1909 (9 Edw 7, c. 4), there shall be inserted—

"Legislative Council of the Governor of Fort William in Bengal 50

"Legislative Council of the Lieutenant-Governor of Bihar and Orissa ... ... 50"

PART II.

Repeals.

Secs. 53 and 57 of the East India Company Act, 1793 (33 Geo. 3, c. 52).

In sec. 62 of the Government of India Act, 1833 (3 and 4 Will. 4, c. 35 the words "and Governor of the Presidency of Fort William in Bengal" and sec. 71 of the same Act.

In sec. 50 of the Indian Councils Act, 1861 (24 and 25 Vict. c. 67) the words "and Governor of the Presidency of Fort William in Bengal."

In the first Schedule to the Indian Councils Act, 1909 (9 Edw. 7, c. 4), the following words:—

"Legislative Council of the Governor General of the Bengal Division of the Presidency of Fort William 50

"Legislative Council of the Lieutenant-Governor of the Province of Eastern Bengal and Assam ... ... 50"

Correspondence.

VAKIL'S PRIVILEGES AT THE INNS OF COURT.

[TO THE EDITOR OF THE "CALCUTTA WEEKLY NOTES."]

SIR,—Some of your editorial paragraphs in the last number of the *Calcutta Weekly Notes* concerning the proposed alteration of the Rules for enrolment of advocates have come as a painful surprise to Vakils. These latter had hitherto believed that as the editor of a Law Journal of standing like the *Calcutta Weekly Notes* you would take up an impartial stand-point and hold no brief for any particular branch of the legal profession. Any such idea will have, however, to be abandoned if the sentiments contained in those paragraphs represent anything more than a passing phase—a momentary aberration, caused by passion.

For one thing, the draft rules which have furnished you with the text for delivering your attack on the professional honour of Vakils do not, directly or indirectly, raise the Vakil-Barrister question. But the attack having been made, no Vakil will care to parry or avoid it on the mere plea of irrelevancy.

The two grounds which you urge against the Inns of Court regulations (not the draft rules of the Calcutta High Court) relating to Vakils (and they have been in existence for years) are, *first*, that a residence in the United Kingdom for at least three years is absolutely necessary to enable the student to "grasp the unwritten code of honour and self respect that prevails amongst the profession and the cultured people" there. What this unwritten code which appears to be the exclusive property of professional and cultured men in England may be, a mere Vakil like myself has no means of knowing. But if the chief value, as you say, of education of our youths in England is that it "serves to widen their views, discard the narrow interests associated with caste, creed and social life in India, develop healthy and noble ideals of humanity and that it enables them to assimilate and appreciate the modern outlook of life and of the world," then it would seem that the extended stay of four years required by the draft rules should be warmly welcomed by barristers upon whom a three years' stay has already conferred these inestimable benefits. But it surely does not augur well for the future of a community which, in your view, is so devoid of innate

sense of honour and self-respect that its youths must travel thousands of miles away to pick up from foreigners their unwritten Code of honour and self-respect. The worst critics of Indian life and Indian morals have not said of educated Indians what you, under stress of controversy, have unwittingly laid at their door. The argument has only to be exhibited in its true perspective to make its utter futility self-evident.

You say next that a three years' stay in England is specially necessary in the case of Vakils in order to wean them from their previous association with clients, witnesses, muktears and law agents. You apparently forget that the Inns of Court regulations do not insist upon *practice* as a Vakil as a condition precedent to their being permitted to avail themselves of the facilities provided, nor do Vakils as a rule go to England to qualify for the Bar after some years' practice. Most of them get enrolled as Vakils and start for England almost immediately, and if the draft rules framed by the High Court should pass, the number of Vakils who would adopt this course would increase rather than diminish, for it is only through the opening left by the Inns of Court regulations that the disturbed balance between Indians and non-Indians, about which you justly entertain apprehensions, will be corrected. But even assuming that the Vakils in future will not go to England to qualify for the Bar before being inextricably committed to the conditions of practice prevailing on the Appellate Side of the High Court, what are the actualities of these conditions which excite your horror? No body of legal practitioners in the world have less to do with witnesses than Vakils practising on the Appellate Side, and Vakils are seldom called upon to exercise their wit and ingenuity in that fruitful field of practice, called "Advice on Evidence." As to association with Muktears you might well have left these men alone, seeing that they enjoy a certain legal status conferred on them by Statute and by the Rules of the High Court, and if the association of any body of legal practitioners with Muktears were at all demoralising both the Legislature and the High Court would have long ago seen to the abolition of this branch of the profession. As to association with clients and law agents, association with the one or the other of them may conceivably be wrong, but association with both cannot be wrong at the same time. From what we can gather from legislative enactments and High Court Rules the trend of opinion at the present day is in favour of encouraging direct contact between advocates and clients. The unwritten practice of the Bar to the contrary is a survival, not wholly conducive to the best interests of the clients. Again, law agents (or ammuktears) must exist and be tolerated if female litigants and zemindars and others who cannot or do not care to look after their own law suits are not to be prohibited from resorting to the law Courts.

So far as regards the conditions of practice of Vakils. But what are the conditions of practice of Barristers with which they are sought to be contrasted? You have not taken the trouble to draw a picture of the actual conditions of practice of Barristers which are patent to every one familiar with the High Court corridors and the attorneys' offices. But for me to draw such a picture here in a spirit of mere retaliation would not be consistent with *savoir vivre* and I refrain from it. Suffice it to say that the immaculate creature sitting like the Grand Lama of Thibet away from the vulgar gaze behind a serried rank of solicitors with briefs does not exist, nor would he be of any use if he existed.

But after all, no amount of special pleading, however plausible, by a Barrister on behalf of Barristers or by a Vakil on behalf of Vakils will be of any avail before the bar of public opinion which goes by the test of merit. The very success of Vakils at the Bar Examinations in England by a strange freak of logic suggests to you an argument against taking that success as a test of fitness. Does it not rather go to show that by reason of their previous training and culture and also the maturity of their intellect they are better able to resist the temptations of London streets and are better fitted to utilize the opportunities of moral and intellectual improvement which their one-and-a-half year's stay in England affords them? But if the result of the examination is no sure test, surely, the rapid and remarkable success which they have, almost without exception, attained in the practice of their profession, is. The verdict of the public on the merits of the Vakil-Barristers is unmistakable.

You cannot be unaware, though you may have momentarily forgotten it, that Vakils are not the casual and fortuitous products of University examinations. They have their honourable traditions, not brought out it is true in sealed packets like the Sybilline books from accross the seas, but not less jealously guarded on that account. Has not the Vakil bar produced leaders and Judges whose record would bear comparison with the highest and noblest in the profession in any part of the world? I must therefore entirely repudiate your suggestion that a three years' study (*neither more nor less*) in England is indispensable to make a legal practitioner what he ought to be and that without it he cannot hope to attain to the highest level of professional competence and honour. I do not, for one moment, deny that a sojourn in England extending over years would be to the benefit of any Indian however qualified he may otherwise be, and any rules or regulations which would tend to discourage Indian youths from

visiting the centres of European culture should be scrutinised with jealous care. In so far also as the proposed rules have a tendency to introduce invidious distinctions between Indians and non-Indians, your criticism of the rules will secure public support—and this even though your picture of Indian parents sending out their youths to England in order to save them from the grinding oppressions of the Indian Universities and of these youths, in turn, repaying their parents' solicitude by devoting themselves wholly and solely to imbibing all that is noble and beautiful in English life and English institutions, is a trifle overdrawn.

I cannot conclude this letter without expressing my surprise at the fact that whilst you have exhausted your logic and rhetoric in attacking the regulations of the Inns of Court concerning Vakils you have left untouched the very much more lenient provisions relating to Solicitors who, if of five years' standing *in their profession*, are admitted to the final Bar examination without having to attend a single term. If your views are sound, then the Benchers would appear to be singularly indifferent to your requirement of a change in the conditions of practice and environments as being absolutely essential for the proper growth and nurture of that very delicate and elusive ideal of professional honour which is supposed to govern a Barrister's dealings in later life.

I have &c, &c.,
ROMESH CHANDRA SEN,
Vakil.

Vakils' Library,
10th May 1912.

Reviews.

MEMORIES OF SIR TIRAVARUR MUTTUSAMY AIYAR. *By M. P. Duraiswami Aiyar. Tanjore. Price Rs. 2.*

Sir T. Muttuswami Aiyar was a great judge, a great man and an example to mankind of how poverty and adversity offers no effective bar to the true genius rising to deserved eminence. His life and memories are therefore well worth recording, for they are bound to be a source of inspiration to all. In so far as the work before us is a record of the life and doings of the great man from the pen of one who had singular opportunities of knowing them we should like to welcome this volume. But the record is as badly made as it could well have been and the philosophy and moral lectures of the author such as they are, which are freely interspersed in the work, make it quite impossible reading. A plain and unvarnished narrative of events would have been immeasurably better. In his preface the author says "though this memoir is wanting in scholarly merit, oratorical brilliance, grammatical excellence and even typographical accuracy, I may at least claim for it an abundant sincerity of thought and honesty of purpose, the most essential feature of any biography." Putting aside the author's view of the "essential feature" of a biography this is not all mere modesty. The English of the work might form a companion to that of another well-known biography of a High Court Judge—of Calcutta. The author includes in this work not only extracts from valedictory references to his hero by prominent men but also solicited testimonials to him from men whom the author considered well worthy of pronouncing on his merits. We should think that Muttusami Aiyer's fame could well afford to stand without the props furnished by most of these appreciations.

Sir Philip Hutchins has furnished an introduction which is short and sweet though not lacking in irrelevancy for all that. The only readable thing about the work is Mr. Eardley Norton's appreciation, though his attempts at humour are at times very tiring.

THE INDIAN LIMITATION ACT. Being Act IX of 1908, with full notes and complete index. *By Sarat Chandra Ghosh, B. L., Vakil, High Court, Calcutta. Calcutta: Printed and published by R. Chatterjee, University Prig. & Pubg. Co., Ld., 1, Gangadhur Babu Lane. 1912. Rs. 5/8.*

This is a handy annotated edition of the Limitation Act which will be much appreciated by the profession. It covers about 750 pages and, so far as the case-law is concerned, seems to be exhaustive, cases decided when the book was going through the press being collected in the "Addenda." The Statement of Objects and Reasons and the Select Committee's Report on the Bill which subsequently became Act IX of 1908, Tables of Cases and a Subject-index, all go to make the book as complete a book of ready reference as the practitioner may desire. The mechanical execution of the book also deserves commendation, the printing and get-up being quite satisfactory. The subject-headings and the references in the notes are for convenience distinguished by thicker types.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION.—Ex parte *Tupper.* Before JUSTICES PHILLIMORE, HAMILTON AND LUSH. 8th March 1912.

Repetition of alleged libel after service of writ—Circumstances justifying it—Right of public criticism and interferance with fair trial.

Mr. Tupper who is one of the leaders of the Labour movement took out a writ for libel against the *Daily Express*. Before the writ was actually served the newspaper published another article in

which Mr. Tupper's character and antecedents were adversely commented upon. Even after the service of the writ the newspaper persisted in publishing damaging statements against him. He thereupon obtained the present rule *nisi* against the Editor of the newspaper to show cause why a writ of attachment should not issue against him. The Defendants pleaded justification in the action for libel, and contended that they had a right to criticise the Plaintiff, even to repeat the alleged libel in the interests of free speech and the public. The Court discharged the rule. In the course of his judgment Mr. Justice Phillimore said :—

To say that a newspaper was to be restrained from expressing its opinion on a man who bulked large in the public eye, from the issue of the writ to the trial of the action, the date of which must be to a considerable extent in the Plaintiff's hands, would be a very grave restriction on the freedom of the Press, likely in many cases to be fraught with danger. He put aside political cases such as the present one, and the terrible circumstances in which they now stood. But take the case of a vulgar cheat trying to get money by passing himself off as an old soldier or fraudulently collecting money on the pretence that i was for some missionary society. If some one once committed himself to the expression of an opinion as to this person it would only be necessary for him to issue a writ, and no one was to be allowed to say anything about him for fear it should prejudice the fair trial of the action. He did not believe that the law was responsible for any such absurd conclusion.

Of course, there were limits to the right of free speech, and no doubt articles or statements made near the time of the trial, especially on the eve of the trial or made at a place near in point of locality, were calculated to create an atmosphere unfavourable to one of the parties by deterring witnesses from coming forward and speaking their minds freely or by warping the minds of the jurymen, and these should be deemed an interference with the course of justice, and should be restrained by the wholesome exercise of the jurisdiction of the Court. But it was quite another thing to say that a man could procure himself protection for life from the exposure of his character by the issue of a writ. Mr. Inskip had rightly said that the Court must not assume that the account of the Plaintiff which the Respondent had sworn to was correct, nor did they do so. But, on the other hand, neither did they assume the contrary. But if by chance it was true that Mr. Tupper was only half what the Respondent said he was, then it was very much for the public benefit that his unmasking should not be delayed.

He did not go so far as to say that there were no cases in which the issue of damages must be considered an unimportant issue, and there might be cases where matters tending to prejudice the fair trial of that one issue only might be so serious as to warrant the application of this remedy.

Up to the time of the case of *Cronmire* v. *Daily Bourse*, 9 T. L. R. 101, there had been no precedent for an application in a libel action similar to the present one, and that was a very good reason for saying that libel actions were the last to which this remedy should be applied ; for the Plaintiff always had two other remedies. He could bring a further action for the second libel, and have the two cases tried together or at the same Assizes, or he could give in evidence the second libel in which the Defendant had indulged, in aggravation of damages. No doubt there had been other cases since the above case, but the facts were very different from those in the present one.

In adopting the language of the Judges in the cases of *Bonnard* v. *Perryman* (1891, 2 Ch. 282) and *Duncan* v. *Sparling* (10 T. L. R., p. 355) his Lordship asked, what did those decisions come to ? Where the Defendant swore he was going to justify the words of the alleged libel the Court would not grant a rule in a case of this kind unless it saw that the justification was an idle one and not genuine. Here the Defendants had averred that they were prepared to justify at the risk of the damages against them being thereby inflated, and that they were solvent and able to pay damages. Of course, that did not necessarily touch upon the question of the interference with a fair trial. The Court had to reconcile two things—namely, the right of free speech and the public advantage that a knave should be exposed, and the right of an individual suitor to have his case fairly tried. The only way in which the Court could save both was to re[illegible] an unlimited extension of either right. It became, then, a question of degree.

If the case were tried in Glamorgan it would come on in July : if in Middlesex not for a considerable time. They did not know what the Plaintiff was going to say about the libel, for the case was in its very earliest stages, and there seemed some substance in what had been said—namely, that the object of bringing it was to prevent any inquiry as to the Plaintiff's career. The Plaintiff, not unnaturally, had taken occasion to vindicate his character. If unjustly accused he had every right to defend himself by open speech ; but if he might do that, might not the Defendants do the opposite, and might not third parties do the opposite ? The effect of the doctrine propounded by Mr. Inskip would be to prevent all newspapers and all public men from saying what they honestly believed as to the Plaintiff's character.

Suppose the character in which he presented himself were false, was it not of vital importance that some one should say to the men whom he was leading that he was an impostor ? He quite

agreed that no atmosphere must be created near the time of the trial. Still the Plaintiff had one remedy in his own hands. While he was a public man he was the subject of public comment; he must retire into private life; as long as he remained what he was he could not complain of comment, which would be made at the risk of paying damages.

Messrs. F. E. Smith, K. C., McCardie and Field shewed cause.

Mr. Inskip in support of the Rule.

B. D. *Rule discharged.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and CHAPMAN, J. APPEAL FROM ORDER No. 384 OF 1910. BASANTA LAL, Decree-holder, Appellant *v.* SECRETARY OF STATE AND CHEDU SINGH, Surety, Respondent. 19th April 1912.

Civil Procedure Code, sec. 145—Forfeiture of surety bond.

The Appellants obtained a decree against one Gendu Sing and in execution of his decree got the judgment-debtor arrested and put in civil jail. The judgment-debtor applied for being declared an insolvent and was released from jail on the surety depositing Rs. 500 and executing a bond to produce the debtor when required. The application for insolvency was dismissed and the surety was called upon to produce the debtor but he reported that the debtor had absconded. Thereupon the decree-holder put in a petition in Court asking the money in deposit to be paid to him and the surety bond forfeited in his favour. The District Judge, however, held that as Chedu Sing stood surety for production of the debtor the money should be forfeited to Government and not to the creditor. Against this order the judgment-debtor appealed to this Court making the Secretary of State a Respondent to the same.

Held—The rights of the decree-holder were interfered with by taking the security and releasing the debtor and there is no power in the Civil Procedure Code by which the money could be forfeited to Government.

Babu Kshetra Mohun Sen for the Appellant.

Babu Ram Charan Mitra for the Secretary of State.

Babu Harihar Prosad Sinha for the Surety.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and N. R. CHATTERJEA, J. P. C. APPEAL No. 22 OF 1911. NAND KESSORE SING AND OTHERS, Defendants, 3rd Party, Appellant, Petitioners *v.* RAM GOLAM SAHOO, Plaintiff, Respondent, Opposite Party. 16th April 1912.

Review of order granting or refusing certificate under sec. 110, C. P. C.

The Plaintiff-Respondent brought the suit for recovery of Rs. 8,413 due on a mortgage bond executed by the Defendant 1st and 2nd party. The Appellants were made Defendant 3rd party, as they are the purchasers of equity of redemption in some of the mortgaged properties. The suit was dismissed by the first Court but on appeal the High Court decreed the suit, and passed the usual mortgage decree for Rs. 11,429 and odd. The Defendants 3rd parties applied for leave to His Majesty in Council but at the hearing of the application it was admitted by the Vakil for the Appellant that the value of the subject-matter in the Court of first instance was less than Rs. 10,000 and as the value of the mortgaged-properties was not proved to be over Rs. 10,000 the application for leave to appeal to His Majesty in Council was refused. Thereafter the Petitioners applied for review of the order refusing leave to appeal. A preliminary objection was taken that the order cannot be reviewed as the Judges in the Privy Council Department were sitting under the orders of the Privy Council rather than as Judges of the High Court, and reference was made by analogy to 25 W. R. 529, I. L. R. 7 Cal. 339 at p. 341, I. L. R. 17 Cal. 455.

Held—That applications for review of orders under sec. 110, C. P. C., can be entertained. I. L. R. 16 Cal. 292 notes. Sec. 314, Or. 47, C. P. C., referred to. The application for review was dismissed on the merits.

Mr. A. Caspersz and *Babu Upendra Nath Chatterjee* for the Petitioners.

Dr. Rash Behari Ghose and *Babu Kshetra Mohun Sen* for the Respondent.

A. T. M. *Application refused.*

RATE JHA v. THE KING-EMPEROR.

such receipt was produced and the evidence shows that no such seal ever existed. The Karpardaz who is alleged to have granted the receipt is dead and so could not be called to deny the aspersion made on his character.

The third contention is that the receipt was not used. What happened was that the receipt was produced by the muktear and handed to a witness and, though that witness did not prove it, it nevertheless went to the file after being initialled by the trying Magistrate. It appears to us that this constituted user. The learned Vakil cited the case of *Ambika Prosad* v. *Emperor* (1), as an authority for the proposition that the filing of a document is not a user within the meaning of the Act. But the case he cited, when the judgment comes to be looked at, does not support that proposition. That case was one in which the receipts which were alleged to be forged were entered into a list and it appears from the report that what was filed was this list of the documents which was filed with a statement made on behalf of a third party. The filing of a list of documents is not the same thing as the filing of the documents themselves. There was no filing of the forged document in that case which would bring the accused within the Act. In the present case the document was tendered to the witness and then it was initialled by the trying Magistrate and placed on the file by him after having been handed to the muktear by the Appellant himself for the purpose of being used in the case. In our view, that is a sufficient user and the conviction under sec. 471, I. P. C, is right and cannot be disturbed.

As to the fourth question, we think that the sentence may properly be reduced. The offence is no doubt a serious one because it is an offence which must have been committed after preparation and not an offence committed under pressure or sudden impulse. But, on the other hand, it is to be observed that the document was produced in the course of a criminal trial in which the Appellant was one of the Defendants and the primary intention which he had was to get out of the difficulty which he had got into in consequence of the riot, and, after all, the circumstance that the document was not supported by the production of perjured evidence of its genuineness may be taken into account in mitigation of punishment. On these grounds, we think the sentence may with propriety be reduced and we reduce it from five years' rigorous imprisonment to three years' rigorous imprisonment. Subject to this modification in the sentence, the appeal will be dismissed.

B. C. *Sentence reduced.*

(1) I. L. R. 35 Cal. 820 (1908).

[PRIVY COUNCIL.]

[APPEALS FROM THE CHIEF COURT OF PUNJAB.]

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.

1911,
Heard, 8 and 9, November.
1912,
Judgment, 30, January.

NAWAB IBRAHIM ALI KHAN,
Appellant,
v.
NAWAB MUHAMMAD AHSAN ULLAH KHAN and anr.,
Respondents,
and
NAWAB MUHAMMAD ASHAN ULLAH KHAN and anr.,
Appellants,
v.
NAWAB IBRAHIM ALI KHAN,
Respondent.

Kunjpura riasat, *succession to—Custom of pri-*

mogeniture if affected by withdrawal of quasi-*sovereign powers from the Chief—Status, change of, if effected.*

The chiefship of the Kunjpura riasat *was proved to have, ever since its establishment, descended in the male line to a single heir according to the rule of primogeniture. In 1849 Government withdrew the civil and criminal powers the Chiefs had hitherto exercised:*

Held—*That there being nothing to show that the Government in so doing intended to make any alteration in the status of the chief or to vary the rule which governed the succession to the estate, the custom of succession by primogeniture continued to govern not merely the properties which appertained to the* riasat *prior to 1849 but equally to land and properties acquired by the Chiefs since 1849.*

These were two appeals from a judgment and decree of the Chief Court of the Punjab, which in part reversed a decree of the District Judge of Karnal, in whose Court the Plaintiffs, Nawab Muhammad Ahsan Ullah Khan and Muhammad Yusaf Ali Khan, brought a suit against the Defendant, Nawab Ibrahim Ali Khan, for partition and possession of four-fifths of the moveable and immoveable property left by one Nawab Muhammad Ali Khan, *Jagirdar* of Kunjpura, and for rendition of accounts.

The District Judge dismissed the suit. The Chief Court, on appeal, reversed the decree of the District Judge and ordered that the claim of the Plaintiffs in respect of a portion of the property in dispute should be dismissed, and in respect of another portion thereof, should be decreed.

The question for determination in the present appeal was whether the succession to the property in suit was regulated by the rule or custom of primogeniture or by the Muhammadan Law. The following summary of the pleadings of the parties shows how that question arose in the present suit.

In their amended plaint, dated the 22nd May 1903, the Plaintiffs alleged as follows:—That Nawab Muhammad Ali Khan, who died on the 13th of January 1886, was their father, and also the father of the Defendant by another wife. The heirs of of the deceased Nawab were the Plaintiffs, two full brothers of theirs, and their step-brother, the Defendant. Each of these heirs succeeded to one-fifth of the property left by their father. On the death of the said two full brothers, their shares, according to law and custom, devolved upon the Plaintiffs alone, and they thus became owners of four shares and the Defendant of only one share. After the death of the Nawab the Court of Wards took possession of everything left by him. On the 22nd of July 1900, the Defendant attained his majority. He was then released from the control of the Court of Wards and took possession of all the property in suit. The Plaintiffs, by a written notice, dated the 17th April 1902, demanded their shares from the Defendant, but he refused to give them any property, stating that they had no right whatever. They therefore prayed for a decree awarding them four-fifths of all the property left by the Nawab.

On the 14th of August 1903, the Defendant filed a written statement in which he pleaded that the Plaintiffs were not entitled to the relief claimed in the plaint, because the family of the parties did not follow Muhammadan Law, but custom. The custom was that only the eldest son became proprietor of the property left by his father, and the other sons received a maintenance allowance. The rule of

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primogeniture applied to the Estate of Kunjpura, and it was not liable to partition. The Plaintiffs could not have a share of the property in dispute. They were only entitled to receive reasonable maintenance. If the Court found that any portion of the property in suit were partible, each of the Plaintiffs was not entitled to more than one-third thereof.

On the 26th of August 1903, the Plaintiffs put in a replication, in which they alleged that Kunjpura was not a State, nor had the eldest son any preferential right, nor was the property in dispute incapable of partition. On the contrary the succession to it was governed by Muhammadan Law, and it was liable to partition. According to that law the Plaintiffs were entitled to succeed to a four-fifth share of the property in dispute, not a two-third share as stated by the Defendant. Even if Kunjpura were presumed to be a State, a fact which was not admitted by the Plaintiffs, still the property in dispute could not be included in the State and was liable to partition.

On the 30th of November 1904, the Subordinate Judge delivered his judgment and decree, by which he ordered that the claim of the Plaintiffs should be dismissed. He found the second issue in favour of the Defendant and against the Plaintiffs, holding that no property of any kind had ever been partitioned in the family of the parties and that, therefore, with reference to the first issue, no property left by the father of the parties was liable to partition. On the third issue he held that the Plaintiffs had no right, according to the custom of the family, to get the said property partitioned. Having regard to his decisions on the first, second and third issues he considered that there was no need to discuss the fourth and fifth issues and, in the result, he ordered that the claim of the Plaintiffs should be dismissed, and that the parties should bear their own costs.

The Plaintiffs appealed from the decree of the District Judge to the Chief Court of the Punjab. The appeal was heard by Robertson and Lal Chand, JJ., who, on the 21st of December 1906, delivered their judgment. They observed that the question before them for decision was, "In the Kunjpura family does the rule of primogeniture prevail as a custom having the force of law in regard to all or any of the property claimed or is the Muhammadan Law the rule of succession?"

Having considered the evidence at length, they came to the conclusion that the custom set up by the Defendant was made out as regards all property which could be shown to have formed part of the State before 1849. In respect of such property they, in fact, concurred with the finding of the District Judge.

In regard to lands acquired after the year 1849, the learned Judges thought the case was different. In the course of their judgment they said :—

The case now before us, it is urged, is the first case which has occurred since the proclamation of 1849, in which a *Nawab* has died leaving more than one son, and, it is urged, the resumption of the "Sovereign rights" and the reduction of the *Nawab* to the position of a private gentleman, completely altered the whole aspect of the case, and destroyed the binding force of the custom, if it had ever existed.

There does not appear to us to be sufficient reason to hold that the family custom, which we hold to have been established before 1849, was abrogated by the proclamation so far as concerns the property which was then the property of the State. We know that this could not have been in accordance with the policy of the supreme Government, and we know that in 1849, when the *Nawab*, Ghulam Ali Khan, died, after the issue of the proclamation his son was allowed to succeed to th

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title of *Nawab* and was invested with a robe of State (letter 219, dated 4-2-1800, from the Punjab Board of Administration to Commissioner and Superintendent, Cis-Sutlej States).

The supreme Government undoubtedly took away certain powers and privileges; it had done something in this direction in 1837, on which occasion it took away the rights of the *Nawab* to levy dues, and it at once upon that occasion allotted compensation for the resumption, which is still paid We are not to assume any intention on the part of the paramount power to interfere further than was necessary for the carrying-out of this purpose, which was to provide for the good government of the State, and there is not only no indication that there was any interference with family custom, but every indication to the contrary We find in the case of *Muhammad Afzal Khan* v *Ghulam Kasim Khan* (1) that these principles received full assent of their Lordships of the Privy Council. In that case the vicissitudes undergone by the *Nawabs* of Tonk had been even greater than in the case of the Kunjpura family, and the land there in dispute had been actually for years out of the possession of the *Nawab's* family and had been re-granted by Government. The case for the existence of a precisely similar custom set up by the *Nawab* of Tonk was not nearly so strong as it is in regard to the Kunjpura family.

We think, therefore, that the custom set up by the Defendant *Nawab* is made out as regards all property which can be shown to have formed part of the State before 1849 But as regards lands subsequently acquired we think the case is different. The custom owed its rise and *raison d'etre* to the existence of the State and the exigencies of chiefship. A family custom, respected by the authorities and fully established as accompanying the chiefship, must be held to obtain as regards the estates of the chiefship as such. But when the chiefship ceased as an independent entity it was not only privileges but duties and liabilities also which were abrogated, and we do not think that lands and property acquired by the *Nawab* after 1849, with income, which he was admittedly competent to deal with as he pleased, can be held to be subject to the same rule of succession now as the land which once appertained to the chief as chief. And here also we can obtain valuable guidance from the case of *Muhammad Afzal Khan* v. *Ghulam Kasim Khan* (1) quoted above and known as the Tonk case, decided by a Division Bench of this Court on 3rd January 1898, and by their Lordships of the Privy Council on 15th May 1903,

It appears from the judgment of this Court, *Muhammad Afzal Khan* v. *Ghulam Kasim Khan* (1), that there was a large amount of property in general of over 32,000 kanals—4,000 acres, which the *Nawab* did not even claim to be subject to the special custom of primogeniture set up, although it had been acquired by the *Nawabs*, and there was also certain other property of small area which was claimed, but to which the rule of primogeniture was held not to apply. We would apply the same principle here, and we shall uphold the decision of the Lower Court and dismiss the claim as regards all the lands which were owned by the State as a State before 1849, and which we hold includes all the lands then in the *Nawab's* possession and so entered in the Settlement Records of 1852, and we shall decree their share to the Plaintiffs of the remaining lands, holding that as regards those the personal law of the parties, that is the Muhammadan Law, must apply, as it is clear that no other custom has been shown to govern succession in the family."

A decree was accordingly made from which both parties appealed to His Majesty in Council.

Mr. L. DeGruyther, K. C., and *Mr. Ross* for the Appellant.—Both the lower Courts have found that the *riasat* or estate is impartible and that it descends by the rule of primogeniture. Ever since the *riasat* came into existence the younger male members of the family received maintenance. And when some members did set up claims for inheritance the claim was dismissed. There is a concurrent finding of the Courts below that the original estate as well as the accretions thereto devolved by the rule of primogeniture and that the succession was never

(1) L. R. 30 I. A. 190: s. c. I. L. R. 30 Cal. 843; 8 C. W. N. 81 (1903)

(1) L. R. 30 I. A. 190: s. c. I. L. R. 30 Cal. 843; 8 C. W. N. 81 (1903).

governed by the Mahomedan Law. The effect of confiscation and re-grant was considered in *Sundaralingasawmi Kamara Naik* v. *Ramasawmi Kamara Naik* (2), *Ram Nundun Singh* v. *Janki Koer* (3). In the absence of evidence settlement must be presumed to have been made on the basis of the original status of the estate and that the law of succession previously applicable continued as before, *Beer Pertab* v. *Rajender Pertab* (4). The case of *Muhammad Afzal Khan* v. *Ghulam Kasim Khan* (1) is not applicable to the facts of this case. These properties were held under a totally independent title. Here they were purchased from the income and formed part and parcel of the original estate.

In the absence of evidence to the contrary accretions go with the estate and belong to the impartible zemindari. *Lakshmipathi* v. *Kandasami* (5), *Sarabjit Partap Bahadur* v. *Indarjit Partap Bahadur* (6), *Thakur Isri Singh* v. *Baldeo Singh* (7). There could be no difference in principle between the law regulating the succession to property owned before 1849, and that acquired after 1849. The fact that *quasi*-sovereign rights were taken away by the Government would not change the status of the *riasat* or the law of succession applicable thereto. *Kachi Kaliyana* v. *Kachi Yuva* (8).

Sir R. Finlay, K. C., and *Mr. O'Gorman* for the Respondents.—We claim partition of the zemindari and personal properties, and not of the *jagir* lands.

(1) L. R 30 I. A. 190: s. c. I L. R. 30 Cal. 843; 8 C. W. N. 81 (1903).
(2) L R. 26 I. A. 55 (1899).
(3) L. R. 29 I. A. 178 (1902).
(4) 12 Moo. I. A. 1, 18, 33, 34 (1867).
(5) I. L. R. 16 Mad. 54, 59 (1892).
(6) I. L. R. 27 All. 203, 251, 252 (1904).
(7) L. R. 11 I. A. 135, 148 (1884).
(8) L. R. 32 I. A. 261, 265, 268 (1905).

The succession to the former is regulated by the Mahomedan Law, and not by the rule of primogeniture. In fact Mr. Lawrence did so decide in 1852, and that decision is now binding. In those days there were no law Courts and the Board of Revenue of which Mr. Lawrence was a member was the final authority. The original *sanad* related to *jagir* only. In the absence of clear proof that zemindari was not governed by the personal law the ordinary Mahomedan Law applied. It was not a case of concurrent finding of facts. It was a question of law. No custom that accretions go with the estate by the rule of primogeniture was proved. The case in *Muhammad Afzal Khan* v. *Ghulam Kasim Khan* (1) applied. After 1849 the *riasat* ceased to exist. It continued only in name. Its status and incidents were altered. The properties acquired by the Nawab were like those acquired by an ordinary citizen, and succession thereto was governed by the ordinary Mahomedan Law as modified by some proved usage or custom.

Mr. L. DeGruyther, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The sole question for determination involved in these two appeals relates to the rules of succession applicable to the Kunjpura State lying in what are called the Cis-Sutlej Districts of the Punjab.

The Kunjpura *riasat* lies about 100 miles to the north of Delhi, in the District of Karnal, and was founded in the first half of the 18th century by an Afghan soldier of fortune of the name of Najabat Khan, who, like many other adventurers,

(1) L. R. 30 I. A. 190: s. c. I. L R. 30 Cal. 843; 8 C. W. N. 81 (1903).

native and foreign, had taken advantage of the troublous times when the whole fabric of the Mogul Empire had fallen to pieces to carve out a small principality for himself. In 1748 he obtained a *sanad* from the Afghan conqueror Ahmed Shah Abdali, also called Durani, then in the height of his power in northern India, granting him a hereditary "*jagir*" of the villages, 149 in number, of which he was in possession at the time. The villages were declared to be *inâm*, or revenue-free, and he was to enjoy thenceforth the revenue payable to the Imperial Government, subject to the obligation of maintaining order in his *ilaqa* or possessions.

It is not disputed that the chiefship has from the time of Najabat descended in the male line to a single heir, and that heir has been invariably the eldest son, save in one instance, where the deceased *rais* left no issue, and was succeeded by his eldest surviving brother.

Nawab Muhammad Ali Khan, the seventh in descent from Najabat Khan, succeeded to the chiefship in the year 1849. He died in 1886, leaving several sons, three of whom only are now surviving, *viz.*, the Defendant Ibrahim Ali Khan, the eldest, and the two Plaintiffs, Respondents in the first appeal.

He left also three daughters, but both parties are agreed that by the custom of the family they receive no share in his inheritance.

The Defendant was a minor at the time of his father's death, and during his minority the Court of Wards managed the estate. In 1900 he attained majority and assumed charge of the properties.

The Plaintiffs claim that under the Mahomedan Law, which they allege governs the succession in their family, they are entitled to shares in the Kunjpura Estate, and they brought this suit against the Defendant in the Court of the District Judge of Karnal for partition, possession, and "rendition of accounts."

The Defendant contested the action on the allegation that the Estate of Kunjpura was an impartible *riasat* or principality which had been recognised as such by the sovereign power, and which had descended under the custom governing the family by the rule of primogeniture, and that the younger male members had no title beyond a claim to reasonable maintenance.

It will be noticed that both parties allege the existence of a custom at variance with the Mahomedan Law with regard to succession in their family; the Plaintiffs restrict it to the exclusion of females from inheritance, whilst the Defendant asserts that it extends to the younger male members.

The District Judge found in favour of the custom alleged by the Defendant, and dismissed the Plaintiffs' suit. On appeal the learned Judges of the Chief Court have affirmed the view of the District Judge in respect of all property that appertained to the *riasat* prior to 1849, holding that the custom set up by the Defendant, which they found established, clearly applied to it. But they were of opinion that as in that year the Government withdrew from the chiefs of Kunjpura the *quasi*-sovereign powers they had hitherto exercised, "the chiefship ceased as an independent entity," and consequently lands and property acquired by the Nawab after 1849 were not subject to the same rule of succession as was applicable to lands which once appertained to the chief as chief."

In this view they decreed the Plaintiffs'

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claim in respect of their shares under the Mahomedan Law in the latter properties.

Both parties have appealed from the decree of the Chief Court. The Defendant contends that the learned Judges are in error in drawing a distinction between the properties held before and those acquired after 1849, and that the custom, the existence of which has been found by both the Courts in India, applies to all property. The Plaintiffs on the other hand urge that the custom alleged by the Defendant, on whom the onus lay, has not been established; that in any event the effect of the withdrawal in 1849 from the chiefs of all civil and criminal powers was to reduce their status to that of private citizens, subject to their ordinary personal law. That, in substance, represents the contentions of the parties before this Board.

The Chief Court has traced the history of the Kunjpura family with much care and discrimination. Their Lordships do not, therefore, propose to discuss the evidence at any length, for they find it established beyond doubt that the Estate of Kunjpura has, ever since the time of Najabat, descended to a single heir, who has been recognised as the chief of an impartible *riasat*, which is the Arabic or Mussulman synonym of the Hindu word *raj*; and that attempts by junior members of the family to obtain shares in the *riasat* properties have invariably failed. The two instances on which the Plaintiffs rely as showing allotment of shares to junior cadets of the family appear to their Lordships to be clearly opposed to their contention. The first is the case of Karam Sher, the second brother of Gulsher Khan, third in descent from Najabat, who obtained under circumstances that cannot be ascertained at this distance of time, several villages which were separated from the *jagir*, and are still held by his descendants. There is nothing, however, to show that the villages Karam Sher received bore any relation to the share he would have been entitled to on partition under the Mahomedan Law. Nor does it appear or is even alleged that Gulsher Khan's brothers other than Karam Sher obtained any share of the family properties. In 1851, whilst the *Dastur-ul-amal* or settlement records of these villages were in course of preparation, Nizam Ali Khan, the son of Karam Sher, applied to have his name entered as *jagirdar* of the villages in question. His application was resisted by Nawab Muhammad Ali Khan, who was then the *rais* of Kunjpura, on the ground that the villages held by the applicant had been given to him for maintenance, and that they should revert to the chief on his (the applicant's) death without male issue. The Commissioner of the Cis Sutlej States, within whose jurisdiction Kunjpura lay, after recording the Nawab's objection, made the following recommendation to Government :—

"I think that all the villages and land possessed by the younger branches of the family should be held and recorded to be component parts of the chief's integral estate, that while the present incumbents or any of their descendants are living the chief be altogether debarred from disturbing or interfering with their possession, and that, on failure of issue in any branch, the lands composing the maintenance (*guzarah*) of that branch revert to the chief's integral estate, in place of lapsing to the Government, as they would do, were they severed from that estate The *Dastur-ul-aml* would thus be drawn in the name of the *Nawab Rais* (the chief)."

The Commissioner's view was accepted and affirmed by Government on the 31st October 1851, and the final order was passed by him on the 17th November

following. It is clear, therefore, that neither the Government nor the chief ever recognised that the villages received by Karam Sher were in lieu of his share by right of inheritance under the Mahomedan Law. On the other hand it was alleged on the first opportunity that offered itself that the villages had been granted to Karam Sher and his male descendants for maintenance, and that they were to revert to the *riasat* on the extinction of his male line, and this contention was accepted and affirmed by the Government.

The other instance is that of Ghulam Muhay-ud-din Khan. Gulsher died in 1804, leaving several sons, of whom the eldest, Rahmat Khan, succeeded to the *riasat.* Quarrels then broke out between him and his second brother, Ghulam Muhay-ud-din, about the latter's claim for maintenance, which at last became so violent that the British authorities, who had in the year 1806 assumed charge of the Cis-Sutlej districts, were compelled to interfere. The dispute between Rahmat Khan and Ghulam Muhay-ud-din was referred to the arbitration of the Resident at Delhi, Mr. Metcalfe (afterwards Sir Theophilus Metcalfe) and Mr. Fraser. As a result of the arbitration Ghulam Muhay-ud-din obtained a number of villages yielding a considerable income. Upon the evidence their Lordships have no hesitation in agreeing with the Chief Court that he received them in lieu of maintenance. In fact some years later, when a younger brother applied for maintenance out of the properties in the possession of Rahmat Khan and Ghulam Muhay-ud-din respectively, the latter objected to his being made liable on the ground that he himself had obtained for maintenance the villages held by him, and he was accordingly exempted from the obligation of contributing towards the younger brother's maintenance.

Ghulam Muhay-ud-din died in 1841, and a claim was put forward on behalf of his minor son, Muhammad Yar Khan, to the possession of all the villages that had been held by him. But a part only was assigned to Muhammad Yar Khan for his maintenance, whilst the rest reverted to the chiefship.

As already observed, these two cases, far from supporting the Plaintiffs' allegation, appear to their Lordships to be quite opposed to it. No other evidence has been referred to to suggest that there has ever been a division of the Estate in accordance with the rules of the Mahomedan Law since the time of Najabat Khan. It was, however, contended, on behalf of the Plaintiffs that although the *jagir* may be impartible and descendible by the rule of primogeniture, the *zemindari* rights in the villages comprised in the *jagir* cannot be so treated in the absence of clear evidence of custom applicable to them. In support of this contention reliance was placed on the dictum of Mr. Lawrence (afterwards Lord Lawrence) pronounced in 1852 in a case which had come before him as a member of the Board of Administration. Janbaz Khan and Shahbaz Khan, two younger sons of Rahmat Khan, had preferred a claim for shares in the *zemindari* rights in one of the villages appertaining to the Kunjpura Estate. Their application was dismissed by the Commissioner. On appeal to the Board Mr. Lawrence expressed himself as of opinion :—

"That *zemindari* rights did not belong to the State, that, like other moveable or immovable property, it should be given by right of inheritance according to Muhammadan law, and that all the

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descendants of *Nawab* Rahmat Khan, who had acquired this *zemindari*, had rights in it."

The other members appear to have concurred in this view. But the final decision was made dependent on the determination of the question whether Janbaz and Shahbaz had ever been in possession of the shares which they claimed should be recorded in their names. They were found, however, never to have been in possession, and their claim was finally dismissed.

The opinion of Mr. Lawrence, however deserving of respect, affords, therefore, little assistance in deciding the question whether the *zemindari* rights are subject to a different rule of succession from the *jagir*. The opinion was, in the result, ineffective, and seems never to have been accepted or acted upon in the course of the constant claims the junior members of the family have put forward to a share in the Estate. The decisions in the later cases lay down in explicit terms that the *zemindari* rights belong to the *riasat*. Similarly, it is recorded in the *Wajib ul arz* that "the entire *biswadari*, *zemindari*, and *jagirdari* rights are possessed by the Nawab." Any other conclusion would not only be inconsistent with the policy which the Government has maintained for nearly a century towards these *riasats*, but in the end would prove positively destructive to the chiefships.

It remains, however, to consider whether the view taken by the Chief Court with regard to the rule of succession to acquisitions made by the chiefs after 1849 is well-founded. After holding that the custom set up by the Defendant *Nawab* is made out as regards all property which can be shown to have formed part of the State before 1849, the learned Judges proceed to say :—

"As regards lands subsequently acquired we think the case is different. The custom owed its rise and *raison d'être* to the existence of the State and the exigencies of chiefship. A family custom, respected by the authorities and fully established as accompanying the chiefship, must be held to obtain as regards the estates of the chiefship as such. But when the chiefship ceased as an independent entity, it was not only privileges but duties and liabilities also which were abrogated, and we do not think that lands and property acquired by the *Nawab* after 1849 with income, which he was admittedly competent to deal with as he pleased, can be held to be subject to the same rule of succession now as the land which once appertained to the chief as chief."

Their Lordships regret to be unable to follow the reasoning on which the view expressed by the learned Judges proceeds, or assent to the conclusion at which they have arrived. There is nothing to show that the Government in withdrawing the civil and criminal powers the chiefs had hitherto exercised, intended to make any alteration in their status or to vary the rule which had governed the succession to the Kunjpura Estate. The withdrawal of those powers was no doubt due to the needs of administration, but that circumstance cannot affect the custom under which the entire Estate descended by the rule of primogeniture to a single male heir.

On the whole, their Lordships are of opinion that the appeal of the Defendant Ibrahim should be decreed and the Plaintiffs' suit dismissed. They will accordingly humbly advise His Majesty to discharge the decree of the Chief Court, and to restore that of the District Judge, dismissing the Plaintiffs' suit.

The Plaintiffs will pay the costs of these appeals.

Solicitors : *Messrs. Hartcup and Davis* for the Appellant.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Respondents.

B. D. ***Suit dismissed with costs.***

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 35 OF 1910.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
14, March.

D. CHATTERJEE, J.
1910,
21, March.

GOPAL KRISHNA JANA, Plaintiff, Appellant,
v.
LAKHIRAM SARDAR, Defendant, Respondent.

Limitation Act (XV of 1877), Sch. II, Art. 144—Landlord and tenant—Encroachment by tenant—Adverse possession of encroached land as tenant, if creates title—Landlord's right to recover possession when barred—Interest acquired by tenant.

While a tenant is bound to treat that which is an encroachment on his landlord's land as held by him under his landlord the landlord is not bound to treat the land on which his tenant encroaches as held under a tenancy. But the landlord's right to recover possession of the land encroached upon may be lost by the tenant having adversely to the landlord asserted his title as tenant to the land for more than twelve years.

Under Art. 144 of the Limitation Act, there may be adverse possession not only of immoveable property but of any interest therein, and a tenant may claim to have been in adverse possession for 12 years of a limited interest in encroached land, viz., a tenancy commensurate with that in the admitted lease between the parties.

This was an appeal under sec. 15 of the Letters Patent preferred on the 16th of April 1910 against a decree of Mr. Justice D. Chatterjee, dated the 21st of March 1910, passed in second appeal No. 480 of of 1908, which had been preferred against a decree of Babu B. B. Chatterjee, Subordinate Judge of Zillah Manbhum, dated the 12th of December 1907, affirming that of Babu Khagendra Nath Bose, Munsif of Purulia, dated the 25th of March 1907.

The JUDGMENT OF D. CHATTERJEE, J., which states all the material facts, was as follows :—

D. CHATTERJEE, J.—The Defendant encroached upon the lands of his landlord and claimed that these lands were within his tenure. Hence the landlord brings a suit for ejectment and the claim of the lands being included in his tenure having failed the Defendant pleads that he has been in possession of these lands now found to be an encroachment upon the neighbouring lands of the landlord for more than 12 years and whatever may be the rights of the landlord as regards additional rent he is not entitled to evict him—his claim for eviction being barred by the limitation under Art. 142 of the Second Schedule to the Limitation Act. He relies on the case of *Ishan Chandra Mitra* v. *Ram Ranjan Chakraverty* (1), in which it was laid down that in the case of such encroachments the article of the Limitation Act applicable was Art. 142 and not 144 and the Plaintiff must shew possession within 12 years. That case is also an authority for the proposition that there can be dispossession in respect of a limited interest. The case of *Ichharam Singh* v. *Nilmoney Bahida* (2) does not qualify the previous decision in *Ishan Chandra Mitra* v. *Ram Ranjan Chakraverty* (1). It has been contended, however, that dispossession must be to the knowledge of the landlord, for otherwise it could not be adverse to him [*Wali Ahmed Chowdhry* v. *Tota Meah* (3)], and it is virtually found in this case that the Plaintiffs who are absentee landlords had no knowledge of the Defendants'

(1) 2 C. L. J. 125 (1905).
(2) 12 C. W. N. 686 (1908).
(3) I. L. R. 31 Cal 397 (1903).

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possession until within 12 years. It is contended, however, that this is a case of dispossession. The Plaintiffs plead dispossession in 1311 and if it is proved that the Plaintiff was dispossessed more than 12 years before suit the Plaintiff's suit for ejectment is barred under Art. 142. It is contended that the element of knowledge enters both into Arts. 142 and 144, and the Defendant's possession cannot avail unless he shows he had possession with the knowledge of the Plaintiff which is found against him in this case. The Appellant answers, however, that the subject of dispute being capable of actual possession by enjoyment of profit, knowledge if necessary must be inferred as soon as it is shown that another person is enjoying that which the Plaintiff ought to have had for enjoyment. Art. 142 seems to require that the Plaintiff should prove possession within 12 years of the suit whether then the acts of the Defendant which amount to dispossession came to his knowledge recently or long ago.

The lower Appellate Court has tried the case on the basis of its being governed by Art. 144 and does not seem to have come to any clear finding as to whether the Defendant was in possession for more than 12 years under a claim of title to hold the disputed lands as part of his tenancy and the case must go back for a finding upon that point. If he finds like the first Court that the Defendant has been in actual possession for more than 12 years claiming the lands as included in his tenure the Plaintiff's suit for eviction and damages must fail.

The decree of the lower Appellate Court is therefore set aside and the case sent back for a decision in view of the above observations.

Costs to abide the result.

[The Plaintiff preferred an appeal under sec. 15 of the Letters Patent.]

Babus Jogesh Chandra Ray and *Rajendra Chandra Guha* for the Appellant.

Babu Dwarka Nath Mitter for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This is an appeal to the Court under cl. 15 of the Letters Patent from a judgment of Mr. Justice Digambar Chatterjee, who set aside the decree of the lower Appellate Court and sent back the case for decision in the light of the observations contained in his judgment.

The suit is one for *khas* possession of lands, and the lands in respect of which this relief is sought have been treated as so situate and circumstanced as to come within the doctrine of encroachment; and, without questioning the propriety of this view, I assume that this is a case in which that doctrine would properly apply. The Defendant undoubtedly is a tenant of the Plaintiff in respect of the other property, and the question is whether the Plaintiff, the landlord, can recover *khas* possession of the land in suit which was not included originally in the lease but is now treated as the subject of an encroachment by the Defendant as a tenant of the Plaintiff. The Plaintiff's claim was upheld in both the lower Courts, on the ground that the Defendant was not entitled to assert his position as a tenant of the Plaintiff. Mr. Justice Chatterjee dissented from this view. He thought that the facts were such that it might be a reasonable view that the Defendant had, by virtue of the Statute of limitation, acquired a right which entitled him to claim to hold the land as a tenant of the Plaintiff, and so entitled him to resist the

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claim for *khas* possession. The law as to encroachments is well-settled; while a tenant is bound to treat that which is an encroachment, as held by him under his landlord, the landlord is not bound to treat the land on which his tenant encroaches as held under a tenancy. Therefore, it may be that in appropiate circumstances a landlord can recover against his tenant the land on which the tenant has encroached. There is a limit to that right, for if the tenant has been in possession of the land for that which for brevity I may call the statutory period, and the landlord repudiates the encroachment, it becomes a question whether or not the tenant has gained an interest that would be a bar to his landlord's claim for possession. In this case there is a finding of the first Court, though not of the lower Appellate Court, that the Defendant has been in possession of the land in question for a period of twelve years and upwards. That period of possession complies with one of the conditions necessary to establish a right by adverse possession. The other condition is that the possession should be adverse. What is asserted by the Defendant is not that he has acquired by adverse possession an absolute interest, but only a tenancy right in the property. As I read the judgment of the lower Appellate Court, it has failed to consider whether, though the Defendant may not have asserted an absolute title to the property he did not assert a title to the property as a tenant. Under Art. 144 of the Limitation Act, there may be adverse possession not only of immoveable property but of any interest therein, and it appears to me that it may properly be contended that in the circumstances of this case there was an adverse possession of the limited interest which the Defendant claims, that is to say, a tenancy commensurate with that in the admitted lease between the parties. That, as I have said, is an aspect of the case which has not been investigated, and I think it should be.

The result then is that we agree with the decree passed by Mr. Justice Chatterjee and we must dismiss this appeal with costs.

N. R. CHATTERJEA, J.—I agree.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 3135 OF 1909.

D. CHATTERJEE, J.
N. R. CHATTERJEA, J.
1912,
Heard, 14, February.
Judgment, 4, March.

BINDAE DASYA CHUTIANI, Plaintiff, Appellant,
v.
CHOTA, Defendant, Respondent.

Contract Act (IX of 1872), sec. 25, cl. (3)—Debt barred, promise to pay—Conditional promise—Suit to recover debt if lies.

Acknowledgment of a barred debt cannot give a fresh start to limitation in favour of the creditor.

Under cl. (3) of sec. 25 of the Contract Act a barred debt is considered a good consideration for a promise to pay, the new promise furnishing the measure of the creditor's right; the whole of the promise whether free or clogged with a condition gives the cause of action.

Where A. and B. entered into an agreement of partnership wherein it was inter alia *provided that 6 as. out of the profits of the business in the share of A. would go toward liquidating a previous debt of Rs. 600 due by A. to B., which had become time-barred at the date of the agreement.*

Held—*That B. could not recover the debt except in the manner provided in the agreement.*

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This was an appeal preferred on the 15th of December 1909 against a decree of Mr. S. N. Mackenzie, Subordinate Judge of Nowgong, dated the 15th of September 1909, confirming a decree of Babu A. S. Guha, Munsif of Nowgong, dated the 7th of July 1909.

The Appellant who was the Plaintiff in the suit out of which this appeal arose, was the mistress of Sonaram Rajkhowa, deceased, the father of the minor Defendant Chota, the Respondent in this appeal. She alleged in her plaint that she had made a loan of Rs. 600 to Sonaram, and that Sonaram being unable to pay up the loan, on the 7th October 1904, executed a bond in the following terms :—

To

Srimati Bindu Dasya.

I, Sonaram Rajkhowa, son of Ghinloga Rajkhowa, deceased, inhabitant of Hoibargaon, Mouzah Town, Thana Suddar, District Nowgong, do execute this *ekrarnama* (letter of admission) and state that I retained the abovenamed Bindu Dasya as my wife, that I got an advance of Rs. 600 (six hundred rupees) in cash from her for my private use without the execution of any document under private arrangement, and that subsequently she having demanded payment of that amount, I was unable to meet her demand; I therefore hereby promise, being unable to satisfy her said debt, and decide to lend to her the use of my trained *dhari* (big) elephant measuring 5 cubits, named Joymala, for capturing wild elephants by *shikar* and make her a partner. I hereby declare in writing that of the amount to be realised from sale of wild elephants to be captured with the help of the said trained elephant of mine, she (you bearing all other expenses required for the purpose and the royalty and *mehaldari* dues being deducted from the sale proceeds, 8 anna share of the balance will be received by you on account of your contribution (of the incidental expenses), while I will be entitled to the remaining 8 anna share on account of my elephant; but out of this, 8 anna share to be paid to me on account of my *kunki* or capturing elephant, 6 anna share will be received by you in satisfaction of the amount (of debt) paid in advance to me by endorsing the payment on the back of the bond and the remaining 2 anna will be received by me. I can have no objection to this arrangement. To the above effect I execute this *ekrarnama* of my own accord. The 7th October 1904, corresponding to the 21st Assin 1311 B. S.

1. The said elephant may be kept engaged in *shikar* from this day till the 30th day of April 1905.

She sued to recover the said loan of Rs. 600 with costs of the suit basing her cause of action on the said bond.

The written statement in defence raised *inter alia* the plea that "the Plaintiff's claim is barred by limitation. According to the allegations made in the plaint the Plaintiff's cause of action has not yet arisen."

The Munsif held that the amount of Rs. 600 was not borrowed on the date of the bond and there was no evidence to show that it was borrowed within the period of limitation from the date of the bond, and thus the Plaintiff was not entitled to the benefit of sec. 19, Limitation Act. He was further of opinion that sec. 25 (3) of the Contract Act did not apply, as there was no unconditional promise in the bond to pay the old debt. The bond only showed the manner in which the original debt was to be discharged. If there was no profit in the elephant *shikar* business opened between Sonaram and Bindu, the old debt could not be paid. He accordingly dismissed the suit.

The decision was affirmed on appeal by the Subordinate Judge.

The Plaintiff then preferred this second appeal.

Babu Hem Chandra Mitter for the Appellant.

Babu Girija Prasanno Ray Chowdhury for the Respondent.

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The JUDGMENT OF THE COURT was as follows:—

This suit was brought on the 4th of October 1907 on an alleged bond of the 7th of October 1904. The document however is not a bond but an agreement of partnership for the capture of elephants and incidentally mentions a debt of Rs. 600 previously taken from the Plaintiff and provides that 6 annas of the profits of the business in the share of the executant would go towards the liquidation of the debt of Rs. 600. The Defendant who is the heir of the executant of the bond pleads limitation and want of cause of action and the lower Courts have upheld the plea. It is contended in second appeal before us that the Courts below are wrong, *firstly*, in the construction of the agreement and, *secondly*, in holding that the document does not repel the bar of limitation.

The document undoubtedly contains an acknowledgment of the debt and if it could be shown that it was made while the debt was yet alive the provisions of sec. 19 of the Limitation Act would repel the statute. The Plaintiff has however failed to prove that and the suit must fail unless the document is such as to attract the provisions of sec. 25, cl. 3 of the Contract Act. That section provides that an agreement made without consideration is void unless (3) it is a promise made in writing * * * to pay wholly or in part a barred debt. The effect of the section is that the old debt is not revived but it is considered to be a good consideration for the promise to pay and this new promise is the measure of the creditor's right. This promise may be absolute or conditional. If it is absolute, if there is no "but" or "if," it will support a suit without anything else: if it is conditional the condition must be performed before a suit upon it can be decreed. This is the English Law on the point: See Leake on Contracts, 6th Ed., 723-724. *Philips* v. *Philips* (1), *Chasemore* v. *Turner* (2). This rule has been followed in India before the passing of the Contract Act. See *Tilakchand* v. *Jitamal* (3), (Westropp, C. J. and West, J.) and also after the passing of the Contract Act: See *Watson* v. *Yates* (4), Sargent, C. J., and Farran, J. And we cannot say this is inconsistent with the rules of justice, equity and good conscience according to which we have to administer the law. As the debt is *ex-hypothesi* barred and the creditor cannot insist upon its being paid, the debtor who is inclined to be honest, must be allowed to impose his own terms if any. He may agree to pay instalment or by some special arrangement or on the happening of a contingency. The whole of the promise whether free or clogged with a condition gives the cause of action. If he says "I will pay when I can" the creditor must prove his ability to pay: See *Tanner* v. *Smart* (5), *Watson* v. *Yates* (4). If he says "I will pay by a set-off or some special arrangement" the creditor can realise his dues in no other way: See *Routledge* v. *Ramsay* (6), *Cripps* v. *Davis* (7), *Goate* v. *Goate* (8), *Francis* v. *Hawkesley* (9). In the present case the debtor promised to pay by a share of the profit of the elephant business and the Plaintiffs cannot recover in any other way.

(1) 3 Hare 281 at pp. 299-300 (1844).
(2) L. R. 10 Q. B. 500 (1875)
(3) 10 Bom. H. C. 216 (1873).
(4) I. L. R. 11 Bom 580 (1887).
(5) 6 Bar. & Cress 603; 30 R. R. 461 (1827).
(6) 8 A. & E. 221 (1838).
(7) 12 M. & W. 159 (1843).
(8) 1 H & N. 29 (1856).
(9) 1 El. & El. 1052; 28 L. J. Q. B. 870 (1859).

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The appeal therefore fails and must be dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE NOS. 92 AND 221 OF 1909.

MOOKERJEE, J.
CARNDUFF, J.
1911,
1, September.

LAKHI CHOUDHRY and another, Plaintiffs, Appellants,
v.
AKLOO JHA and others, Defendants, Respondents.

Estates Partition Act (V of 1897, B. C.), secs. 25, 119—Civil suit for declaration of tenancy right where Collector decides against it in partition proceedings—Maintainability—Defect of parties, objection when must be taken.

Where in the course of partition proceedings before the Collector the Defendants set up a claim that they were tenants in respect of that land to which the Plaintiffs who were some of the joint proprietors objected and the objection was overruled by the Collector,

Held—*That a suit by the Plaintiffs for a declaration that there was no tenancy right of the Defendants was not barred.*

Where an objection on the ground of defect of parties was not taken in the Court of first instance though there was an opportunity to take it it was not open to the Defendants to take it at the appellate stage.

This was an appeal preferred on the 20th of January 1909 against the decree of Mr. H. E. Rawson, District Judge of Zillah Durbhanga, dated the 26th of November 1908, reversing the decree of Moulvi Abdul Jubbar, Munsif at Durbhanga, dated the 30th April 1908.

The facts of the case will appear from the judgment.

Babu Atul Chandra Dutt for the Appellants.

Babu Lakshmi Narain Singh for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal is directed against a decree of dismissal in a suit for declaration of title to immoveable property and for confirmation of possession. The Plaintiffs and the second party Defendants are the joint owners of an estate which is now in course of partition under the provisions of the Estates Partition Act of 1897. In the partition proceedings the first Defendant put forward a claim that he was the tenant in respect of a particular parcel of land. The Plaintiffs repudiated that position but their objection was overruled by the Revenue authorities. They thereupon commenced this action for declaration that the first Defendant was not a tenant in respect of those lands and that he had as a matter of fact been set up fraudulently by the second party Defendants. The Court of first instance went into the merits and made a decree in favour of the Plaintiffs. Upon appeal two objections appear to have been urged on behalf of the Defendants; namely, *first*, that the suit had not been properly constituted, because the son of one of the Plaintiffs had not been joined as a party and, *secondly*, that the suit was barred under the provisions of sec. 25 of the Bengal Estates Partition Act. In respect of the first objection, the learned Judge held that it was well-founded but that the suit ought not to be dismissed on that ground; he stated in fact that if the suit had not been open to any other objection, he would have remanded the case for retrial. But in so far as the second

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objection was concerned, the learned Judge allowed it to prevail and dismissed the suit as not maintainable.

The Plaintiffs have now appealed to this Court, and on their behalf the view taken by the learned Judge upon both these matters has been called in question. We are of opinion that his conclusions cannot be supported.

In so far as the question of defect of parties is concerned it is clear that this specific objection was not taken in the Court of first instance. One of the Plaintiffs went into the witness-box and from his examination it transpired that he had a son who was jointly interested in the subject-matter of the litigation but had not been brought before the Court. It was therefore open to the Defendants to take exception to the frame of the suit. They did not do so but allowed the suit to proceed as properly constituted. It was therefore not open to them at the appellate stage to take a technical objection of this character. It is further clear that it is needless to send back the case to the original Court for retrial, as the father may well be deemed to represent all the members of the family. In any event it is open to the Court to decide the questions in controversy under r. 9 of Or. I of the Code of Civil Procedure of 1908, in so far as the parties before the Court are concerned.

With regard to the second point it has been contended on behalf of the Appellants that the suit is not barred under the provisions of sec. 25 of the Estates Partition Act of 1897. This argument has not been seriously controverted on behalf of the Respondent and, in our opinion, there is no answer to the contention of the Appellant. Sec. 25 provides that no suit instituted in a Civil Court after the lapse of four months after the Collector has made a direction under cl. (*a*) or cl. (*b*) of sec. 23, or recorded a proceeding under sec. 29, by any person claiming right or title in or to a parent estate shall avail to affect or stay the progress of any proceedings which may have been taken under the Act for the partition of the estate. This section obviously has no application to the case before us. In the first place, the Defendant does not claim any right or title in or to the parent estate. He claims the status of a tenant under the proprietors in respect of a specific parcel of land. In the second place the section does not say that a suit of this description does not lie; it merely provides that a suit instituted after four months does not affect or stay proceedings for partition. In the third place neither sec. 23 nor sec. 29 has any application to the facts of this case. It has been argued however by the learned Vakil for the Respondent that the suit is barred because the partition proceedings have not yet been completed and the matter is still under the consideration of the revenue authorities. But there are two obvious answers to this contention. In the first place, so far as the question sought to be raised is concerned, it has been finally disposed of by the revenue authorities. In the second place, sec. 119 of the Estates Partition Act specifies the orders of the revenue authorities which cannot be questioned by a suit in any Civil Court. An order under sec. 45 or 46 is not one of the orders mentioned in sec. 119. The reason for the exclusion is obvious. The determination by the revenue authorities is of a summary character and it cannot be taken to conclude finally a question of title between one of the proprietors and

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a stranger to the proceeding. The learned Vakil for the Respondent has not disputed that if the decision of the revenue authorities had been adverse to the claimant who set up a tenancy, the latter would have been entitled to maintain a declaratory suit for the establishment of the right alleged by him. The same principle is applicable to the converse case and has been recognised in a series of decisions of this Court amongst which may be mentioned, *Bibee Khoobun* v. *Wooma Charan* (1), *Kalupnath* v. *Ramdien* (2), *Ananda Kishore* v. *Daije Thakurain* (3) and *Janoki Nath* v. *Kali Narain* (4). As pointed out in the case of *Zahrun* v. *Gowri Sunkar* (5), the true test to be applied in the solution of questions of this description is, whether the parties who seek relief in the Civil Court really intend to get an adjudication which may affect the Government revenue. If the question which is sought to be raised is of this description, the Civil Court has no jurisdiction. It cannot be suggested with any degree of plausibility that the question sought to be raised in this case is of this character.

The result therefore is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him in order that the appeal may be heard on the merits. The costs of this appeal will abide the result.

Under sec. 13 of the Court-fees Act we direct that the court-fees paid on the memorandum of appeal to this Court be returned to the Appellant.

It is conceded that the judgment will govern the other appeal, in which a similar order will be drawn up.

Case remanded.

(1) 8 C. L. R. 453 (1878).
(2) I. L. R. 16 Cal. 117 (1888).
(3) I. L. R. 36 Cal. 726 (1909).
(4) 15 C. W N. 45 : s. c. I. L. R. 37 Cal. 662 (1910).
(5) I. L. R 15 Cal. 198 (1887).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 233 OF 1909.

CHITTY, J.
TEUNON, J.
1912,
Heard,
25, March.
Judgment,
26, March.

MRINALINI DEBI, Appellant,
v.
TINKAURI DEBI, Respondent.

Civil Procedure Code (*Act XIV of 1882*), *sec.* *413 – Application to sue* in formâ pauperis, *dismissed – Petition if may be treated as plaint on payment of proper court-fees – Costs of Government, payment of, if condition precedent to action – Dismissal of suit when no demand made for payment, if proper.*

Held (*without deciding any question of limitation*)—*That there can be no objection to a petition to sue* in formâ pauperis, *which has not been granted, being registered as the plaint in the suit on the full fees being paid.*

Although sec. 413 of the Civil Procedure Code makes it a condition precedent to the institution of a suit in the ordinary way by a person whose application to sue in formâ pauperis *has been rejected, that he should first pay the costs incurred by the Government in opposing the application, the suit ought not be dismissed for non-payment of such costs when no demand for its payment was made at any time either on behalf of Government or by Court.*

The lower Court having dismissed the suit on that ground the Plaintiff on appeal was allowed to pay the amount and the suit was remanded for trial on the merits.

This was an appeal against the decree of Babu Uma Charan Kar, Subordinate

Judge of Zillah Hughly, dated the 7th of December 1908.

The material facts will appear from the judgment.

Babus Baidya Nath Dutt and *Tarakeshur Pal Chowdry* for the Appellant.

Babus Sarat Chandra Roy Choudhury and *Probodh Chandra Mukerjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the Plaintiff, Srimati Mrinalini Dabee, against an order of the Subordinate Judge of Hughly dismissing her suit under the following circumstances:—

On the 30th November 1907 the Plaintiff presented a petition for leave to sue the Defendant, Srimati Tincowri Dabee, in *formâ pauperis*. This application was refused on the 28th March 1908 on the ground that she was not a pauper and she was ordered to pay the costs of the Defendant and of the Government. The costs of the Government amounted to Rs. 16-4. On 6th May 1908 the Plaintiff applied to the Court for leave to pay the full court-fees. On the 13th May 1908 the Court gave her 3 days in which to pay and on the 16th May 1908 extended the time for another 3 days. The fees for Rs. 325 were paid by the Plaintiff on the 1st May 1908 and on 10th May 1908 it was ordered that the suit be registered and fixed for settlement of issues on 3rd July 1908. On 10th July 1908 the Defendant filed her written statement pleading (among other grounds) that the petition to sue in *formâ pauperis* could not be stamped as a plaint and that the Plaintiff's suit must be taken to have been filed, at the earliest, on the day when she paid the court-fees and that it was barred by limitation. Nothing was said in the written statement about the payment of the costs to Government of the enquiry into pauperism.

Issues were settled on 21st July 1908. On 5th December 1908 the Subordinate Judge heard arguments on issues 1 and 2 and on the 7th passed the order now under appeal dismissing the Plaintiff's suit. The Plaintiff has appealed and on 15th March 1909 she paid in this Court the Rs. 16-4 due to the Government for the costs above-mentioned. In our opinion, the Subordinate Judge was clearly in error in dismissing the suit on either ground. There could be no possible objection to the petition to sue in *formâ pauperis* being registered as the plaint in the suit on the full fees being paid. This was done by the Court as of course on 19th May 1908 and it would be most unjust more than 6 months later to tell the Plaintiff that she had no plaint on the file after all. It may be pointed out that the same course was adopted apparently without objection in the case of *Abhoya Churn Dey* v. *Bissesswari* (1). The other ground, that she had not paid the costs of the Government in opposing her application for leave to sue as a pauper, is a more substantial one, but after consideration we think that it ought not to prevail. No doubt in terms sec. 413 of the Civil Procedure Code, 1882, makes it a condition precedent to the institution of a suit in the ordinary way by a person whose application to sue in *formâ pauperis* has been rejected, that he should first pay the costs incurred by the Government in opposing that application. But it is obvious that some demand should be made upon the would-be Plaintiff for such costs, either by Government or by the Court. It might well be that Government did not

(1) I. L. R. 24 Cal. 889 (1897).

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desire to press for their costs. The demand if made by the Court could be made either before it registered the plaint in the suit or at some later stage when the matter was brought to its notice. Here the plaint was registered without any such demand. When the matter was brought to the notice of the Court and the issue raised, the Court should have at once called on the Plaintiff to pay those costs. It would certainly not be justified in dismissing the suit on the ground of non-payment unless and until the Plaintiff had neglected or refused to comply with that demand. It would appear from her affidavit filed in this Court on 12th March 1909 that the Plaintiff was ready and willing to pay those costs when the arguments had been heard and before judgment was delivered. However that may be the amount was paid into this Court and we presume is still lying here.

We do not desire to express any opinion on the question of limitation. That may depend on facts as to which we have not the materials at present before us to decide. The question on what precise date—whether on the date the Government's costs were paid into this Court or some earlier date the suit—must be taken to have been instituted, will have to be determined and also the precise date on which the cause of action arose. Then and then only will it be possible to say whether the suit is or is not barred.

We set aside the order of the Subordinate Judge and remand the suit to his Court for trial on the merits. The Plaintiff must have her costs of this appeal. Hearing-fee 3 gold mohurs.

Suit remanded.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 4029 OF 1911.

STEPHEN, J.
COXE, J.
1911,
23, November.

LAL CHET NARAIN SAHI, Defendant, Petitioner,
v.
RAMPAL MANJHI and another, Plaintiffs, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 9, r. 13, Or. 47, r. 1—Ex parte *decree, if may be reviewed on the ground that Defendant had sufficient cause for not appearing—Limitation.*

The fact that a Defendant against whom an ex parte *decree was passed did not apply within time under Or. 9, r. 13, C. P. C., for a revival of the case is no bar to his applying for a review of the decree under Or. 47, r. 1 of the Code on the ground that he was prevented by sufficient cause from appearing at the hearing.*

RAJ NARAIN PURKAIT *v.* ANANGA MOHAN BHANDARI (1) *relied on.*

This was a Rule granted on the 17th of July 1911 against the judgment of Mr. D. H. Kingsford, Judicial Commissioner of Chota Nagpur, dated the 27th of May 1911, reversing the judgment of Babu Sarat Chandra Pal, Subordinate Judge of Ranchi, dated the 4th of January 1911.

The facts of the case will appear from the judgment.

Babu Nagendra Nath Ghose (with him *Mr. S. K. Sahay*) for the Petitioner submitted that the application for review was maintainable, the applicant having only to pay half the court-fees whereas if he had applied under Or. 9, r. 13, he would have been spared this expense. *Harihur* v. *Buddu* (2); also *Raj Narain Purkait* v. *Ananga Mohan Bhandari* (1),

(1) I. L. R. 26 Cal. 598 (1899).
(2) 18 C. L. R. 254 (1888).

which explains *Koilash Mondol* v. *Nabadwip Chandra* (3). Neither of the lower Courts has decided my application on the merits. It has been dismissed on a preliminary point but erroneously. There ought to be a trial on the merits.

Mr. I. B. Sen (with him *Babu Jyotish Chandra Hazra*) for the Opposite Party relied on *Koilash Mondol* v. *Nabadwip Chandra* (3), and urged that the Defendants deserved no indulgence. They never paid the adjournment costs which they were on each occasion ordered to pay before the next hearing.

[COXE, J.—But the application has not been heard on the merits. Was evidence taken on the application?]

Yes.

[The evidence was read.]

The JUDGMENT OF THE COURT was as follows:—

The case out of which the Rule arises was instituted so far back as the 25th June 1908. It was at one time dismissed for default; but was again revived, and after innumerable applications for adjournments it was finally decreed *ex parte* on the Defendant's failing to appear on the 18th May 1910. Early in July the Defendants applied under Or. 47, r. 1 to have the case revived on the ground that their pleader had been prevented from appearing on the day of hearing. This application dragged on until the present year and was finally granted by the Subordinate Judge without giving any reasons for his decision.

The case then went on appeal before the Judicial Commissioner and he held that the Subordinate Judge could not have dealt with the matter under Or. 47, r. 1, inasmuch as it came properly within the scope of Or. 9, r. 13, and was accordingly barred by limitation. It appears to have been argued before him that the Appellants in his Court were not entitled to take this plea inasmuch as they had consented to the revival of the case; but this contention was not accepted by the learned Judicial Commissioner and he accordingly held that the order of the Subordinate Judge was wrong, set it aside and directed that the case should be dismissed.

The Defendants obtained a Rule from this Court to show cause why that order should not be set aside or why such other order should not be passed as to this Court might seem fit. The view of the learned Judicial Commissioner that the Subordinate Judge could not deal with this matter under Or. 47, r. 1 does not appear to be in accordance with the decision in the case of *Raj Narain Purkait* v. *Ananga Mohan Bhandari* (1), and cannot be sustained. The point which really arises for decision in this case is whether the Defendants were or were not prevented from appearing on the day fixed for the hearing of the case. This point has not been considered or decided by either of the Courts below. We have not thought it necessary to send back the case inasmuch as there is but little evidence on the point and we have been able to consider it. On reading that evidence we think that the Subordinate Judge acted with undue haste in finally disposing of the case, and therefore the case ought on certain conditions to be reheard. We would however invite the attention of the learned Subordinate Judge to the extreme delay that has occurred in disposing of this case and express our hope that the trial may be conducted

(3) 2 C. W. N. 818 (1896).

(1) I. L. R. 26 Cal. 598 (1899).

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more expeditiously in future. In particular when the Subordinate Judge directs the payment of costs as a condition precedent to proceeding with the suit, it is not sufficient for him to order the payment, but he should see that the money is paid before he proceeds further. For instance in the present case he directed payment of Rs. 40 to the Plaintiff, apparently as a condition precedent to reviving the case, but in the end he appears to have revived the case without ever attempting to see whether that order had been complied with. We think therefore that the proper order to pass will be that on the present Petitioner's depositing in Court the sum of Rs. 40 which they were ordered to pay by the Subordinate Judge within one week from the arrival of the records in the Court of first instance the case shall be reheard.

If the money is not paid within this period, this Rule will stand discharged with costs. If the money is paid in time the costs in this Court, which we assess at two gold mohurs, will abide the result.

Rule made absolute.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 5426 OF 1911.

D. CHATTERJEE, J.
N. R. CHATTERJEA, J.
1912,
Heard, 1, March.
Judgment, 4, March.

RAM CHARAN CHANDRA and ors., Petitioners,
v.
TARIPULLA SHEIKH and anr., Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 195, cls. (6) and (7)—Order of Munsif refusing sanction—Revocation by Subordinate Judge, if legal—Appeal to District Judge, transferred to Subordinate Judge—Civil Courts Act (XII of 1887), secs. 21, 22.

A Subordinate Judge cannot grant or revoke a sanction to prosecute refused or granted by a Munsif.

This was a Rule granted on the 20th of September 1911 against an order of Babu Behary Lal Chatterjee, Subordinate Judge of Mymensingh, dated the 22nd of July 1911, reversing an order of Babu A. Roy, Munsif of Pingna, dated the 21st of April 1911, and sanctioning the prosecution of the Petitioners under secs. 463 and 471, I. P. C.

This Rule arose out of an application by the Opposite Party under sec. 195 of the Code of Criminal Procedure for sanction to prosecute the Petitioners (5 in number) under secs. 463 and 471 of the Indian Penal Code. The Opposite Party were sued on a bond, dated the 26th Falgoon 1303, B. S., by the Petitioner No. 1. The Petitioner No. 2 was an attesting witness to the bond and the Petitioners Nos. 3, 4 and 5 were witnesses to certain endorsements of payments on the back of the bond. These endorsements purported to save the claim under the bond from being barred by limitation. The suit was dismissed by the original Court as also by the Court of Appeal and the present application was put in by the Opposite Party. The Munsif dismissed the application, observing as follows:—"Now for offences described in secs. 463 and 471 of the Indian Penal Code, it must be shewn that the bond as well as the endorsements were false. I have carefully gone through the judgments both of this Court and of the Court of Appeal but do not find the judgments laying down anywhere that the bonds and the endorsements thereupon are absolutely false. Certain circumstances culled from the evidence on the record of the suit have been pointed out and certain discrepancies in the statements of the witnesses

examined by the Plaintiff have been noted as tending to shew that no reliance can be placed upon the genuineness of the bond and the truth of the alleged payments. It was in this view of the evidence that the Plaintiff's suit was dismissed. There does not seem to be any motive on the part of the Plaintiff so as to induce him to fabricate a false bond against the Defendants and the suit was dismissed as the evidence fell short of the prescribed mark. The petition seems to be frivolous. The application for sanction is rejected. No order as to costs."

The Opposite Party appealed to the District Judge who transferred the matter for hearing to the Subordinate Judge.

The Subordinate Judge reversed the Munsif's order and granted the sanction prayed for, whereupon the present Petitioners moved the High Court and obtained this Rule.

Babu Dwarka Nath Chuckerbutty (with *Babu Kali Kinkar Chakravarty*) submitted (*i*) that the facts do not justify sanction, (*ii*) that the Subordinate Judge had no jurisdiction to grant sanction inasmuch as his Court was not the Court to which an appeal from a decision of the Munsif does ordinarily lie; it is to the Court of the District Judge to which an appeal from a decision of the Munsif ordinarily lies, sec. 195 (7), Cr. P. Code, and sec. 21, cl. (2), Civil Courts Act.

Babu Akhil Bandhu Guha in reply.—Application was under sec. 115, C. P. Code, not under sec. 195 or 439, Cr. P. Code. High Court would not interfere unless there was a question of jurisdiction. The High Court has no power to interfere under sec. 195 (6) as no second appeal is contemplated by the section, *Joy Narain v. Upendra Narain* (8), *Sew Bollok Singh v. Ramdhin Bania* (9), *Ram Proshad v. Raghubar* (7), *Kali Prosad v. Bhuban Mohini* (10), *Hamijuddi Mondal v. Damodar Ghose* (4), *Salig Ram v. Ramji Ram* (11), *Mahomed Bhakku v. Queen-Empress* (12), *In re Chennanagoud* (13) and *In the matter of Bhup Kunwar* (14). As to Subordinate Judge's jurisdiction, all appeals from the decision of the Munsif must be preferred to the District Judge but the District Judge has power under sec. 24, C. P. Code, on his own motion, to transfer any suit, appeal or other proceedings pending before him to a subordinate Court competent to try or dispose of the same. The Subordinate Judge was quite competent to try this case under the Civil Courts Act.

The JUDGMENT OF THE COURT was as follows:—

In this case a Munsif dismissed a suit on a bond and the decree was upheld by the Appellate Court. An application for sanction to prosecute the Plaintiff for offences under secs. 463 and 471 of the Indian Penal Code was refused by the Munsif. From this order an appeal was preferred evidently to the District Judge: this appeal was heard by the Subordinate Judge who reversed the order of the Munsif and granted sanction. The Plaintiff obtained this Rule for setting aside the order of the Subordinate Judge.

It is contended by the learned Vakil for the Petitioner that the Subordinate Judge had no jurisdiction to make the

(8) 13 C. L. J. 216 (1903).

(4) 10 C. W. N. 1026 (1906).
(7) 13 C. W. N. 1038 (1909).
(9) 14 C. W. N. 806 (1910).
(10) 8 C. W. N. 73 (1903).
(11) I. L. R. 28 All. 554 F. B. (1906).
(12) I. L. R. 23 Cal. 532 (1896).
(13) I. L. R. 26 Mad. 139 (1902).
(14) I. L. R. 26 All. 249 (1903).

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order that he has made and on the merits that the order of the Munsif refusing sanction was a proper one and should not have been set aside as the Courts which decided the bond suit went upon the failure of the Plaintiff to prove his case. The learned Vakil for the Opposite Party contends that we cannot go into the second question as we have no jurisdiction to interfere under sec. 195 of the Criminal Procedure Code, and the Rule must be discharged, unless we uphold the first contention, in which case we may have jurisdiction under sec. 115 of the Civil Procedure Code. We shall deal with the first question first. Sec. 195, cl. (6) of the Criminal Procedure Code provides that "any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate." Cl. 7 provides that "every Court shall be deemed subordinate only to the Court to which appeals from the former Court ordinarily lie." Chap. III of the Civil Courts Act, which is headed as dealing with ordinary jurisdiction contains sec. 21 of which cl. 2 says that "save as aforesaid, an appeal from a decree or order of a Munsif shall lie to the District Judge." The saving is in respect of any provision to the contrary in any other Act and is not material in this case, as there is no suggestion that there is any such special enactment applicable to it. Cl. (4) of sec. 21 provides that the High Court may under certain circumstances allow appeals lying to the District Judge to be preferred to the Court of a particular Subordinate Judge. That also is not material as there is no suggestion that there is any such special order applicable to the present case. No appeal lay to the Subordinate Judge and he was therefore not the authority which could grant or revoke a sanction refused or granted by the Munsif. It is true that under sec. 24, cl. (*a*) of the Civil Procedure Code, the District Judge can transfer any suit, appeal or proceeding pending before him to any subordinate Court competent to try it but the Subordinate Judge was not competent to try this appeal as he was not the authority to which the appeal lay. The order of the Subordinate Judge was therefore incompetent.

As regards the second question there is some conflict of authority. The Allahabad High Court has held that under sec. 195, cl. (6), there can be only one proceeding by way of appeal from an order giving or refusing a sanction and as soon as the Appellate Court makes an order either way there is no further appeal: See *Emperor* v. *Serh Mal* (1), *Kanhai Lal* v. *Chhadammi Lal* (2). The Madras High Court has decided that an appeal lies to the High Court not only in cases where the first Court refuses sanction, and sanction is granted by the Court to which that Court is immediately subordinate, but also in cases where the first Court grants sanction and the sanction is revoked by the Court to which that Court is immediately subordinate: See *Muthu Swami Mudali* v. *Veeni Chetti* (3). The learned Judges differ from the Calcutta ruling in *Hamijuddi Mondal* v. *Damodar Ghose* (4), and agree with two subsequent Calcutta rulings; *Habibur Rahaman* v. *Khoda Bux* (5), *Girija Sankar* v. *Benode Sheikh* (6). The same point was raised in the case of *Ram Proshad* v. *Raghubar* (7), but the learned Judges, whilst

(1) All. W. N. for 1908, p. 102.
(2) I. L. R. 31 All. 48 (1908).
(3) I. L. R. 30 Mad. 382 (1907).
(4) 10 C. W. N. 1026 (1906).
(5) 11 C. W. N. 195 (1906).
(6) 5 C. L. J. 222 (1906).
(7) 13 C. W. N. 1038 (1909).

expressing an inclination in favour of the Madras view, supported as it was by some of the Calcutta cases, preferred to interfere under sec. 622 of the old Civil Procedure Code. It is not necessary, however, to pursue this question further as our view on the first question is sufficient to dispose of this Rule.

The Rule is accordingly made absolute. We make no order as to costs.

N. R. CHATTERJEA, J.—I agree with my learned colleague in making the Rule absolute.

Under sec. 21, sub-sec. (2) of the Bengal, N. W. P. and Assam Civil Courts Act, an appeal from a decree or order of a Munsif ordinarily lies to the District Judge and not to the Subordinate Judge. There is no suggestion in this case that there is any special order as provided for in sub-sec. (4) of that section under which appeals could have been preferred to the particular Subordinate Judge, who passed the order on appeal in the present case. Under sec. 22 (1) a District Judge no doubt may transfer to any Subordinate Judge under his administrative control any appeals pending before him from the decrees or orders of Munsifs. When an appeal transferred under sec. 22 (1) is withdrawn by the District Judge he may either dispose of it himself or transfer it to a Court under his administrative control competent to dispose of it. The question of competency to dispose of an appeal does not arise when an appeal is transferred in the first instance to a Subordinate Judge under sec. 21 (1), and it seems therefore that a Subordinate Judge is competent to dispose of any appeal pending before the District Judge and transferred by him to the former.

But under sec. 195, sub-sec. 6 of the Criminal Procedure Code, the power of revoking or granting any sanction given or refused, is given to the authority to which the authority giving or refusing it is subordinate and sub-sec. (7) provides that for the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie. There is no doubt that the District Judge is the only Court to which appeals from an order of a Munsif ordinarily lie. For the purposes of sec. 195, Criminal Procedure Code, therefore, a Munsif is not subordinate to a Subordinate Judge. A Subordinate Judge can dispose of any appeal transferred to him by the District Judge under sec. 21 (1) of the Civil Courts Act, but the power of revoking or granting sanction is given only to the Court to which an appeal lies. The power, therefore, cannot be exercised by a Subordinate Judge to whom an appeal does not lie, but who can only dispose of an appeal transferred to him by the District Judge.

In this view of the matter the other questions raised in this Rule need not be considered.

Rule made absolute.

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NOTES.

THE FOLLOWING INCIDENT NARRATED BY LORD Minto at a meeting held in the Caxton Hall in London would go to remove the erroneous impression that exists in the public mind that Mr. S. P. Sinha, the ex-Law Member of the Viceroy's Council, was an out and out supporter of the Press Bill. It is no longer an official secret now that the difference between him and some of his colleagues regarding some of the provisions of this measure and particularly on the question whether any appeal should be allowed to the High Court from the Magistrate's order of confiscation was so very keen that Mr. Sinha actually submitted his resignation the day before the Bill was to have been introduced in the Council. The attitude that Mr. Sinha had taken up then was indeed highly commendable as the question involved was one of principle. We must also say at the same time that Mr. Sinha acted quite honourably in withdrawing his resignation when he found that his resignation would prove embarrassing to his colleagues at the time of general alarm that followed the daring political crime that was committed within the precincts of the High Court and in the immediate neighbourhood of the Government House. It would appear that the support of the Press Bill was forced upon Mr. Sinha by stress of circumstances.

THIS IS WHAT LORD MINTO SAID WHILE PRESIDING at a meeting held under the auspices of the East Indian Association :—

"No man," said Lord Minto, "ever served me more faithfully than did Mr. Sinha. I will tell you a story about that gentleman. I was coming back one day from Barrackpore to Government House, when just as I reached home a letter was put into my hand. Before I could open it, my private Secretary came into my room. What he had to say was startling, for it was to the effect that a prominent Police Inspector had been assassinated within a stone's throw of Government House just an hour previously. My anxiety may be imagined. It was not lessened when I opened the letter in my hand. This was from Mr. Sinha regretting that he could no longer serve upon my Council, and begging that I would accept his resignation; he found himself unable to support the provisions of the Press Bill which was about to be introduced by the Government of India. This was a second and a shattering blow. And that night I had a big dinner party coming on at Government House! What was I to do? Two hours later I received a second letter from Mr. Sinha. When he had written his first letter, he had not known of the murder of the Police Inspector. He now desired to withdraw that letter The circumstances had altered his decision. He would not desert me. He would support the Press Bill. And some of you may remember what a magnificent speech he made in defence of that measure when it was introduced in Council. Now I call that patriotism It is the highest form of patriotism."

AFTER GIVING THE PROPOSED DRAFT RULES FOR the admission of advocates our careful consideration we would venture to suggest that the adoption of the new rules may be deferred until we have had an opportunity of judging the result of the Inns of Court Regulations regarding Indian students. Under these Regulations every Indian student who may desire to study for the Bar in England must either be a graduate of some Indian University or an under-graduate of some English University. It may be assumed that Indian under-graduates at the English Universities would not care to come away without degrees when they have once joined a University there. As for the graduates of Indian Universities they are given special concession at the principal English Universities both as to the keeping of terms as also in the matter of examinations. Any student who has passed the Intermediate examination at some Indian University in the first

division or who has taken honours in the B. A. or other degree examination or taken his M. A. degree is excused four terms and some examinations at Oxford and Cambridge. It would therefore be always to their advantage to join some University and to take a degree during the first two years of their residence in England. Then in the third year they usually study for the Bar and get called after keeping 12 terms.

THUS THE PURPOSES OF THE HIGH COURT DRAFT rules will ordinarily be met by the Inns of Court Regulations. The additional burden that is proposed to be cast on the Indian students by requiring them to study in some barrister's Chambers for a year before they can be admitted as advocates is, as we have already said, capable of colourable compliance by going to men who have no practice. If study in the Chambers of practising barristers is seriously contemplated one must not ignore the real difficulties in the matter. There are hundreds of students studying for the Bar in England. What guarantee is there that there would be the same number of practising barristers of position available or willing to take pupils in their Chambers. It would be very unfortunate if after the rule is passed, the Indian students meet with any difficulty in getting such men to take them to study in their Chambers. So we would venture to suggest that the Judges should first put themselves in communication with the Benchers of the Inns of Court to ascertain the names of the practising barristers who would be willing to accept Indian pupils. It would be very hard indeed, if any Indian student after getting called to the Bar should have to return without getting the opportunity of qualifying himself in this respect and be refused admission as an advocate of the High Court in consequence. In that case all his time, trouble and money will go for nothing and he will return to India without any prospect in life. In any event the rules should not be made final by the Hon'ble Judges before making all necessary enquiries on this behalf.

BRAHMINS AND CAPITAL PUNISHMENT IN HINDU INDIA.

[BY K. P. JAYASWAL, B. A. (OXON).]

The rule of law, (1) introduced as a weapon of the imperial system by the founders of the Mauryan Empire, sought to impose equality of all classes before law. The policy of legislation of the Brahmana Chancellor Kautilya essayed that the Brahmana be subjected to the same penal provisions as the Shudra, that the axe of the execution should not discriminate between the high and the low. The only point of inequality consisted in the fact that the Brahmana was to be punished with the greatest severity, as he stood at the highest rung of the social and intellectual ladder. (2) In other words, privilege was arraigned inversely before the bar of justice. This treatment of privilege and especially of Brahminical privilege could only be supported by Equity, it had no sanction from the Common law. The Common law had all along upheld the social division and its incidental privileges. The basis of inequality in that division had been punctuated by law for the sake of peace and order in the days when the Crown had not become all-powerful in society. But, under a throne, which was not only, to quote the words of Rhys-Davids, "the mightiest throne then existing in the world" but also could give birth to and justify the theory, "the Sovereign is the State," (3) it was possible to discard the petty policy of maintaining authority by upholding privilege and depressing the populace. The Government of Chandra Gupta was strong enough to afford an "impartial" administration of justice and to invert the position of privilege.

But after the Revolution which swept away the pietist Emperor and the Mauryan system from Pataliputra and the 'viciously valiant Greeks' under Menandisos out of India, this attempt at, what we may call, a judicial levelling by the imperialist legislation and the corner stone of its penal policy—*that no offender was to escape punish-*

(1) *See* 15 C. W. N. cclxxvi.

(2) For instance, a Brahmana was to be amerced four times what a Shudra would be for selling a free Hindu. (Artha. III, 12, 65, Cap. Law of Slaves). In cases of treasonous acts where a culprit was to be executed under an exceptional form of capital punishment, a Brahmana offender was to undergo the most ignominious one, *viz.*, that of drowning, (IV, 10, 86).

The inversion was uniform in all cases when prosecution was commenced, in the language of the *Mrichchhakatika*, 'according to (the rules of) the *Artha.* (shastra), the complaint being either entertained or rejected by the sole discretion of the judge,' as in modern law in all cases of crimes proper where the State (the *Artha.*, see 15 C. W. N. cclxxv, *n.* 5) was the prosecutor. But in offences where complaint, to quote the Judge's definition, was lodged 'according to the rules of the text, (*Vakya-anusarena*) and private parties (*Arthi-Pratoyarthi*) were required,' that is, in the cases which were analogous to civil suits, such as defamation and simple assault वाक्पारुष्य and दण्डपारुष्य, (*Artha.* III, 18, 19) the old consideration of the privileged social order was retained.

The former novel position of Kautilya was based on his penal theory that punishments, instead of being rigid like the fixed scales of the authorities, 'should be according to the magnitude of crime, that is to be passed having regard to the culprit and the crime.' (यथापराधः दण्डः) । *Artha.* III, 17, 41; पुरुषापराधविशेषेण दण्डविशेषः कार्यः । III.

(3) राजा राज्यमिति । *Artha.* VIII, 2, cf. L' etat c'est moi."

ment—(नास्ति अपकारिणो मोक्षः ; Arth. IV, 19), were loudly denounced as a baneful innovation by those who now invested orthodoxy with the prestige of the saviour of society. They preferred a claim that the Brahmana was absolulety exempt from capital punishment, that the penal equality as regards the Brahmana was repulsive to the spirit of the sacred common law (4).

The former law used to be that a Brahmana was to be branded on the forehead and then to be banished (Gautama Dharma Sutras, 10, 11, 47), banishment entailing forfeiture of property. This was quite in consonance with the penal theory of Hindu law which aimed at determent and had, therefore, invented a class of punishments which it called *chiefly-psychological* (Prayas-chittah) for heinous offences as murder. The culprits under punishment had to bear some sign to proclaim his deed, *e.g.*, a murderer of a woman to carry a human skull for so many years. (*Apastamba Dharma Sutras*, 2, 10, 27, 18 *seq.*) It was thus sought to cure criminal tendency. Brahmanas and non-Brahmanas were alike subject to psychological treatment. What was now claimed for the Brahmana amounted a total immunity from even ante-Mauryan provisions.

This was a claim of aristocratic privilege. The Brahmanas had come to form the real aristocracy of the Hindu society. They had been gratuitous educators of society (5), they had been gratuitous advisers to the State, they had been a check upon the Sovereign's arbitrariness. They had never kept themselves aloof from public affairs and public services. On the other hand they had existed, with characteristically aristocratic psychology, for the sake and service of the public. The belief is not correct that the Brahmanas did not fight in national crises. The Greeks under Alexander have borne testimony to their stout resistance. Over and above that they had ordained a self-denying regulation for themselves that they would never engage in any occupation which would bring riches to themselves: they had chalked out a life of poverty for the sake of the society they lived in. Their class had thus become the essential aristocracy in the Hindu society.

Aristocracies all the world over have claimed privileges, and our extraordinary aristocracy, the *aristocracy-in-poverty*, claimed an extraordinary privilege. The claim was extraordinary from the point of view of Hindu Law and not from that of the history of aristocracies. To concede to such a claim, embodied though it was in the great Manava Dharma Shastra, would have been to act in direct opposition to the spirit of Law. Hindu Law recognised social inequality but it was far from holding any one, even the King, above the law and immune from punishment.

But was the claim so forcibly urged by the author of the Manava Dharma Shastra allowed by the Hindu society? Or was the principle of penal equality which was based upon the juridical invention of equity surrendered at the orthodox command of the so-called Manu? We have evidence to declare in the negative in both particulars.

EVIDENCE OF THE MRICHCHHAKATIKA.

The Sanskrit play called the Mrichchhakatika is a work of about the first century of the Christian era (7). In the prelude it is stated that the object of the performance is to stage the course of politics, to exhibit the abuses in the administration of justice, to delineate a wicked character and to show the working of destiny, through the love-story of Charudatta and Basantasena of Ujjain (8). The last but one scene (9) brings on the stage a judicial trial with dramatic touches necessary for sustaining the respective characters of

(4) "Tonsure is ordained as capital punishment in the case of a Brahmana (culprit). Let it be life-ending in cases of other castes. Do not let a Brahmana be slain, whatsoever sinful deed he might have perpetrated. He should be banished unscratched from the State and (intact) with all his property. As there is nothing on this earth so contrary to the (spirit of Dharma as the killing of a Brahmana, the king, therefore may not even think of his execution."

मौण्डं प्राणान्तिको दण्डो ब्राह्मणस्य विधीयते ।
इतरेषां तु वर्णानां दण्डः प्राणान्तिको भवेत् ॥
न जातु ब्राह्मणं हन्यात् सर्वपापेष्वपि स्थितम् ।
राष्ट्रादेनं बहिः कुर्यात्समग्रधनमक्षतम् ॥
न ब्राह्मणवधाद्भूयानधर्मो विद्यते भुवि ।
तस्मादस्य वधं राजा मनसापि न चिन्तयेत् ॥

(Manu VIII, 379-81).

(5) As late as the compilation of the ethico-political fable book, the *Panchátantra* (translated into Pahlavi about 500 A. D.), we find the Brahmana Vishnusharma saying proudly to the King in reply to the royal promise of remuneration in the shape of a fief, Your Majesty, I shall teach the prince, but I don't sell learning. (राजन् हम् विद्याविक्रयं करोमि Panch. Introduction).

(7) Regarding the above date of the work there has been practically a unanimous verdict of European Sanskritists, and it is confirmed by a recent discovery. Excavations near Allahabad have brought to light along with other remains of the first century before Christ a number of clay-carts as described in the drama and from which it takes its title. Journal of the Roy. Asi. Society, p. 135, 1911, also the mention of *Vásudeva* in Act IX probably refers to the dynasty of Kanva Vasudeva (70 B. C.—25 B. C.).

(8) तयोरिदं सत्सुरतोत्सवाश्रयं
नयप्रचारं व्यवहारदुष्टताम् ।
खलस्वभावं भवितव्यता तथा
चकार सर्वं किल शूद्रको नृपः ॥ ७ ॥

(9) A translation of this scene has been published at p. ii of this volume.

the *dramatis personae.* Two legal points of paramount importance stand forth therein. The first and the foremost is the plea of defence based on the alleged privilege of the Brahman caste and the second is the non-allowance of the ordeals. It is very significant that after the finding of the Judge as to the guilt of the accused and the conviction, the Judge refrains from passing any sentence and he submits his finding to the "Governor" (9) for passing a suitable sentence that according to the authority of "Manu" the accused Brahmana ought to be only banished with all his property intact, and that he was not to be executed (10). The Kshatriya Governor however does not only (11) disregard the opinion of "Manu" but directs an ignominious and exemplary form of capital punishment, it being the murder of a woman. Upon this Charudatta complains bitterly that he has not been allowed any of the ordeals and, though a Brahmana, he was going to the saw-gullotine (क्रकच). He hints at a revolution (12) one of the reasons for which was what he thought the bad administration of law, which did not recognise the exemption of the Brahmana from capital punishment (13).

It is thus clear that judicial equality of the Maurya empire outlived the re-action of the Manava Dharma Shastra and was existing, though greatly resented, in the first century after Christ. It is also evident that the battle mainly raged round one point alone, and that was the question of capital punishment.

The question was for a time decided shortly after when the school of common lawyers had to adopt a new standard of legal norms which they embodied in a treatise under the title of the *Yajnavalkya Smriti*, and which have since then remained in actual life the most accepted authority on Hindu law. *There the Brahmana is no more exempted from capital punishment.* The old punishment of branding and banishment was retained only as a special mode of punishment for him in cases of theft which did not entail capital punishment (14). Manu's code on this point of privilege, as on many others, was unmistakably superseded. And this must have been done by the Brahmanas themselves, or at any rate with their approval. In other words, they relinquished their claim of privilege.

Two centuries later, however, during the great Brahmanical revival following tremendous political exertions on the part of the Hindu society, we find the privilege recorded in emphatic terms in the *Narada Smriti.* Whether they were put into practice, or remained only a pious opinion on paper cannot be decided for want of evidence. The faint repetition of the exemption in Brihaspati tends to create doubts as to its actual observance in the sixth and the seventh centuries.

The actual change might have been in the fourth and fifth centuries. In explaining the attitude of the *Narada Smriti* with regard to the exemption of the Brahmana from capital punishment we have to notice a special factor which is highly important in the history of the penal jurisprudence of Hindu India. Just at the time the speculative mind of the Hindu was being troubled with the question whether capital punishment as such was moral and desirable. In the Shanti Parva of the Mahabharata which bears abundant proof of being a composition of the period between the third and the fourth centuries, a discussion on the subject is preserved in Ch. CCLXVII (15).

The discussion starts with the stock adverse argument that if capital punishment was abolished, "all distinction between virtue and vice would disappear. '*This is mine*,' '*That is not his*,' distinctions like these would prevail no more,' rights and obligations would be in abeyance, and 'society would come to an end.'" The fallacy is obvious: the argument assumes that total cessation of punishment has been premised. And the reply opens with an emphasis on the desirability of punishing offence. But the punishment should be inflicted "without destroying the person" of the offender. In support of this four reasons are advanced :

(9) The ruler in the Mrichchhakatika is sometimes called 'Governor (राष्ट्रिय) and sometimes King. Ujjaini was one of the seats of the provincial Governors of the Mauryas. In the decadence period the province of Aventi seems to have become independent but the title *Rashtriya* of the Maurya Governors still survived as a special designation of the ruler.

(10) Mrichcht., Act IX, Verse 39.

(11) अयं हि पापो विप्रो न वध्यो मनुरब्रवीत ।
राष्ट्रादस्मात्तु निर्वास्यो विभवैरक्षतैः सह ॥
Cf Manu, VIII, 380.

(12) The popular revolution which follows has been regarded by scholars as a historical fact. See Wilson's remarks, Hindu Theatre.

(13) It is noteworthy that the caste privilege of the Manava Dharma Shastra is advanced only in respect of capital punishment, otherwise it is totally disregarded, for instance, in setting up the Shudra Aryaka on the throne and in the treatment accorded to him while in a humble situation. Orthodoxy prohibited social equality of the Shudra with the Brahmana, but despite that Charudatta seated him next to himself in his charriot and addressed him as he would address a Brahmana. Orthodoxy detested a Shudra ruler, but the Brahmana bowed cheerfully to the authority of the newly anointed Aryaka.

(14) "Having caused restitution of the stolen property, the king shall cause the thief to be punished by different modes of corporal punishment. A Brahmana guilty of theft should be branded and banished from his kingdom." Yajna. II, 270 (Mandalik's trans.) See II, 273—75. where cases of theft are detailed and punishments from death down to fines prescribed.

(15) Once more I am grateful to my friend Mr. P. Chaudhuri for drawing my attention to this important discussion.

(i) *Capital punishment operates hardship upon the innocent dependents.* "By killing the wicked, the king kills a large number of innocent men; (for instance) by killing a single robber, his wife, mother, father, children, (etc.) are (sometimes) killed." (10).

(ii) *The offender may be capable of improvement.* "Sometimes a wicked man is seen to imbibe right mode of life." (11).

(iii) *Capital punishment takes away the possibility of good membe s being added to society.* "It is again seen that good people do spring from wicked ones."(11).

(iv) *The historical reason.* "The offender should not be uprooted, for it is not in consonance with the traditional law" (16). The end of punishment which the traditional law had in view is assumed to be a *mental cure* "and for mental cure, non-capital punishments are prescribed (in ancient law): men al pain, imprisonment, disfiguring etc. (some readings also inclu le *confiscation*)." (12-13)

This speculative view of the time greatly explains the granting of the privilege of exemption in the *Narada Smriti* after the question had once been set at rest by the *Yajnavalkya.* By the concession a high ideal of penal jurisprudence was to be realised on a limited scale within comparatively safe bounds, and without running the risk of an all-round experiment embracing all classes of men. At the same time the estate whose political and social utility and importance made its preservation a desirable thing, would be insured against the poten ial loss of future good members. It is on the utility theory that the *Institutes of Narada* base the claim of the exemption—"for these two (a ruler and a Brahmana) are sustainers of society." Narada, XV XVI, 20 And the utility was more of the political than of the social nature. It was under their guidance that an all-India empire was founded and fostered to be the most prosperous and the longest lived of all the Indian imperialisms yet known to history. It was one of them who two centuries later following the facts of the history of his times proudly defined India as the land 'where the intruders in spite of repeated attempts could not permanently stay.' यत्र म्लेच्छा आक्रम्याक्रम्य न स्थातारो भवन्ति । (Medhatithi commenting on the descriptions of Aryavarta in Manu). The political importance of the Brahmanical estate in Hindu society had been immense and aristocratic. In a society where economic struggle was almost absent and consequently when the masses could not rise to a high level of social responsibilities, it was deemed desirable even in Europe as late as the days of Machiavelli, to have and preserve the aristocratic element as a source of national strength. The Hindus of Hindu India therefore ultimately conceded the privilege to this unique aristocracy, the like of which has never been known in the history of the world.

(16) न मूलघातः कर्त्तव्यो नैष धर्मः सनातनः

THE TRANSFER OF OCCUPANCY HOLDING—WHETHER VOID OR VOIDABLE.

Is the transfer of an occupancy-holding void in the absence of a local custom recognising such transfer? Or, is it only a voidable transaction so that unless the landlord intervenes the right of the transferee is a good one?

In the case *Hari Das Bairagi* v. *Uday Chandra Das Bairagi*, reported in 12 C. W. N. 1086, Mr. Justice Doss maintained that the transfer of a so-called non-transferable occupancy-holding was not altogether void. "It is almost elementary," said his Lordship, "that if a transaction is void no right in favour of either party can grow under it." "It is not necessary to set it aside." "It is incapable of being confirmed or ratified." If however the transaction is voidable it is valid and binding upon the parties until it is avoided. "It is perfec ly clear upon authorities," continued His Lordship, "that the transfer of an occupancy-holding which is not transferable by local custom or usage may be validated by the consent of the landlord (*Radha Kishore Manikya* v. *Sreemati Ananda Priya*, 8 C. W. N. 235, *Jognu Prosad* v. *Poshnu Sahoo*, 8 C. W. N. 172, *Sreemti Sibosundary Ghosh* v. *Raj Mohun Guha*, 8 C. W. N. 214)." His Lordship meets a possible contention that such consent on the part of the landlord may be regarded as a new settlement in favour of a transferee, by pointing out that the supposed new settlement would not vest in the transferee any right of occupancy, it would create a holding in the transferee for the first time. Therefore, when the landlord recognised a transfer he recognised it as the transfer of an existing right of occupancy.

Whatever views his Lordship Mr. Justice Doss might have expressed in the above case, he seems to have changed his opinion subsequently. For, in the case of *Sreemutty Agarjan Bibi* v. *Panaulla* (14 C. W. N. 779) he agreed with Sir Lawrence Jenkins, C. J., in coming to the conclusion that the transferee of a share of one of several persons jointly owning an occupancy-holding could not claim joint possession of the holding against his transferor's co-sharer. The judgment was apparently based on the ground that the alleged transfer was altogether void and the purchaser acquired no right under it. Their Lordships remarked, "The question involved has been somewhat obscured in more recent times" and therefore looking into the history of the law on the subject from the Regulations down to the present time, they expressed themselves in the language of Phear, J.

(in the case *Narendra Narain Roy* v. *Ishan Chandra Sen*, 22 W. R. 22) that the right of occupancy was a personal right and could not therefore be transferred. Their Lordships went further and referred to the case *Tara Prosad Roy* v. *Surja Kanto Acharya* (15 W. R. 152) and remarked that it was instructive to note the view expressed therein, *viz.*, that even if the zemindar consented to the transfer the transferee would thereby merely acquire a new jote on the same term as the original tenancy.

Now, if this be the correct interpretation of the law one is bound to hold that a usage of transferability of occupancy-holding can never grow up in a locality where there was previously no such custom. For, in order that the usage may be built up each individual transfer which would go to establish that usage must be rendered effective without the landlord's consent somehow And how can that possibly be unless the transaction be a voidable one?

But in the case *Buzlul Karim* v. *Satis Chandra Giri* (15 C. W. N. 752), Mr. Justice Mookerjee expresses an opinion that there may grow up a usage of transferability where there was originally none. "It will be observed," said his Lordship, "that in the case of usages of transferability of holdings they can grow up only by the acquiescence in the first instance of the landlord himself; they are at first matters of choice with him but may acquire an obligatory element or binding force after he has acquiesced in the conduct of his tenant for a sufficient length of time." But how can the acquiescence of the landlord render valid a transaction which is void *ab initio*? Apparently Mr. Justice Mookerjee seems to consider the transfer of an occupancy-holding as a mere voidable transaction.

Thus the judicial decisions are in conflict with each other on matters of principle. Under the circumstances it seems to be very desirable that the whole question should be threshed out and settled by a Full Bench.

N. CHANDRA.

Reviews.

THE INDEX OF CASES, 1836—1911. Parts I and IV. Privy Council and English Cases. *By S. Srinivasa Aiyar, B. A., B. L. Madras: Printed by Temple & Co., 332, Thumbu Street.*

The plan of the present compilation is somewhat original. A case generally decides a number of points and may be cited in later decisions with reference to one or other of these points. The existing Indexes give bare lists of these later cases, so that much time is lost to the practitioner in finding out whether all of them deal with the particular point upon which he may be looking for authorities. In the present Index, so far as the Privy Council cases are concerned, they are analysed and the points decided in them separately set out and the subsequent cases noted in their appropriate places with reference to the point or points upon which they have a bearing. With reference to the English cases, the orthodox plan is followed. The compilation is decidedly an improvement upon other compilations of its genus, and we shall be glad to see it completed.

THE DIGEST OF INDIAN CASES. The Annual Digest, 1911. With a collection of cases overruled, followed, dessented from and referred to. *By S. Srinivasa Aiyar, B. A., B. L. Madras: Printed by Thompson & Co., at the Minerva Press, 33, Broadway. 1912.*

No lengthy notice is necessary in the case of an annual publication which has appeared with unfailing regularity for more than 12 years. We have to note, however, the increase in bulk of the present compilation showing that a larger number of reports have been laid under contribution in preparing it. As we have noticed before, Mr. Aiyar's Digests are in many respects models of what they should be. Mr. Aiyar has recently consolidated his Annual Digest for the years 1901 to 1910, so that the present compilation is the first annual publication following it.

A SELECTION OF LEADING CASES, illustrating the Criminal Law for the use of students. *By A. M. Wilshere, M. A., LL. B. London: Sweet & Maxwell Ld., 3, Chancery Lane. 1912.* 6s. 6d.

This collection of cases is prepared as a companion volume to "The Elements of Criminal Law and Procedure" by the same author, and the selection and arrangement of cases follow the plan of that work. Leading cases on evidence bearing on the law of Crimes have been excluded, as these have been dealt with in Mr. E. Cockle's "Leading Cases on Evidence" belonging to the same series which has been already reviewed in these columns. The collection, we need hardly say, is bound to be of great use to students, and practitioners also will find it very useful.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH.—*In re Walker and another.* Before JUSTICES DARLING, PICKFORD AND BANKES. 28th March 1912.

Adoption of a child—Court's power to deprive the parents of the custody if for the benefit of the child.

This was a case by way of an appeal and related to the custody of a male child born of an unmarried woman. The mother gave her few months' old baby to the Walkers in adoption. The grandmother of the child gave £200 to them for support without the knowledge of the child's mother. Seven years afterwards the child's parents went through the ceremony of marriage. Their circumstances also improved and they applied to the Walkers for return of the child. But the Walkers refused, and the case was tried by Mr. Justice Hamilton who refused to order that the child should be given up. On the present appeal it was contended on behalf of the parents that their parental right came first and in the absence of proof that the parents were in any way unfit for the custody of the child they had a paramount right. The Court affirmed the order of the Court below. In the course of his judgment MR. JUSTICE DARLING said :—

The persons with whom the boy was living had had him for ten years, and the evidence was that, as was natural, he had become much attached to them. Until these proceedings began he did not know they were not his real parents.

The boy's own parents lived together for seven or eight years after his birth without being married, on the ground that they could not afford to marry. It was now said that his natural mother would come into a half share of £17,000 on the death of his grandmother; but he (Mr. Justice Darling) was by no means sure that it would be to the benefit of the boy to bring him up in the expectation of coming into money rather than bring him up to a way of earning a respectable living for himself, and if the natural mother were as fond of the boy as she said she was, she could always leave him the money, even if he were not in her custody.

Mr. McCall had contended that the mother's right was paramount, but from the cases he thought that, as laid down in *Regina* v. *Nash*, 10 Q. B. D. 455, the real question must always be what was best for the benefit of the child.

His Lordship as a result of the evidence said that he felt it would not be for the benefit of the boy to remove him from his present home.

Messrs. McCall, K. C., and McCall for the parents.

Messrs. Pollock, K. C., and Tomlin for the foster parents.

B. D.

KING'S BENCH.—*Curtis* v. *B. U. R. T. Company, "Ld."* Before MR. JUSTICE PHILLIMORE. 9th March 1912.

Wrongful dismissal—Breach of contract—Waiver.

This action was brought to recover damages for wrongful dismissal. The Plaintiff was engaged by the general manager of the Defendant company to act as its traffic manager for a period of seven years, and before the expiration of that period he was dismissed on three months' notice.

The company contended that the general manager had no authority to bind them for so long a period, and they also pleaded that there was no sufficient written contract to satisfy the Statute of Frauds, and alternatively, that after receiving notice to leave the Plaintiff attended a meeting of creditors of the company and approved a deed of arrangement.

The jury found that the general manager had authority to make the seven years' agreement and awarded £225 damages. On the points of law raised by the Defendant, MR. JUSTICE PHILLIMORE observed :—

The only thing which the Defendants disputed was the right of the general manager to commit them to a seven years' engagement. They took the point under the Statute of Frauds, that no date was mentioned in writing at which the engagement was to begin or to end. The Plaintiff had already been in their service in another capacity, and the letter offering him the new engagement concluded with the words "acceptance of the above will oblige"; and to that the Plaintiff replied accepting the terms in their entirety, and saying he would start "as from now" in his new employment.

In his opinion there was a continuing offer of immediate employment, which offer was accepted from the date of the letter of acceptance; and the cases of *Marshall* v. *Berridge* (19 Ch. D., 233) and *Re Alexander's Timber Company* (70 L. J. Ch., 767) relied on by the Defendants did not apply.

As to the other defence raised, ought the Plaintiff to have a claim under the deed of arrangement for breach of the contract? The correspondence indicated that when he was told he must go he elected to treat the notice as a present breach of the contract, and his staying on for three months and receiving salary during that period was an arrangement for the mutual convenience of both parties and was without prejudice. The cases of *Hochster* v. *Delatour* (2 E. and B., 678) and *Frost* v. *Knight* (L. R. 7 Ex., 111) were a little difficult to apply, as they both related to a refusal to begin contractual relations rather than to continue them, but the principle must be the same. The Plaintiff was entitled to treat the notice as a present breach, though he was not bound to do so, *Avery* v. *Bowden* (5 E. and B., 714), Anson on Contract (12th Ed., p. 320)—and in his opinion the Plaintiff had so elected to treat it, and he should therefore have put in a claim for the breach under the deed of arrangement. As he had omitted to claim he was now barred—*Re Midland Coal Company* (1895, 1

Ch., 267)—and the verdict and judgment must be entered for the Defendants.

Messrs. Salter, K. C., and Mears for the Plaintiff.

Messrs. Shearman, K. C., and Schiller for the Defendants.

B. D.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN. LORD ATKINSON. LORD SHAW. LORD MERSEY. 1912, 23, April.	SURENDRA NARAYAN SINGH, Appellant, Petitioner, *v.* MAHARAJ BAHADUR SINGH and ors., Respondents.

Privy Council, appeal to—Restoration of appeal dismissed for default, application for.

This was the Appellant's petition for restoration of an appeal which had been dismissed for non-prosecution. The facts stated in the petition were briefly as follows :—

The Petitioner was the Plaintiff, and the Respondents were the Defendants in Suit No. 169 of 1905 in the Court of the Subordinate Judge of Purneah, which suit was dismissed on the 23rd July 1906. The Petitioner appealed against the decision of the Subordinate Judge to the High Court of Judicature at Fort William in Bengal, and the appeal was dismissed by the High Court by a decree, dated the 8th April 1908. The Petitioner applied to the High Court for leave to appeal against the decree, and leave was granted by an order, dated the 13th July 1909. The record of the appeal was transmitted to the Registrar of the Privy Council, and was received by him on the 26th day of June 1911. On the 14th November 1911 the appeal was dismissed for non-prosecution. The Petitioner alleged that he was not aware of such dismissal till on or about the 19th December 1911, when the appeal was placed on the Peremptory Board of the High Court for formal disposal, in accordance with a letter from the Registrar of the Privy Council intimating that the appeal had been dismissed as aforesaid. He further pleaded as an excuse that he was under the belief that notice from the Privy Council of the arrival of the Record in England would be served on him, and that he need take no steps to prosecute the appeal till such service of notice.

Mr. Eddis who appeared in support of the petition relied upon his client's affidavit. But their Lordships rejected the petition with costs without calling upon

Mr. Ross who appeared for the Respondents.

B. D. *Application refused.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and CARNDUFF, JJ. APPEAL FROM ORDER No. 574 OF 1911. KENARAM AKULI, Defendant, Appellant *v.* SRISTEDHAR CHATTERJEE AND OTHERS, Plaintiffs, Respondents. 18th April 1912.

Water, overflow of, damage by—Defendants not actively contributory, if liable—Damnum sine injuria.

Plaintiff brought this suit for recovery of damages and for a permanent injunction on the allegation that a tank called Duttaband belonged to a third party, that the Defendants' land was on the north of the northern embankment of the said tank and that the Defendants' land which was high had been made low and culturable and the water of the Dattaband which overflowed the bank fell into Defendants' land and rushed into Plaintiff's and caused damages. The defence was that the bank of the Dattaband was of the same height as before, that the *mohana* of the said tank had been silted up and the water therefore overflowed the banks and fell into Defendants' land and flowed into Plaintiff's by natural course, and the Defendants were not liable for any damage. Both the Courts below found that the northern bank of the Dattaband was of the same height as before and Defendants' land was not on any higher level than the bank of the tank and the water overflowed by the silting up of the *mohana*. The first Court dismissed the Plaintiff's suit on the ground that the Defendant was not liable for any loss on Plaintiff's lands but the Court of Appeal below held that the Defendants had every right to convert their *danga* land into culturable land but they must erect an *ail* between their land and the Plaintiff's land in order to prevent water passing into Plaintiff's land from their land and remanded the case for trial of other questions not decided by the 1st Court Against that order the Defendants appealed.

Held—That the Plaintiff was not entitled to any damages or injunction in this case. The Defendants had not raised any artificial structure for storm water on their own land nor had they forced any water on Plaintiff's land, and no legal rights had been infringed, L. R. 10 Ex. p. 4; 28 Law Times 836 and 7 H. L., p. 349 followed. L. R. 3 H. L, p. 330 distinguished.

Babu Kshetra Mohun Sen for the Appellant.

Babu Bepin Behary Ghose II for the Respondents.

A. T. M. *Appeal allowed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 639 OF 1910.

CHAUDHURI, J.
1912,
23, April.

KAMINI DASSEE
v.
KRISHNA CHANDRA MUKERJEE.

Purdanashin *lady, improvident gift by—Gift to priest—Fiduciary relation—Suit to cancel gift—Onus on Defendant, extent of—Independent advice, solicitor's duty regarding—Solicitor if should act for both parties.*

Where a purdanashin *lady with very slender means made a highly improvident gift to her priest,*

Held, *in a suit by the lady to set aside the deed of gift, that for the purpose of discharging the onus that lay on the Defendant to prove the entire* bonâ fides *of the transaction, it was not enough for him to prove that the document had been read by an attorney and explained to the lady and that the attorney had explained to her that by it her interest in the property would cease and it would become the Defendant's. He must show that the whole of the circumstances were present to her mind and that the intention to give was really her own voluntary act.*

An attorney acting for both parties in such a transaction places himself in a very false position.

An attorney called in to advise the donor in such a case should be independent of the donee in fact and not merely in name.

A solicitor in such a case does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out a particular transaction. He must also satisfy himself that the gift is one that is right and proper for the donor to make under all the circumstances and if he is not so satisfied his duty is to advise his client not to go on with the transaction and to refuse to act further for him if he persists.

POWELL *v.* POWELL (1), WRIGHT *v.* CARTER (4) *followed.*

In re COOMBER (2) *distinguished.*

Suit for a declaration that a deed of gift executed by the Plaintiff in respect of 13, Mullanga Lane, is null and void.

Plaintiff was a *purdanashin* lady being the widow of Durga Charan Soor who died without any issue male or female. The Defendant's father was Giris Chandra Mookerjee, who was the priest of Durga Charan Soor, and the Defendant himself since his father's death had been the priest of the Plaintiff.

The suit was brought on the allegation that the Defendant took advantage of her age, deafness, infirmity, and helplessness and that she was fully dominated by the Defendant who acted in violation of the trust reposed in him in having the deed executed by her. It appeared that after Durga Charan Soor's death the Defendant came to reside close to Plaintiff's house and used to look after her and her mother.

The deed of gift which was drafted on the 9th July 1908 was explained to the Plaintiff in the house of one Khettra Mohan Bhattacherjee, a neighbour of the Plaintiff and a friend of Durga Charan Soor, deceased. The Plaintiff approved of it and requested an Attorney, Babu Dwijendra Mohan Ghose, to complete the draft. On the 15th July 1908, the Plaintiff called at the house of Babu Dwijendra Mohan Ghose when the deed was again read over and explained to her and she executed the same. The deed was also executed by the Defendant as accepting the gift. The document was registered on the 16th July 1908. The Plaintiff's prayer was that—

(1) [1900] 1 Ch. 243.
(2) [1911] 1 Ch. 723.
(4) [1903] 1 Ch. 27

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(1) The deed of gift be declared null and void.

(2) That the Defendant be ordered to return to the Plaintiff all the documents.

(3) That an injunction be issued restraining the Defendant from dealing with the property in any way whatever, pending the final decision of the suit.

Mr. Pugh (with him *Mr. G. P. Roy*) for the Plaintiff.

Mr. N. Sircar (with him *Mr. C. C. Ghose*) for the Defendant.

[CHAUDHURI, J.—Asked how far delivery of possession was necessary to validate a gift.]

Mr. N. Sircar.—Secs. 123 and 129 of the Transfer of Property Act abrogates the rule of Hindu Law which necessitates delivery of possession to complete a valid gift. *Dharmodas* v. *Nistarini* (8), *Bai Rambai* v. *Bai Mani* (9).

Mr. Pugh (for the Plaintiff) submitted that in such a case it is the duty of a solicitor independently advising an intending settlor to protect her against herself and not merely against the personal influence of the donee in the particular transaction, and if his advice is not accepted he should decline to act for the intending settlor. Reliance was placed on the passage in the judgment of Lord Justice Farwell in *Powell* v. *Powell* (1). He referred to the case of *Huguenin* v. *Basely* (6), and submitted that it is for the Court to inquire whether all that care and providence was placed round the donor as against those who advised her which from their situation they are bound to exert on her. He further submitted that if any authority is needed, reference may be made to the judgment of Lord Justice Vaughan Williams in *Wright* v. *Carter* (4) and to May on Fraudulent Dispositions of Property, at p. 476, *vide* also *Mannu Singh* v. *Umadat Pande* (10).

Mr. N. Sircar (for the Defendant) submitted that the duty extends only to explaining the contents of the documents and to see that she understood the effect of it. It is not incumbent on the solicitor to have warned the lady against executing a deed which seemed to him improvident by saying "If I were you I would not do it"—this being no part of the attorney's duty. *In re Coomber* (2).

The JUDGMENT OF THE COURT was as follows :—

CHAUDHURI, J.—This is a suit brought by a Hindu *purdanashin* lady to set aside a voluntary deed of gift in respect of 13, Mullanga Lane, which she had executed on the 15th July 1908, in favour of the Defendant. The case made by her in the plaint is that the Defendant "taking advantage of her age and infirmity and helpless condition obtained from her this deed of gift which she executed without any independent advice, being fully dominated by the Defendant and in violation of the trust and confidence reposed in him."

The Defendant is the son of her husband's priest and he has also been her priest since his father's death. The Defendant accepted the position that the onus lay upon him to show the entire *bonâ fides* of the transaction, it being conceded by him that there was fiduciary relationship between himself and the Plaintiff. The Plaintiff's husband, Durga Charan Soor, died in June or July 1906.

(1) 1 Ch. 243 at p. 246 (1900).
(6) 14 Ves. 273 at p. 300 (1807).
(8) I. L. R. 14 Cal. 446 (1887).
(9) I. L. R. 28 Bom. 234 (1899).
(2) [1911] 1 Ch. 723.
(4) [1903] 1 Ch. 28.
(10) I. L. R 12 All. 523 (1890).

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This property did not come to her through her husband, but it had been given to her by her father's sister from her own moneys, the property being purchased in the Plaintiff's name. This house was, therefore, her *stridhan* property, and she held it in her own right. There is no question that she had a right of gift, if she chose to exercise it. Her husband had left him surviving some nephews, brother's sons, who did not live in Calcutta, except one of them, who stayed in the house of the Plaintiff and another who used to come there from time to time. These persons were not her heirs. There has been a suggestion that the husband had desired the Plaintiff to provide that after her death the property should go to the nephews, but that the Plaintiff had declined to make any such provision. She however says that she intended to make this property *debutter* and her husband's nephews were to be *shebaits* after her death and she was to be the "shebait or Malik" during her life-time. At the time of her husband's death, her mother was alive. The mother lived with the Plaintiff and it is said that it was her wish that Plaintiff should make a gift of the house to the Defendant. The Defendant says that he had been told by the Plaintiff that her mother had taken her to the Jagganath Temple at Puri and made her swear in the temple that the property was to be made a gift of to the Defendant. This story, however, the Plaintiff denies. Her version is that he had, on one occasion after the death of her husband and also some little time before the execution of this deed, taken her to a room in her own house in Mullanga Lane where she used to keep a Lachmi Thakurani and made her swear that this property was to be given to the Defendant. There is direct contradiction with regard to this matter, and it is difficult to decide which of the two versions, or if either of them is true. It may however be inferred from what has been said by them that she considered it would be a meritorious or religious act to give the property to her priest. She had been so told by the witness, Khettra Mohan Bhattacherjee, to whom I shall have to refer later. The Plaintiff's mother died on the 15th April 1908 shortly before the execution of the deed. That the Plaintiff was in mental distress at the time is quite certain, and it also appears that she was not in good health. Her age was then about 60 years and she had two great bereavements within two years. It was after the death of her mother, that she made up her mind to make a gift of this property to the Defendant, *firstly*, because it is said she did not desire that the property should be touched by her husband's nephews and, *secondly*, because she herself was anxious to go away to a holy place and live on such small resources as she had, settling this property permanently upon the Defendant and seeing it secure in his possession and his ownership of it "made pucca." It is also alleged that the Defendant was the *bhikshaputra* of the Plaintiff. The Defendent says that when he was spoken to by the Plaintiff with regard to this matter, he desired that she should send for a friend of the family, one Khetra Mohan Bhattacherjee, who has been examined as a witness in this case. Khettra Mohan says that he was consulted by the Plaintiff, and pointed out to her that she had not very much to live upon, and if she made over this property to the Defendant he might turn her out, and she had no other place of residence, but she insisted upon making the gift and he

thereupon took the title-deeds from the Plaintiff to the Attorney, Dwijendra Mohan Ghose. This happened on or about the 1st July 1908. The attorney has been examined in this case, as also the attesting witnesses with the exception of one Ashutosh Banerjee who is dead and also one Harinath Banerjee who identified this lady at the Registration Office. The document is in the English language, which neither the Plaintiff nor the Defendant understands; but we have the evidence of the Attorney that he explained this document to the lady at the time of the execution and that before the execution he had read over the draft and explained it to her. He says he also told her that by making the gift she would "no longer have any interest in the property" but that it would become the Defendant's. This the lady denies. The lady is hard of hearing and it may be that she did not understand, but I certainly give credence to the evidence of the Attorney in this matter. He has given his evidence in the fairest possible manner. There is nothing to be said against him so far as the actual explanation of the document is concerned. But it is not possible to dispose of this case upon that alone. That evidence is not sufficient to discharge the onus which is upon the Defendant.

Now this gift is undoubtedly of a highly improvident character. It must be held upon the evidence that the lady has very little property except this house. It is her only valuable property. It afforded her shelter and brought her also an income. The evidence of the Defendant on this point is, that he had understood from her that apart from the house, she "had kept Rs. 1,200" with a tenant of hers of the name of Srikrishna Mukherjee, that she had also some other money but that he did not know the amount and that she had also some gold ornaments, of what value he had no precise knowledge or information. Except what the lady had herself stated, he had no personal knowledge of her exact financial position. I do not think he has been candid in his statements and it seemed to me that he attempted to exaggerate what the lady had. He admitted that the lady had given his wife a portion of her gold ornaments. He said he did not know how the *sradh* expenses of her husband and mother were met. His witness, Khettra Mohan Bhattacherjee, says that he came to know from the lady that she had a sum of Rs. 1,200 in deposit with Srikrishna Mukherjee and that she had also some other money and ornaments. He was inclined to exaggerate the value of the ornaments, he first used the expression "bahumulya," meaning "of great value"; but subsequently stated that the value was about Rs. 2,000. Even taking the whole of this evidence as true it shows that the resources of the lady are very limited and the substantial property she has is the house. It has also been proved that the lady has parted with some of her ornaments, she made a gift of some of them to the Defendant's wife and she seems also to have sold a portion for defraying the *sradh* expenses. Both she and Srikrishna Mukherjee deny that the sum of Rs. 1,200 is in deposit with him. The house was for her very valuable as she lived in it and also because it brought her an income of Rs. 19 a month. She had not to pay house rent and from the income derived from it she could manage to live. To make a free gift of this house, which left her without a roof overhead, and deprived her of a permanent source of

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income, must be called improvident. A gift of this character, specially for an old lady who has nobody to look after her, must be called extremely improvident. The case therefore is that of an old *purdanashin* lady with very slender means making an improvident gift to a person who was her priest and in a fiduciary relationship to her. To uphold a gift of this character would require strong evidence showing that the whole of the circumstances were present to her mind, that the intention to give was really her own voluntary act. I need only refer to one or two cases which enunciate the principle that it must be shown by the donee that the donor was in such a position as would enable her to form an absolutely free and unfettered judgment and in particular had independent and competent professional advice. Dwijendra Babu's services as an Attorney were secured, but it is difficult to say what his position was in this matter. Was he the attorney for the lady, or was he the attorney for both? No other attorney seems to have acted for the Defendant. The instructions had originally come from Khettra Mohan Bhattacherjee, said to be a friend of the Plaintiff's husband, but he was the teacher of the Defendant and had himself officiated as the Plaintiff's priest in the absence of the Defendant or his father. I do not think it would be an unjustifiable assumption that Dwijendra Babu acted for both the parties. If he did so act, he placed himself in a false position, because the interests of the two persons were adverse, and although I entertain great respect for him, yet it seems to me to be difficult for any one to do his duty by two such parties in a transaction of this character. The position of an attorney under these circumstances is very clearly set out in *Powell* v. *Powell* (1). Justice Farwell in that case says "a solicitor who accepts such a post puts himself in a false position if he acts for both. He owes a duty to both to do the best he can for both. But the Court requires that the donor should be placed in as good a position as if he were in fact emancipated. The solicitor, therefore, must be independent of the donee in fact and not merely in name, and this he cannot be, if he is a solicitor for both." But I am unwilling definitely to hold that Babu Dwijendra Mohan Ghose was acting for both the parties and prefer to treat him as acting only for this lady. In that position let me see what his duties were to this lady in this transaction. I refer again to the observations of the learned Judge in *Powell* v. *Powell* (1). "A solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out a particular transaction. He must also satisfy himself that the gift is one that is right and proper for the donor to make under all the circumstances, and if he is not so satisfied his duty is to advise his client not to go on with the transaction and to refuse to act further for him if he persists." Now let us see what Dwijendra Babu himself says he did in this matter. He was asked if he had enquired if the donee, her priest, had exercised any influence on her and what her means were. He said "No, I was not told if she had any income, or what income, or if she had any other place of residence." If that is so, it seems to me that he had not placed himself in a position to advise the lady. It is not enough to prepare the document and explain it to the lady. Here the draft was prepared according to the instructions of

(1) [1900] 1 Ch. 243.

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Khettra Mohan Bhattacherjee. It is not enough to get her approval of the draft. The attorney should have enquired about her means and tried to ascertain how her desire to give, had been caused or had arisen, and what was leading her to give up her most valuable property. I do not think the attorney would not have enquired into these matters if they had been present to his mind. He did not entertain any suspicion. He did not know this lady or her family or any circumstances relating to her life. He accepted what had been said to him by Khettra Mohan Bhattacherjee that she desired to give this house to the Defendant if she could legally make a gift. He did not apply his mind to other matters, this being his first transaction of this nature. Nothing was said to him, no circumstances were made known to him by which he could have helped this lady. I think, however, there is a clear duty in cases like these, so far as the attorney is concerned to try and protect the lady against herself. She was an old *purdanashin* lady and suffering from a recent bereavement, had been ill and was in poor circumstances. It has been contended on behalf of the Defendant that the duty cast upon an attorney was merely to see that the client understood the nature and effect of the deed and nothing more, and my attention has been called to the case of *In re Coomber*, *Coomber* v. *Coomber* (2), and the following passage from the observations of Fletcher-Moulton, Lord Justice, at p. 729, was cited. "Again and again we have had it said the lady did not have competent and independent advice, and it seems to me to be based on the fact that the solicitor did not say to her 'I advise you to do it, or I would not advise you to do it.' In my opinion that is not by any means necessary for the purpose of the advice. I think that a solicitor best gives advice when he takes care that the client understands fully the nature of the act and the consequence of that act. He is not bound to say 'I will advise you to do it, or if I were you I would not do it.' Nothing of that kind is necessary for competent and independent advice. All that is necessary is that some independent persons free from any taint of relationship, or of the consideration of interest which would affect the act, should put clearly before the person, what are the nature and consequence of that act." But it will be seen from the latter portion of that paragraph that the learned Judge was of opinion that the duty became more onerous in certain cases He says "when a man takes upon himself the responsibility of advising those who are not adults, who are not persons capable of managing their own affairs in the broadest sense of the word, other conditions may arise." Now these Courts have always held that a *purdanashin* lady is not in the position of an adult male person or an adult, who is capable of managing his own affairs in the broad sense of the word. I need not refer to the rulings on the point. Their position is well-known. She is entitled to the protection which always extends to the weak, ignorant and infirm.

The observations made by the learned Judge and relied upon by the Defendant had reference to the facts of the case before him. In it there was no question of fiduciary relationship. It was a gift from mother to son. The attorney who had acted was the attorney for the father, and in making a gift of settlement the lady had taken into consideration the wishes of the father. All the circumstances were

(2) [1911] 1 Ch. 723.

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known to all the parties. The matter had been duly deliberated upon by the grantor who knew her position and perfectly understood what she was doing. No new principle seems to have been enunciated in that case. All the decisions beginning from a very early period, have been that independent advice is absolutely necessary in such cases, and such advice is to be given at arms' length. See Mr. Justice Phear's observations in *Kanai Lal Jowhari* v. *Kamini Debi* (3). With regard to the duty of the solicitor to enquire into the pecuniary means of his client, I will refer to *Wright* v. *Carter* (4), where it is pointed out that it is the duty of a solicitor who is advising an intending donor or settlor under such circumstances to inform himself of the pecuniary means and prospects of his client with a view to advising him as to the expediency, or otherwise of the proposed gift or settlement." This clearly the attorney in the present case did not do. He had not placed himself in a position to do it. I find therefore that the gift was an improvident one and that the donor did not receive such advice as is required in such a case.

I however find the following facts in favour of the Defendant, namely, that the draft was explained to this lady. She was told what the effect of the deed was and its nature. I accept the evidence of Hari Nath Banerjee, who says that the Registrar asked her if she had executed the deed of gift and that she answered in the affirmative. I also find the account given by this lady in the witness-box unsatisfactory. Her evidence has evidently been shaped according to what she has, I believe, been told to be necessary to prove, and she has not hesitated to tell untruths. Her story that she was not told that she was being taken to an attorney to have the document prepared, and that she did not know that she was going to the Registration Office, which she called as garden house, are untrue.

I do not believe her when she says that the document was not explained to her. But however much I disbelieve her story in the witness-box, I have to see if the Defendant has properly discharged the onus. In *Lyon v. Home* (5), I find the learned Judge distrusted the Plaintiff's story as to how she had been induced to make the gift.

I must also allude to the production of an account book by this lady and an entry in it which she said, she made in it showing that the sum of Rs. 186 had been paid by her to the Defendant for the purpose of making "a will." She admitted in cross-examination that the entry was made only three or four months ago. The entry itself shows interpolations. It was evidently made for purposes of this case. This book shows that the lady can read and write a little and she can also add. This according to the Defendant proved that she was not ignorant and the fact that she kept an account shewed her business capacity. I am unable to draw the same inference. The accounts are kept in a very unbusiness-like way, and her knowledge of Bengali seems to be of a very elementary character. The book also shews that she lends out small sums of money on interest which when collected helps to maintain her, and support a cow which she keeps. Her average expenses came up to about 50 rupees a month and that some portion of it she probably derives from the sums she has lent out. The fact however remains that the house

(3) 1 B. L. R. (O. S. C.) 31 note (1867).

(4) [1903] 1 Ch. 27.

(5) L. R. 6 Eq. 655 at p. 673 (1868).

is her most valuable property and the only source of a permanent income. She has examined one witness, her tenant named Srikrishna Mukerjee, but I am unable to rely upon his testimony. As he said little of importance, I don't think it necessary to deal with his evidence any further. He pretended ignorance of several matters, specially about the institution of the suit which rather tended to show that he knew all about it, and that he was responsible for the absurd story told by the lady in the witness-box.

In this connection I may refer to an incident which occurred during the trial of the case. It was stated one morning that the case had been settled and a document written in Bengali with the signature of this lady was produced. That document showed that the lady could not have understood her position when she signed it. It authorised her attorney to sell the house at a figure mentioned in it and the proceeds of the sale were to be disposed of in paying the costs of both parties the amount to be paid to the Defendant being specifically mentioned. I enquired what the probable costs of the Plaintiff were and found that it left hardly anything for her at all. She said she had not realised that fact and had not been told. If she had understood the result of the settlement she would not have consented. Counsel on both sides agreed that no effect should be given to such a settlement and although the Defendant had given instruction to consent to the terms which had been formally proposed and accepted by him, his counsel refused to take any advantage of the circumstances. In this counsel upheld the best traditions of the bar.

I am referring to this incident to show how easily *purdanashin* ladies in the position of the Plaintiff can be led to sign away their rights, even in matters of vital interest to them. It illustrates to my mind how easily they can be led or misled into such transactions. Everything was formally perfect, and yet it was conclusively shewn that the Plaintiff had not understood the effect of the proposed settlement. It also seemed to me that the price fixed for the sale of the house in the document was for the benefit of Srikrishna Mukherjee. It is all important in these cases therefore to ascertain how the intention to give was created and if the donor had exercised a free and unfettered judgment and realised the consequence of her act. See *Huguenin* v. *Baseley* (6), also *Hall* v. *Hall* (7). The same principle has been accepted and acted upon in our Courts. I have no doubt in my mind that her intention was created by the Defendant and his friends working upon her religious feelings, and at a time when she was in great mental distress and had also been ill.

The story that the Defendant was the Plaintiff's *bhikshaputra* has been put forward. It is mentioned in the deed of gift. The lady denies that he was her *bhikshaputra*. The Defendant gives one version of the matter which differs entirely from that of Khettra Mohan Bhattacharjee. Learned counsel for the Defendant conceded that the evidence about this was contradictory and unacceptable. It is impossible to attach weight to such evidence and to hold that the youngman was taken as the *bhikshaputra* of the Plaintiff. That the statement was introduced into the document shows some weight was sought to be attached to it

(6) 14 Ves. 273: s. c. 1 W. & T. L. C. Eq., 7th Ed., p. 247 (1807).

(7) L. R. 8 Ch. App. 430, per Selborne, L. C., at p. 440 (1873).

in justification of the gift, perhaps to show that the intention to give some valuable property to such a person had been contemplated by the Plaintiff for a long time. It is clear from the letters Exs. 4A to 4G that this lady during her absence from Calcutta relied upon the Defendant to make realizations for her and to send her moneys. The letters also showed that she was in great distress. They are addressed to the Defendant in language which shows the respect which is due to a priest. The style is hardly that of one who had taken the Defendant as her *bhikshaputra*. I therefore reject this part of the Defendant's story.

The Defendant states that he never intended to turn out this lady from the house, that she was to be in possession of the house as long as she lived and it was not his intention to interfere with her collection of the rent. This he has repeated through his counsel. It is in evidence that even after the execution of the deed of gift the lady remained in possession, realized the rents, paid collectorate and municipal taxes and paid the expenses of repairs of a substantial character. If it was not the intention of the Defendant to turn her out why does not the deed provide for it. The attorney was not told of such an intention or of any tacit understanding between the parties that she was to be in possession during her life-time. The provisions of sec. 126 of the Transfer of Property Act could have been availed of to secure the lady's position, and although I am not prepared to go to the extent contended for on behalf of the Plaintiff that the absence of a power of revocation is enough to show that the document is invalid, I attach some importance to the fact of its absence. That I think is the result of the cases on this point, see *Hall* v. *Hall* (7). The attorney had not thought about the matter and the provisions of the section were not present to his mind. I also attach great weight to the fact that in one matter at least of great importance the document does not express the intention of one of the parties, namely, that of the acceptor. He has never treated himself or done any act to show that he was the owner. Long after the deed he came to live in it for a few days only and left it without demur because the lady insisted upon his leaving it even at a time when her feeling was ceasing to be friendly.

Under all these circumstances I hold that the Defendant has failed to discharge the onus, he has failed to show that the lady had or was in a position to exercise her free and unfettered judgment, and clearly understood what she was doing. The suit therefore succeeds, and I hold that the lady is entitled to the relief she has asked for, namely, that the document is to be set aside. Inasmuch as I disbelieve the evidence she has given I disallow her the costs of the days taken up by such evidence, allowing her only two days' costs of the hearing.

Messrs. Ghose and Bose, Attorneys for the Plaintiff.

Babu D. M. Ghose, Attorney for the Defendant.

M. N. M. *Suit decreed.*

(7) L. R. 8 Ch. App. 430 (1873).

[CIVIL REVISIONAL JURISDICTION.]

LETTERS PATENT APPEAL

No. 78 OF 1911.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
Heard, 27 and 28, March.
Judgment, 28, March.

KAILASH CHANDRA BOSE, Appellant,
v.
SREEMATI GIRIJA SUNDARI DEBI, Respondent.

Mortgage by widow for legal necessity—Decree for foreclosure—Appeal by the widow—Continuance of the appeal by the daughter after her death pending the appeal—Application for substitution by reversionary heir, rejection of—Dismissal of appeal—Suit for redemption by reversionary heir—Decree in the previous foreclosure suit, if a bar—Decree on appeal, effect of—Decree against the widow, if binding upon reversioners.

Where a Hindu widow died during the pendency of an appeal by her against a decree for foreclosure upon a mortgage executed by her for legal necessity and the Court, upon applications by the widow's personal representative, her daughter, and also by the reversionary heir of her husband for leave to continue the appeal, erroneously decided in allowing the daughter to be substituted, and the daughter continued the appeal which was dismissed and subsequently the reversionary heir, the present Plaintiff, brought this suit for redemption of the mortgaged property,

Held—*That the decree in the foreclosure suit was no bar to the Plaintiff's claim to redeem as he was no party to it.*

That the question of res judicata *was to be determined with reference to the decree on appeal and not with reference to that of the first Court.*

NOOR ALI CHOWHDURI *v.* KONI MEAH (1) *referred to.*

Quære :—*Whether a decree obtained in a suit against a Hindu widow to enforce a mortgage executed by herself will be binding as against the reversioner.*

(1) I. L. R. 13 Cal. 13 (1886).

This was an appeal under sec. 15 of the Letters Patent from a decree of Mr. Justice Coxe, dated the 27th of March 1911, passed in Appeal from Appellate Decree No. 465 of 1909.

The facts of the case are as follows :—

In default of the timely payment of a mortgage debt by the mortgagor, Bindubashini, widow of one Gunga Mohun, Girija Sundari, the mortgagee, brought a suit for foreclosure (being No. 332 of 1881), in which, after contest, she obtained a decree on the 6th February 1882. In this suit, Bindubashini's pleas were (1) that the *katkobala* was not genuine and (2) that no notice of foreclosure had been served on her. Both her pleas having failed, she appealed against the decree but died in Chait, 1288, B. S., during the pendency of the appeal (No. 77 of 1882). On her death, two rival claimants applied to be substituted in her place as Defendant-Appellant, *viz.*, Joy Durga Dasi, her sonless widowed daughter (claiming under her Will) and Chunder Sekhar Bose, the father of the Plaintiff, as the next reversionary heir to Gunga Mohun's estate. The Court ordered substitution of Joy Durga's name in place of the deceased Appellant and disallowed Chandra Sekhar's petition on the ground that he had not then obtained a certificate under Act 27 of 1860. The appeal was subsequently dismissed on the 23rd June 1882, and Defendant No. 1 came into actual possession of the mortgaged property in Asar 1291, B. S. With regard to the representation of Gunga Mohun's estate, there was contest in the District Judge's Court (in Suit No. 50 of 1882) between Joy Durga, Chandra Sekhar and Dindoyal Bose, the adopted son of an-

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other step-brother of Gunga Mohun. In this suit, the rights between the parties were not determined but on the 14th November 1882 the Court granted probate of Bindubashini's Will to Joy Durga and a certificate under Act 27 of 1860 to Chandra Sekhar authorising the latter to collect the dues to Bindubashini's estate. Chandra Sekhar, it appears, took no steps to appeal against the order disallowing substitution of his name in the appeal case and he died in Pous 1291, B. S. After Chandra Sekhar's death, the Plaintiff brought a suit (No. 248 of 1885) against Girija Sundari for the setting aside of Bindubashini's *katkobala* and for recovery of possession of the mortgaged property on the allegation that the *kobala* was fraudulent and made without legal necessity, Bindubashini having had no right to encumber her deceased husband's estate permanently. The suit was dismissed on the merits and though the Plaintiff carried his case up to the High Court, he did not succeed. In dismissing the Plaintiff's appeal, the High Court remarked "we pass no opinion as to any right that the Appellant may have to redeem."

The other facts of the case will appear from the judgment of MR. JUSTICE COXE, which was as follows :—

COXE, J.—This was a suit to redeem certain properties that had been mortgaged by a Hindu widow. During the widow's life-time the mortgagee issued a notice upon her under sec. 8 of Regulation XVII of 1806 ; and thereafter brought a suit for recovery of possession which was decreed by the Munsif. Reading the judgment of the Munsif with the provisions of the Regulation it is clear that the mortgagee obtained against the widow a decree precluding her from redeeming the mortgage. After the decision by the Munsif, the widow appealed. In the course of the appeal she died and the present Plaintiff and one Joy Durga Dasi applied to be substituted as her representative. Joy Durga's application was granted and that of the Plaintiff refused. The appeal was dismissed. Thereafter the Plaintiff brought a suit for recovery of the property alleging that the mortgage was fraudulent and invalid and executed without legal necessity. That suit was dismissed and it was found that the mortgage had been executed for legal necessity and was a perfectly honest transaction.

The Plaintiff now brings this suit for redemption. It has been decreed by the Courts below. Defendant No. 1 appeals to this Court.

The first point taken is that as it has been settled between the parties that the mortgage was an honest mortgage and executed for legal necessity, the decree for foreclosure which the Defendant obtained against the widow is binding on the reversioners, and in support of this proposition reference has been made to several cases beginning with the case of *Katama Natchiar* v. *The Rajah of Shiva Gunga* (2). There appears to be plenty of authority for holding that where a decree has been obtained on a fair trial in a suit against a Hindu widow, the decree is effectual and operative as against the reversioners unless the decree can be impeached on some special ground. The last case which I have seen on the subject is the case of *Lilabati Misrain* v. *Bishun Chobey* (3). It has been argued on behalf of the Respondent that these rulings only affect those cases in which a widow sues or is sued with respect to a mortgage executed by the last full owner

(2) 9 M. I. A. 543 (1863).
(3) 6 C. L. J. 621 (1907).

and have no application to mortgages executed by the widow herself. Reference is made to a passage in Dr. Ghose's book on Mortgage in which the author quotes the decision of the present learned Chief Justice, then Mr. Justice Jenkins in *Sreenath Das* v. *Haripada Mitra* (4), that where the widow is the person who has created the charge there is no authority to show that she sufficiently represents the reversioners. This decision, however, though entitled to the greatest respect was not confirmed by the Appellate Bench, if I understand their judgments aright, and as a single Judge I cannot place it in competition with the decisions of the Benches to which I have referred. In the case of *Radha Kissen* v. *Nauratan Lal* (5), Mr. Justice Mookerjee adopted the view mentioned above that a decree against the widow binds the reversioners under the circumstances specified. He certainly held on other grounds that in that particular case the decree did not operate as *res judicata* in a subsequent suit. But it does not appear ever to have been suggested that the principle did not apply, because the mortgage which was the subject of that suit had been executed by the widow herself. It appears to me therefore that if the former decision bound the widow it bound also the present reversioner. It is argued, however, that the decision had no such effect, because the widow died in the course of the appeal and was represented by a person who had no right to represent the estate in the hearing of the appeal and reference is made to the case of *Harish Chandra Biswas* v. *Puri Das Das* (6). That case appears to me to be wholly different. In that case one of the Defendants died in the course of the suit and a wrong person was brought on the record as his representative. But here the case is quite different. The present Defendant had obtained a decree. He was the Respondent in the appeal. No doubt it is the business of the Plaintiff or Appellant to see that he sues or appeals against the right person, but it cannot be said to be the duty of the Defendant or Respondent to see that he is sued or appealed against by the right person. The present Defendant had obtained a decree which, unless it was set aside by the Appellate Court, would be final and conclusive in his favour. The widow appealed. That appeal failed through no fault of this Defendant. I have been shown no authority for holding that because a wrong person represented the widow in that unsuccessful appeal, the present Defendant is thereby deprived of the whole value of the decree that he had obtained, and such a view seems to me unreasonable. It seems to me, therefore, now that it has been finally and conclusively settled that the mortgage was an honest transaction executed for legal necessity, that the decree for foreclosure which the Defendant obtained is sufficient to preclude the Plaintiff from bringing this suit for redemption.

Secondly, it has been contended that the suit is barred by sec. 43. As regards this point, I am inclined to think that the decision of the Court below is right and would refer to the case of *Balmakund* v. *Mussit Sangari* (7). But in the view that I take of the first point, it is not necessary for me to go into this point.

The appeal is accordingly allowed and the suit is dismissed with costs of all Courts.

(4) 3 C. W. N. 637 (1899).
(5) 6 C. L. J. 491 (1907).
(6) 12 C. L. J. 561 (1910).

(7) I. L. R. 19 All. 379 (1897).

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Babus Nilmadhub Bose and *Sib Chandra Palit* for the Appellant.

Babu Surendra Chandra Sen for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—The circumstances of this case are peculiar: one Gunga Mohun Bose died, and on his death his widow Bindubashini succeeded to a widow's interest in his estate. In 1877 she executed a mortgage in favour of Defendant No. 1; subsequently, the mortgagee took action under sec. 7 of Regulation XVII of 1806, and notwithstanding the argument that has been addressed to us, I see no reason to hold that there was any irregularity in those proceedings. As a sequel the mortgagee instituted a suit which resulted in a decree for foreclosure against the widow Bindubashini in 1882. The widow preferred an appeal, but while the appeal was pending she died, and the appeal was continued not by Gunga Mohun's reversionary heir but by the widow's legal personal representative, her daughter, and a decree was passed on appeal on the 23rd of June 1882, affirming that of the first Court. In 1884, the mortgagee obtained possession. A suit was instituted in 1886 by the present Plaintiff against the mortgagee, impugning the mortgage as fraudulent and not for legal necessity and therefore as being of no legal effect against him. That suit resulted in a dismissal which was affirmed by the lower Appellate Court and also by the High Court. It was determined in the lower Appellate Court that the foreclosure decree in the former suit did not operate as a bar against the Plaintiff, and the High Court in dealing with the matter said that it passed no opinion as to any right that the Appellant might have to redeem. The Plaintiff has now brought this present suit for redemption making as Defendant the original mortgagee who is still alive and a limited company who does not contest the Plaintiff's claim. Both the Court of first instance and lower Appellate Court decided in the Plaintiff's favour. Mr. Justice Coxe, sitting as a single Judge, has decided adversely to him and dismissed the suit. From his judgment the present appeal is preferred.

The only question that arises on this appeal is whether the result of the first of the suits that I have mentioned, the foreclosure suit, is a bar to the Plaintiff's claim. I have stated that the appeal in that suit was continued not by the reversionary heir on whom the estate devolved at the death of the widow but by the widow's daughter, and she did not in any sense represent the estate of Gunga Mohun Bose and had no interest in that estate. On the other hand, the present Plaintiff's father, the reversionary heir, was a person on whom it had devolved. He applied to be allowed to continue the appeal, but his attempt failed for a reason which was admittedly erroneous. The case was not treated as coming within the operation of sec. 367 of the Code of Civil Procedure of 1877, and we are free from any difficulty that section might create. The Plaintiff on whom, admittedly, (apart from foreclosure) the equity of redemption would have devolved, and in whom it would now be vested, would *primâ facie* be entitled to redeem. And so the question arises whether he has been deprived of that right by the decree in the foreclosure suit. The decree in that suit was in the Court of first instance against the widow and it may be that this decree, had there been no appeal, would have been binding as

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against the reversioner, even though the mortgage was created by the lady herself. That is a point on which I express no opinion at this stage, because I do not think it is necessary and I reserve my opinion until occasion arises for its decision. But whatever may have been the effect of that decree, had it stood by itself, it was superseded by the decree passed on appeal. The decree of the Court of first instance could not in the circumstances be pleaded as *res judicata*, and the effect of a decree on appeal was indicated in *Noor Ali Chowdhuri* v. *Koni Meah* (1), which professed to follow earlier decisions. It is there pointed out that where there is a decree on appeal which confirms the decree against which the appeal is made, it is the appellate decree to which regard must be had, and the appellate decree supersedes the original decree. I would pause here for a moment to draw attention to a possible source of error in decrees of Appellate Courts by reason of failure to observe the provisions of the Code, and in this connection I will refer to the Code of 1882, which contains an expression of the law that is still applicable. By sec. 551 it is provided that in the circumstances there indicated the Court may dismiss the appeal. But where the case goes to a hearing, then the powers of the Court are defined in sec. 577 which provides not that the appeal is to be dismissed but that "the judgment may be for confirming, varying or reversing the decree against which the appeal is made." It may be that when the appeal is incompetent as being out of time or as coming within the provisions of sec. 586, the proper course will be to dismiss it. Apart from that, it seems to me that ordinarily the proper course is, as provided in the section, to confirm, vary or reverse the decree against which the appeal is made. But to return to the facts of this case, what is the answer to the right to redeem vested in the present Plaintiff? It is said the decree in the foreclosure suit is a bar. But that must be the decree in appeal, and to that decree the present Plaintiff was not a party nor was there any one with any interest in the estate, who was a party to the litigation at that stage. The person against whom that decree was passed was one who did not represent the estate but represented only the widow's personal interest. Therefore, the decree on appeal cannot afford an answer to the Plaintiff's claim to redeem. Admittedly if the suit had been commenced against the widow's representative, it would have been insufficient and it seems to me that it is equally insufficient when the only effective decree is one passed against a Defendant who did not represent the estate. I, therefore, think the judgment of Mr. Justice Coxe must be set aside and the decree of the lower Appellate Court restored.

The costs in the High Court must be borne by the Respondent, the original mortgagee.

N. R. CHATTERJEA, J.—I agree.

H. C. S. *Appeal allowed.*

(1) I. L. R. 13 Cal. 13 (1886).

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM ORDER NO. 235 OF 1911.

COXE, J. IMAM, J. 1912, Heard, 6, February, Judgment, 12, February.	SHEIKH KALIMUDDIN, Administrator, Opposite Party, Appellant, *v.* MUSSTT. MAHURNI and others, Applicants, Respondents.

Probate and Administration Act (V of 1881), secs. 79, 86—Administration bond—Assignee not

SHEIKH KALIMUDDIN *v.* MUSSTT. MAHURNI.

enforcing bond—Second assignment if valid—Order if appealable.

An administration bond can be assigned by the District Judge upon conditions, under sec. 79 of the Probate and Administration Act. But there is no provision in the law authorising the District Judge to assign it again while the first assignment is still in force.

Where the first assignee having come to terms with the administrator, other persons interested in the estate applied to have the bond transferred to them and the application was granted :

Held—*That no appeal lay from the order, but the order being without jurisdiction could be set aside in revision.*

BROJO NATH PAL *v.* DASMONI DASI (1), ABHIRAM DAS *v.* GOPAL DASS (2) *followed.*

UMACHURN *v.* MUKTAKESHI (3) *commented on.*

This was an appeal preferred on the 22nd of May 1911 against an order of Mr. S. S. Skinner, District Judge of Zillah Purneah, dated the 4th of March 1911.

The material facts will appear from the judgment.

Babus Sib Chandra Palit and *Nanda Lal Banerjee* for the Appellant.

Babus Mohendra Nath Roy and *M. Nuruddin Ahmed* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The Appellant in this case was granted letters of administration to the estate of one Maula Bux and executed a bond in favour of the District Judge under sec. 78 of the Probate and Administration Act, 1881, for the due administration of the estate. As apparently he did not administer it properly the bond was assigned under sec. 79 of the Act to Gyasuddin, a son of Maula Bux. Gyasuddin however came to terms with the Appellant and did not sue on the bond. The widow and the other children of Maula Bux then sought to have the bond assigned to them. This has been granted by the District Judge and hence this appeal.

A preliminary objection is taken that no appeal lies. We think this contention must prevail. Sec. 86 of the Act enacts that every order of a District Judge under the Act shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals. One of those rules is to be found in sec. 105 of the Code which lays down that save as otherwise expressly provided no appeal shall lie from any order. There is certainly no express provision in the Code for an appeal from an order assigning a bond. This seems to be in accordance with the view taken in *Brojo Nath Pal* v. *Dasmoni Dasi* (1) and *Abhiram Das* v. *Gopal Dass* (2). It was not taken in *Umachurn* v. *Muktakeshi* (3), but in that case the effect of the words "under the rules contained in the Code of Civil Procedure" seems not to have been considered.

We think however that the order of the District Judge is altogether without jurisdiction and that we can accordingly revise it. Under sec. 78 the bond enured for the benefit of the District Judge. Under sec. 79 he can assign it on conditions. But there is no provision in the law which authorises him to assign it again while the first assignment is still in force. If

(1) 2 C. L. R. 589 (1878).
(2) I. L. R. 17 Cal. 48 (1889).
(3) I. L. R. 28 Cal. 149 (1900).

(1) 2 C. L. R. 589 (1878).
(2) I. L. R. 17 Cal. 48 (1889).
(3) I. L. R. 28 Cal. 149 (1900).

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there had been a condition that the assignment should be void if the assignee failed to comply with certain requirements, in that case a re-assignment might perhaps be possible. But there is no such condition in the present assignment. All that is stipulated is that any money decreed should be deposited in Court, a condition that can hardly be said to have been broken. No doubt the Respondents can apply to have the letters revoked, if they can make out a case under sec. 50 of the Act; and can sue the administrator. They can also hold Gyasuddin responsible as a trustee for them under sec. 79 for all that he has recovered. But they cannot obtain an assignment of the bond from the District Judge when it is no longer his to assign.

Accordingly the appeal is dismissed but in the exercise of our revisional jurisdiction we set aside the order of the District Judge assigning the bond to the Respondents. They will be at liberty, if so advised, to proceed with the application for revocation of the letters of administration which the District Judge has left undetermined. We make no order as to costs.

Rule made absolute.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORDER
No. 384 OF 1910.

JENKINS, C. J.
CHAPMAN, J.
1912,
19, April.

BASANTI LAL and anr.,
Appellants,
v.
CHEDDU SINGH and ors.,
Respondents.

Civil Procedure Code (Act V of 1908), sec. 145—Security for production of imprisoned debtor—Failure of surety to produce debtor when called upon—Security money if may be forfeited to Government—Attaching creditor, if entitled to the security.

A debtor who had been arrested and imprisoned in a civil jail was released upon his filing a petition in insolvency and upon a person depositing cash security for his production. After the petition in insolvency was dismissed the surety failed, when called upon, to produce the debtor. The Court thereupon ordered the security money deposited to be forfeited to the Government and dismissed the attaching creditor's application to have the money paid to him:

Held—*That there was no power in the Court to declare a forfeiture in favour of the Government and that the security money should be paid to the decree-holder.*

This was an appeal preferred on the 10th of August 1910 against an order of Mr. S. C. Mullick, District Judge of Zillah Gaya, dated the 14th of June 1910.

The facts of the case were briefly as follows :—

The Appellants in this case had obtained a decree against one Cheddi Halwai and in execution of that decree Cheddi Halwai was imprisoned in civil jail. Thereupon Cheddi made an application in insolvency and was released from civil jail on one Cheddu Singh furnishing cash security for Rs. 500. The insolvency proceedings continued for some time and ultimately on the 18th May 1910 the District Judge rejected the insolvency application of Cheddi with costs. On all the dates including the last date Cheddi was duly produced before the Court. On the 23rd May 1910 Cheddu Singh applied to withdraw the money. On the 24th May the District Judge issued notices calling upon Cheddi Halwai to surrender and Cheddu Singh to produce Cheddi upon the application of the decree-holders Appellants. Cheddu Singh appeared and pleaded that he was under no liability to produce Cheddi as he stood surety for the production of Cheddi

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till final orders had been passed on the insolvency petition and he had produced Cheddi on all days till the date of the final order when the decree-holders omitted to take any proceedings against him. He therefore contended that on his having produced Cheddi on the date of the last order his liability was at an end and he was entitled to withdraw the security he had deposited.

The learned District Judge overruled the objections of the surety and gave him one day's time to produce the debtor. On his failure to produce the debtor on that day the learned District Judge on the 3rd June passed the following orders: "Cheddu Singh appears and says that as the judgment-debtor ran away last night he is not able to produce him. Cheddu Singh's security money Rs. 500 . . . . is therefore forfeited."

On the 4th June the creditor-Appellants filed a petition praying for the payment of the deposited money to them under sec. 145, cl. (*c*) of the Civil Procedure Code. The learned District Judge dismissed the claim and in the course of his order observed, "I do not think, the law quoted on behalf of Basanti Lal has any application to the present case. Cheddu Singh did not stand surety for the payment of any money but for the production of the judgment-debtor, Cheddi Halwai, whenever wanted by the Court. As Cheddu failed to produce the man the money is to be forfeited to the Government and not to the creditor."

Against this order the creditors appealed to the High Court on the grounds *inter alia* that the Court below had no jurisdiction to order that the money be forfeited to Government and that the creditors at whose instance the debtor was imprisoned were entitled to get the money.

Babu Kshetra Mohun Sen for the Appellants.

Babus Ram Chandra Mitter and *Harihar Prosad Singh* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This I think is a very clear case; money was deposited by the surety as a security for the benefit of the decree-holder whose rights were interfered with to enable the judgment-debtor to make an application in insolvency with a view to his protection from arrest. The insolvency application failed, and so it became incumbent upon the surety to produce the debtor before the Court. This he failed to do, and in the circumstances the Officiating District Judge has determined that the sum of Rs. 500 deposited by the surety is forfeited to the Government. The Secretary of State has been represented before us and the learned pleader tells us—I think most properly—that he leaves the matter in the hands of the Court. It is to my mind obvious that there was no power in the Court to declare a forfeiture in favour of the Government. The surety was anxious to suggest that his suretyship did not extend beyond the pendency of the insolvency proceedings. But he has not appealed from the order adjudicating upon this point adversely to him so that we could not give effect to it, even if we thought there was merit in the contention. We must set aside the order under appeal and direct that the sum of Rs. 500 be paid to the decree-holder.

We make no order as to costs.

CHAPMAN, J.—I agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1870 OF 1909.

CARNDUFF, J.
N. R. CHATTERJEA, J.
1912,
Heard, 22, 23, April.
Judgment, 29, April.

BENODE KISHORE GOSWAMI, Defendant, Appellant,
v.
ASUTOSH MUKHOPADHYA and anr., Plaintiffs, Respondents.

Negotiable Instruments Act (XXVI of 1881), secs. 46, 47, 48, 50—Negotiable instrument if may be transferred by registered deed of gift—Transfer of Property Act (IV of 1882), sec. 123—Mode in which transferee may enforce his rights—Evidence Act (I of 1872), sec. 92—Oral evidence to prove deed of gift to be donatio mortis causa.

When the holder of a Government Promissory note purported to transfer it to another by a registered deed of gift,

Held—*That though there was no endorsement and delivery as contemplated by the Negotiable Instruments Act, there was a valid transfer of the document as a chattel, and the transferee was entitled to it and to the property referred to in it.*

[*How such a voluntary transferee is to enforce recognition of his title and payment of the note, not decided.*]

Delivery of the property is not necessary where the gift is by a registered instrument.

Oral evidence is not admissible to prove that a document which in terms is an out-and-out gift was really meant to be a donatio mortis causa.

This was an appeal preferred on the 31st of August 1909 against the decree of Mr. F. Roe, Esq., District Judge of 24-Pergunnahs, dated the 7th of July 1909, confirming the decree of Babu Anil Chandra Dutta, Munsif of Sealdah, dated the 31st of March 1909.

The Appellant was in possession of a Government promissory note standing in the name of one Soudamini Debi, who, he alleged had transferred the document to her before her death in 1884, by a registered deed of gift. He also alleged that the promissory note was handed over to him in the presence of the Sub-Registrar. In 1907, he applied for succession certificate in respect of the note. The Respondent thereupon also made a similar application and it was granted whilst Appellant's application was refused. The Respondent then sued for the recovery of the note upon the establishment of the Plaintiff's title by heirship or in the alternative for a decree for principal and interest due on the note amounting to Rs. 954-14. The suit was decreed by both the Courts below, the lower Appellate Court finding, that the gift was not complete as it appeared from the evidence of Appellant's *ammuktear* that Soudamini had stated at the time the deed was drawn up that if she should live the note should be given back to her, and that there was no proof of delivery of the note to the Appellant, his allegation that it was delivered before the Sub Registrar being disbelieved.

The Defendant preferred this second appeal.

Babu Tarakishore Choudhury and *Dr. Surat Chandra Basak* for the Appellant.

Babu Susil Madhub Mullick for *Babu Provash Chandra Mitter* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

In this case a Hindu widow shortly before her death, transferred a Government promissory note to the Defendant, her brother's son, by means of a registered deed of gift, and the finding is that she was competent to dispose of the note as

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it was part of her *stridhan.* The Plaintiffs, who are her heirs, have attacked the transfer as invalid and sought to recover the note or its value, with the interest accrued, from the Defendant. The Court of first instance held that, in the absence of endorsement and delivery, there was no valid transfer, and it decreed the suit. The lower Appellate Court appears to have held that the note could have been validly transferred without indorsement by delivery of possession with intent to transfer; but it affirmed the decree on the ground that, although possession had been delivered at the time of registration, the lady did not intend to part with the property in the instrument.

The appeal to this Court raises two points of law. The first is as to whether a negotiable instrument such as this Government promissory note can be transferred at all save by indorsement and delivery of possession, as contemplated by the Negotiable Instruments Act, 1881. The answer to this question must, we think, be in the affirmative. No doubt, secs. 46 and 48 of the special Act referred to provide that a negotiable instrument payable to order may be transferred by indorsement and delivery, and it is clear that the privileges of a "holder" secured to the transferee by that Act can be obtained only in the way prescribed by it. But the Negotiable Instruments Act of 1881, like the Bills of Exchange Act, 1882 (15 and 46 Vict., c. 61) deals entirely with transfer by negotiation, that is to say, with transfer according to the Law Merchant; and, as pointed out in Chalmers on Bills of Exchange, 237 at p. 239, it leaves untouched the rules of the general law which regulate the transmission of negotiable instruments and their transfer as chattels. The transferee under the general law would, of course, not be in the privileged position of a "holder" under the special Act, but would be merely in the position of the transferee of any ordinary chattel and have no better title than his transferor. But he would have a good title to the property if his transferor had such a title, and this has been recognised in several cases in England. Thus it was held in *In re Bassington and Barton* (1), that the holder of a note payable to order might transfer his title to another by a separate writing assigning it to the latter; and in *Veal* v. *Veal* (2), it was decided that the holder of such a note could pass the title by giving it to another in contemplation of death. In the case of a transfer for value without indorsement, the transferee would in England, under sec. 30 (4) of the Bills of Exchange Act, 1882, be able to require the transferor or his representative to complete the transfer by indorsement; and elsewhere a Court of Equity would doubtless compass the same end. In the case of a voluntary transfer it is difficult to say what the exact position of the transferee would be, and it is observed by Sir Mackenzie Chalmers—see p. 144 of the work cited already—that the law requires reconsideration. But with that problem we are not here concerned, and we think that we need not consider further how a voluntary transferee could, for practical purposes, enforce recognition of his title and payment of the note. But that he is entitled to the piece of paper and to the property referred to in it seems clear; and this is the view taken by the Madras High Court in ***Muthar Sahib Maraikar*** v. ***Kadir Sahib Maraikar*** (3) and also, as it seems to us, in ***Whistler***

(1) 2 Sch. & Lef. 112 (1804).
(2) 27 Beav. 303 (1859).
(3) I. L. R. 28 Mad. 544 (1905).

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v. *Forster* (4). We are disposed to hold then that, if the note in this case was transferred in accordance with provisions of the Transfer of Property Act, 1882, being moveable property within the purview of that Act, read with sec. 1 (5) of the General Clauses Act, 1868, the enactment in force in 1882, the Defendant was entitled to retain the note as against the Plaintiffs, and the latters' suit ought to have been dismissed.

As to the remaining question raised by the appeal, it is clear, on the findings of both the Courts below, that the deed of gift exhibited was executed in accordance with the requirements of sec. 123 of the Transfer of Property Act. It appears to have been signed on behalf of the donor, Soudamini Debi; it bears the signatures of three witnesses; and it was duly registered. It has been faintly suggested that the learned District Judge, by referring, on appeal to the fact that the "lady was illiterate," meant to throw some doubt on the factum of execution by a *purdanashin* woman; but there is not a trace of any such suggestion in the pleadings or anywhere else, and we cannot listen to it now. The instrument is of the simplest character, and it is in evidence that it was read over to Soudamini before she caused it to be signed; while the judgment of the first Court shows that the learned Munsif was satisfied that she was well aware of what she was doing and acted with marked deliberation. We must take it, then, that the deed was properly executed.

The lower Appellate Court, however, has found that "there is no proof of any delivery of possession of the note to the Appellant with the intention of transferring title in the note from the indorsee to the Appellant," and that, "if there was any delivery of the note at all, that delivery was in bailment only, and not in transfer of title." This finding is, we think, open to criticism on two grounds. In the first place, it is based entirely on the statement of the lady's *ammuktear* that, at the time of execution of the deed, Soudamini made the verbal stipulation that, if she lived, it would be given back to her, and it is a question how far such a statement should have been admitted in evidence at all. In the second place, even if this additional verbal stipulation be taken into account, the fact remains that the lady did die, the stipulation has fallen to the ground, and nothing remains but the instrument itself, which is, on the face of it, an out-and-out deed of gift. And, lastly, the whole of the learned District Judge's enquiry into the matter of delivery is supererogatory; for no delivery was necessary to complete the transfer, since a gift of moveable property may, under sec. 123 of the Transfer of Property Act, be effected either by registered instrument or by delivery. It has been suggested that the gift was a *donatio mortis causa* and that, therefore, the application of sec. 123 of the Act is barred by sec. 129: but there is nothing in this point. The deed is a gift, pure and simple, and the evidence as to Soudamini's verbal stipulation at the time of execution cannot be used to vary its terms and convert it into a gift in contemplation of death. At most, that evidence would be admissible only to show that there was an additional stipulation for a reconveyance in a certain event; but the gift was a complete gift *in presenti*.

The result is that this appeal must be allowed, the decrees of both the Courts below discharged, and the Respondents' suit dismissed with costs throughout.

Appeal allowed.

(4) 32 L. J. R. C, P. 161 (1863).

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 598 OF 1911.

HARINGTON, J.
BRETT, J.
1911,
Heard, 22, 23 & 24, November.
Judgment, 19, December.

LALAN MALLIK and others, *v.* KING-EMPEROR.

Accomplice, corroboration of—Agreement between statement of approver and confessions of accused made at different times and places without collusion—Confession by an accused to a private person immediately after the occurrence before the arrival of the police, but retracted afterwards, value of, as corroboration of an approver as against the makers and against the co-accused—Approver's evidence credited by the Judge and assessors—Conviction on uncorroborated evidence of accomplices, legality of—Evidence Act (I of 1872), secs. 114, Illust. (b), *133.*

A confession made to a private person, immediately after the occurrence and before the arrival of the police, which was repeated two days later to a first class Magistrate, but was retracted four months after—the story told at the retractation being disbelieved by the Court—was held *sufficient corroboration of the approver as against the maker.*

Under sec. 133 of the Evidence Act a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice. To justify the High Court in setting aside the conviction it is necessary to show not only that there is no corroboration, but that the Judge, taking all the evidence together, was wrong in acting on it. Where, immediately after a dacoity and before the arrival of the police, one of the accused who had been caught made a confession to a private person, naming the other persons concerned in it except two, one of whom he named two days after in his confession to the Magistrate, which agreed with the evidence subsequently given by the informer, both the confessions being afterwards retracted, and another accused made a confession naming all the persons mentioned by the approver, the two accused and the latter having been arrested at different times and places, and there was evidence that some of the dacoits were seen in company together shortly before the dacoity and that they were absent from their homes shortly after it:

Held—*That the confessions of the two accused and the other facts were sufficient corroboration of an approver, who had been believed by the Judge and assessor, as against the co-accused who had not made confessions.*

This was an appeal against the order passed by Mr. A. R. Edwards, Officiating Sessions Judge of Faridpur, dated the 19th of June 1911.

The nine Appellants were tried by the Sessions Judge of Faridpur, with the aid of Assessors, under secs. 395 and 396 of the Penal Code, and convicted and sentenced to ten years' rigorous imprisonment under each section. The sentences were directed to run concurrently, and were commuted to transportation for the same period. The Assessors found the Appellants, Lalan Mallik and Sajani, guilty, and acquitted the rest. They believed that Lalan was caught almost red-handed, that his confession on arrest was made to a private individual and recorded on the night of the dacoity and was voluntary, that the confession of Sajani was also voluntary, and that police oppression was not proved in either case. As to the approver, they thought that his evidence was true, but that it was doubtful whether he had given the names of the dacoits correctly.

It appeared that about midnight, on the 6th December 1910, a dacoity was

LALAN MALLIK *v.* KING-EMPEROR.

committed in the house of one Bistoo in Mirgi Bazar, within the jurisdiction of the Pangsa Thana, by a body of men who were residents of villages some 12 miles distant within the jurisdiction of the Baliakundi Thana. The men had their faces covered, and one of them carried a gun. One of the dacoits, Lalan Mallik, fell into a hole as he was running away, and was captured and taken to Bistoo's godown where he was interrogated by the villagers. He made a confession giving the names and villages of the present Appellants, except Pocha Mandal and Gunga Charan, and of eleven others as having been engaged on the dacoity. It was recorded at 1 A.M. by Buzlur Rahman, a resident of Mirgi. While it was being taken down a chowkidar was despatched to the thana to lay a first information which was recorded at 9 A.M. on the 7th, and which referred to the statement of Lalan and the fact of his having named the dacoits. The Sub-Inspector of Pangsa came on the spot at 4-30 P.M. on the 7th, when Buzlur made over the statement to him, and the Sub-Inspector of Baliakundi came the next day. On the 9th Lalan made a detailed confession to a first class Magistrate giving an account of the dacoity and naming the persons concerned therein, including Pocha whom he had not mentioned previously. The police then searched for the persons named by Lalan but they were not found in their villages. Biswanath was arrested on the 16th December, Gouri Charan and Ganga Charan on the 18th, Pocha Mandal on the 29th, Sajani on the 3rd January 1911, Reajuddi on the 25th, Bepin Mandal on the 7th February, Jagadish on the 18th, and Nabadwip early in March. On the 20th February Jagadish, who was afterwards admitted as an approver, made a long and detailed confession to a Magistrate giving the names and villages of 19 persons, explaining in detail how eight of the dacoits met at his house and then proceeded to Mirgi, meeting eleven others on the way, narrating their doings on the way, and detailing his own movements between the 7th December 1910 and 18th February 1911. Sajani also made a confession on the 15th January 1911 giving the names of all the Appellants including Pocha and Gunga. Lalan retracted his confession on the 20th April 1911, and stated to the same Magistrate to whom he had previously made his confession that he had gone to a fair, and was seized by some persons unknown on his way back.

There was no direct evidence of identification of any of the dacoits, but Lalan, Reajuddi, Sajani, and two others not before the Court, were seen together by a witness Subdar Hossein just before the dacoity: while another witness deposed that he saw Lalan, Reajuddi, Sajani, Bepin, and three others, not accused in the present case, sitting close together just before dark on the day of the dacoity.

Babu Gour Chandra Pal for the Appellants.—Lalan was arrested by the chowkidar before he made his statement: the daffadar was also present. Hence Lalan was in police custody and his confession to the villagers is inadmissible. Apart from this the statement may have been concocted after the arrival of the Pangsa Sub-Inspector. The approver was under the influence of the Baliakundi police at the time of his statement to the Magistrate. The case of *Emperor* v. *Noni Gopal Gupta* (1) summarizes the law as to accomplices' evidence, confessions and police verifications. There is no evi-

(1) I. L. R. 38 Cal. 559: s. c. 15 C. W. N. 593 (1911).

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dence of identification and no corroboration. The confessions are inadmissible, and police verification has been condemned: See *Jamiruddi Masalli* v. *Emperor* (2).

Mr. Arthur Caspersz for the Crown.—The case is governed by sec. 9 read with secs. 114, Illust. (*b*) and 133 of the Evidence Act. Lalan's statement made before the police arrived is relevant on the question of identity. If he and Jagadish had called each other by name while running away, and several persons had overheard them, their evidence would be admissible under sec. 9, Illust. (*f*). The names given to Buzlur were of persons resident many miles distant and not known in Mirgi Bazar. The evidence of the witnesses concerned in the recording of the statement corroborates the statement of the approver. It is noteworthy that the Assessors and the Judge both believed that Lalan's confession and the approver's story were true, and that there was no possibility of concert between these two or of police concoction in either case.

The JUDGMENT OF THE COURT was as follows:—

HARINGTON, J.—In this case, the nine Appellants have been convicted under secs. 395 and 396 of the Indian Penal Code, and have been sentenced to ten years' transportation each. The Assessors agreed that Lalan and Sajani were guilty, but, while acquitting the remaining seven prisoners, they expressed the opinion that the deposition of the approver was true, but were doubtful as to whether he had given the names of the dacoits correctly. They also expressed an opinion that Lalan was caught red-handed, and that the confession which he made on the spot was made to a private person and was not obtained by force.

The learned Vakil who appears for the Appellants has taken us at very great length through the evidence of upwards of fifty witnesses who were heard in the course of the case. His object in doing so is not clear because it is conceded by the learned Vakil that it has been established, without any shadow of doubt, that the occurrence took place, and that the only question is whether the evidence of the approver has been sufficiently corroborated to make it safe to uphold the conviction.

The facts that were accepted by the Judge and the Assessors are that, on the night of the 6th—7th of December last year, a large gang of dacoits made an attack on Bistoo's house at Mirgi. Bistoo and another man were sleeping in a verandah. They were assaulted and the dacoits endeavoured with an axe to break into the house. Befere they could effect their purpose, the neighbours came up and there was a fight and the dacoits were driven off; but they were not driven off until they had used a gun which was carried by one of them. Bistoo and several other persons received gun-shot wounds, a man named Mahadeo being so severely injured that he died of the effects a short time afterwards. One of the dacoits, a man named Lalan, fell into a hole near the bank of a *khal* as he was running away, and was captured by one Ahmed and two other persons and brought back to Bistoo's godown. There he gave the names of certain other members of the party of the dacoits. While he was doing this, a chowkidar was sent away to lay the first information. As a result of the information received from Lalan, efforts were made to arrest the persons

(2) I. L. R. 29 Cal. 782, 788 (1902).

whose names he had given; but, they were not to be found in their villages. Not till the 16th of December was Biswanath arrested, then on the 18th Gour Charan was brought by his father and Ganga Charan was caught, on the 29th Pocha Mandal was captured, on January 3rd Sajani, on January 25th Reajuddi, on February 7th Bepin, on February 18th Jagadish who afterwards turned informer, and, in the early part of March, the last prisoner Nabadwip was taken into custody.

A great deal of the evidence which was read dealt with the events that took place when the attack was made in Bistoo's house, but no single one of the dacoits was identified during the attack because they had taken the precaution of arranging their pugris so as to conceal their faces and it was on the capture of Lalan that it was possible to ascertain the names. With regard to Lalan it should be noticed that he appears to have disclosed no defence at all until April 20th, 1911, when before a first class Magistrate, he stated that he went to a fair and that he was seized by persons he did not know on his way back. He had already made to that same gentleman, on December 9th, 1910, a long detailed confession giving an account of the dacoity. I entirely disbelieve the story about his return from the *mela*. If there was any truth in it, it would have been stated at once, and Lalan would not have taken time from December to April to think out the story. I have no doubt it was an invention concocted as soon as he regretted having made the confession which he did as to his proceedings in the dacoity. This confession is ample evidence to corroborate the approver and his conviction must be affirmed.

Another of the Appellants, Sajani, has made a confession which has been accepted by the Assessors and it is ample evidence to corroborate Jagadish's evidence against him. The law as to an accomplice's evidence is clearly and explicitly laid down in sec. 133 of the Evidence Act which provides that an accomplice shall be a competent witness against an accused person and that a conviction shall not be illegal merely because the evidence of the accomplice is uncorroborated. In the present case, therefore, to justify the Appellants in asking us to set aside the conviction, they must shew not only that there is no corroboration but that the Judge taking all the evidence together, was wrong in acting on it. Now, the informer Jagadish was arrested on the 18th of February. He made his statement on the 20th. It is a very long and detailed statement and is one which it is extremely unlikely that he would be able to invent. When Jagadish went into the witness-box, he narrated his story in a way which commended itself to those who heard him giving the evidence. He gave the names of no fewer than 19 persons, some Hindus and some Mahomedans. They were inhabitants of different villages and although Reajuddi, Pocha Mandal and Bepin suggest that there was enmity between themselves and Jagadish, there appears to be no evidence to support the suggestion nor does there appears to be any reason whatever for Jagadish's desiring to implicate any one of the particular persons whose names he had given. He described how the 8 people, amongst whom were Sajani and Lalan, assembled in his *bari* and how they went on to Budhai Mandal's *gulli*, where 11 other persons were waiting, amongst whom were the other 7 out of the nine Appellants.

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Contents.

NOTES.

NOTICE.

The High Court, Appellate Side, will be closed, on Monday, the 3rd June, 1912, being the day fixed by the Government of India for the celebration of the Birthday of he King-Emperor.

HIGH COURT,
Appellate Side,
The 15th May, 1912.

H. T. CULLIS,
Registrar.

THE HIGH COURT ON ALL ITS SIDES, WITH offices, will remain closed on the 3rd of June next for the celebration of the King-Emperor's birthday.

THE POLICE TORTURE CASE WHICH WAS CONcluded at the Sessions of the Calcutta High Court, on Wednesday last, reflects great credit on all who were concerned in this judicial enquiry of great public importance. The jury in this case of whom, with one exception, all were Europeans, deserve great credit for being singularly free from bias either in favour of or against the accused policemen or the European Inspector of Police who were under trial before them. Like good men and true, they did not allow any considerations to influence their mind except what was disclosed by the evidence at the trial. We have heard of the jury in other parts of India being at times influenced by racial or executive bias. But this cannot surely be said of the Calcutta jury, whether European or Indian, who have seldom allowed any consideration other than that of justice to influence them in their verdict. The present is a notable instance which jurymen all over India would do well to emulate.

POLICE TORTURE FOR EXTORTING INFORMATION or confession has formed, the subject-matter of common complaint and discussion in the public press, in Council Chambers and in Parliament, notably of late, though the evil is not certainly of recent origin. There are those who believe it to be a universal practice amongst the Police in this country and there are others who allege that torture is by no means so common as it is often represented to be. These academic discussions have not carried us very far in putting any check on this pernicious practice, even assuming that it has existed only to a moderate extent. A single case like the one that has just been threshed out in open Court and in which justice has been meted out to the offenders would have a more deterrent effect than any departmental measures and action however severe or stringent. Such measures never see the light and affect only the person or persons concerned and do not serve as a warning or example to the Police as a body. The jury have always been the custodians of public liberty and the fact that they have by a majority of 8 to 1 given their verdict against torture or its abetment finding any place in the mode of police investigation is of far greater moment than many an assurance in Parliament and speeches in Council.

WE MUST ALSO CONGRATULATE THE POLICE Commissioner and the Presidency Magistrates for the attitude of detachment and strict impartiality with which they have carried on the investigations in this case. To give them the credit that is due to them we must briefly note how the case came before the Courts. On the 4th of March last a theft had taken place in the godowns of Jodhan Dhobie in the Fort William. On the 5th information was given to the Police. One Ananta who was residing in the Fort without a pass was arrested. On the 9th Jhinku Ojha and Nageswar Ojha who were also residing in the Fort, but with passes, were arrested. On the 12th Ananta and Nageswar were placed before Mr. Keays, the 2nd Presidency Magistrate, for trial but not Jhinku who was placed by the Police in the witness-box for deposing against the two accused. Jhinku, however, complained before the Magistrate from the witness-box that he knew nothing about the case and that he and Nageswar had been severely beaten and otherwise maltreated by the Police for extorting confession while in custody. Mr. Keays finding marks on the body

of Nageswar reported the matter to the Police Commissioner and Sir Fredrick Halliday forwarded Mr. Keays' letter to Mr. Swinhoe, the Chief Presidency Magistrate, for judicial inquiry. Mr. Swinhoe thereupon asked Mr. Bagchi, the Fourth Presidency Magistrate, to investigate into the matter and report. Mr. Bagchi went to jail and obtained the statements of Nageswar and Jhinku and reported that there seemed to be truth in the allegations. The Chief Presidency Magistrate then took up the case, recorded evidence and committed Inspector Heelis, Writer Constable Narayan Chandra Das and Head Constables Amrita Chakravarti and Abdul Sattar Khan, to the Court of Sessions charging them with having tortured the complainants for obtaining confession and information and for the abetment of such torture

THE ATTITUDE OF THE POLICE AUTHORITIES throughout the case has, as is well-known, been one of non-interference. We have seen, however, how promptly Sir Fredrick Halliday forwarded the case for judicial enquiry before the Chief Presidency Magistrate. We are of opinion that he acted very properly in directing the Police not to interfere in the case in any way. For, if the prosecution had failed, it might have created a public impression that the failure was due to Police interference. We are glad to find that the public are at one with the learned Chief Justice in absolving the Police authorities in Calcutta of any sinister suggestions with regard to the matter. We ought, however, to mention that the charges at the trial as also some other facts disclosed in the case such as the interpolations in the Station Register and the Division Register have brought serious discredit on the methods of the Subordinate Police in Calcutta. We are sure that the lessons of this case will not be lost on them and that the superior authorities will make every endeavour to improve the morals and methods of the Police force in Calcutta. We have said that the jury have returned a verdict in this case to which no exception can be taken and we must say in conclusion that the sentences meted out to the offenders are quite deterrent without leaning on the side of severity. The trial and its result has, we are glad to note, produced an excellent impression in the country.

NOTWITHSTANDING THE THEORY OF RELIGIOUS efficacy there can be no question that even in orthodox Hindu minds the secular aspects of adoption, marriage, inheritance and succession ordinarily loom as large as in that of any other mortal. It may be that beyond the present material felicities that flow from them, a Hindu looks forward to some spiritual benefits that are likely to bless his soul in the next world, but that does not make these institutions any the less secular. That the religious aspects of such secular institutions linger more in theory than in actual intention may also be presumed from the fact that a sonless Hindu without property hardly ever thinks of making or authorising an adoption. Things might have been slightly different in 1867 when Raja Raghubar Singh, the deceased husband of Rani Dharam Kunwar, the Appellant in the Privy Council case reported in this issue (p. 675), died leaving authority to the Appellant to adopt "some boy" and, in case of his death, another. It is quite evident that the Raja though in some degree was solicitous for the benefit of his soul in the other world, was by no means less anxious for the preservation of the family name and prestige in this.

THE WIDOW WHO HAD SUCCESSIVELY ADOPTED four sons, having fallen out with the last and the only surviving adopted son, sought to set aside his adoption as not being within the terms of the authority left to her by her husband. The Courts in India without deciding this question dismissed her suit on the simple but sufficient ground that she was estopped from challenging the validity of an adoption which she herself had brought about by representating that she had the requisite authority, the adoption having materially affected the position of the adopted son.

BEFORE THEIR LORDSHIPS OF THE JUDICIAL COMmittee, Sir Robert Finlay, K. C., for the widow raised what from the purely religious standpoint would seem to be a formidable objection to the decision of the Courts in India. This eminent counsel argued that a "son by estoppel would be no son under the Hindu law," and added, as a natural sequence to the spiritual theory, that it would be "terribly disappointing to the deceased if the law of estoppel were held to prevail in the next world." His apprehension on behalf of the deceased Raja's soul drew from Lord Robson a dictum which would leave the path of our future spiritual salvation unobstructed, since his Lordship declared that the law of estoppel would affect transactions in this world alone. It is indeed very reassuring for us all to find that the judgments of Courts here below will not work either as estoppel or *res judicata* against us in the next world and that we may, if we must, have a trial there *de novo.*

TURNING TO THE SECULAR SIDE OF THE CASE WE are glad that their Lordships of the Judicial Committee have affirmed the decision of the Courts in India dismissing the Plaintiff's suit upon the merits as well as on the ground of estoppel. It is worthy of note also that their Lordships interpreted the desire of the deceased to adopt a son not in the narrow and literal sense of the words used but in a wider sense so as to give

effect to his wishes as expressed to his wife for the perpetuation of his name and the prestige of his house as also for the performance of his *shradh*. A further commendable feature of the judgment is that the finding of their Lordships on the evidence closes the door to further litigation by persons other than the widow and claiming to be the reversionary heirs of the deceased Raja. It is always a satisfaction to us to find a Court of Appeal putting its seal of finality to a litigation. This is all the more so in this case because notwithstanding all the learned argument about spiritual benefit or religious merit advanced on behalf of the Rani we singularly miss any considerations of religion or morality in the initiation of this suit by her. Nor do we meet in her any qualms of conscience, religious or moral, in carrying it on to its bitter end, impelled by the common human failing of anger and spite. The Hindu spiritual theory sounds very fine in the abstract but the cases which are often sought to be propped up by it are mostly a bitter satire on it.

THE RISK OF HASTILY PASSING DECREES BY DEFAULT in undefended cases is well illustrated by the case of *Rex* v. *Castiglione and Porteous*, which recently came up before the Criminal Court of Appeal in England. *Castiglione* was a picture dealer and he devised a very ingenious means of selling out his stock of pictures by fabricating some fictitious legal proceedings. He saw the Defendant Porteous, a solicitor, and with his assistance instituted a suit in the High Court in the name of a fictitious Plaintiff against an imaginary Defendant. Porteous made an affidavit that the process was properly served on the Defendant and a judgment by default was passed in the suit. Execution was then taken out and some of the stock of this resourceful picture dealer was attached as belonging to the fictitious Defendant. They were then sold by the Sheriff with all the solemnity of a sale held under the order of the High Court and attracted a lot of customers. But the trick was afterwards discovered and Porteous was indicted for perjury for having sworn a false affidavit and Castiglione for aiding, abetting and suborning him to commit perjury. A very ingenious defence was raised before the Appeal Court. It was contended that as the charge was one of perjury in the course of judicial proceedings, the proceedings in this case being wholely fictitious and the Plaintiff and the Defendants being imaginary persons, the affidavit and allegations in the case were only imaginary and did not constitute or amount to perjury in the proper sense of the term. The Court of Appeal found both the accused guilty relying on the Perjury Act of 1911 which provides that whoever wilfully swears falsely in any oath or affidavit shall be guilty of perjury as if he sworn in judicial proceedings.

CURRENT INDIAN CASES.

Land Acquisition Act, sec. 32 –Land dedicated to religious or charitable purposes—Disposal of compensation for.

Land dedicated for religious and charitable purposes is land which belongs to a person (the shebait) who has no power to alienate it and therefore when such land is acquired the compensation money should be invested under sec. 32, Land Acquisition Act On the question whether any part of the invested funds may be available for necessary repairs to the rest of the debutter property, as the Legislature in sec. 32 of the Land Acquisition Act adopted the language of sec. 69, Land Clauses Consolidation Act, in *pari materia* English decisions on that Act prior to the Indian Act could be relied upon to understand the intention of the Legislature The Court therefore considered the principles laid down by English decisions on the question as to how far the capital may be available for repairs and *held* that the position of the parties ought to be the same as if the land had never been converted into money and as the *shebait* was competent to alienate a portion of the land for the preservation of the buildings he should also be held entitled to withdraw the compensation money for such purpose.

The land acquisition Judge has power to deal with an application to have part of the invested funds for necessary repairs as under sec. 32 of the Act the fund is placed in the custody of that Court and the jurisdiction is by implication conferred on it to deal with all questions that may arise as to the application of the fund.—*Mookerjee* and *Caspersz, JJ.*

KAMINI DEBI *v.* PRAMATHA NATH MOOKERJEE, I. L. R. 39 Cal. 33.

Easement—Right to light and air, extent of—Measure of nuisance.

The rules governing right to light and air in India must be ascertained by reference to the English law on the subject before 2 and 3 Will. IV, c 71. Sec. 26 of the Limitation Act only provides for the acquisition of the right and does not define its extent. The extent of the right is indicated by the fact that the remedy for interference with the right is not an action for trespass but one for nuisance

What is or is not a nuisance must largely be determined by the facts of each case and before relief is granted it must be shown that there has been sensible privation of light sufficient to render occupation of the house uncomfortable and less fit for use. In determining this the character of the previous enjoyment must be taken into consideration but that is not the decisive measure of the injury which constitutes nuisance. In considering the question as to whether there has been a nuisance by the deprivation of light the other sources of light of the Plaintiff's dwelling which may prevent the obstruction from diminishing the quantity of light in such manner as to make it less fit for use may be taken into account, provided that the light from other sources has been acquired by prescription and is not liable to be cut off without remedy being left to the Plaintiff. Where therefore it was found that though there had been an abridgment of direct light from the east by the Defendants erecting a building, there remained a sufficiency of light for the ordinary purposes of the Plaintiff's house and there was not such material detraction from the value of the rooms as to materially affect the suitableness of the premises for the purposes for which they might be reasonably regarded as available, the Court *held* that there was no nuisance —*Jenkins, C. J.*, aud *Woodroffe, J.*

PAUL *v.* ROBSON, I. L. R. 39 Cal. 59.

Prohibitory order, Court if may issue on a debtor of judgment-debtor outside jurisdiction in execution of a decree.

In execution of a decree for money a Court has no jurisdiction to issue a prohibitory order under Or. 21, r. 46, C. P. C., on a debtor of the judgment-debtor residing outside the local jurisdiction of that Court in respect of property

outside its jurisdiction. A Court has on a proper view of secs. 38 and 39 of the Code no jurisdiction to attach property outside its jurisdiction. The same principle is applicable to the attachment of a debt. The decree must be transferred to the Court having local jurisdiction to attach a debt in execution of it. Any loss for delay may be avoided by the procedure of attachment by precept under sec. 46, C. P. C.

There is no analogy between an attachment before judgment and an attachment in execution of a decree and the fact that there may be attachment out of jurisdiction before judgment is no argument for similar attachment in execution

The mere fact that the garnishee did not object to a prohibitory order issued by the same Court, in a previous execution proceeding which proved infructuous is no bar to his urging any objection to a fresh attachment in a new proceeding.—*Mookerjee* and *Carnduff, JJ.*

BEGG DUNLOP & CO. *v.* JAGANNATH, I. L. R. 39 Cal. 104.

Bengal Tenancy Act, sec. 160—Protected interest.

B. held a land under a permanent lease granted by P. which was interpreted as giving B. authority to grant sub-leases. Where B. under that authority granted a permanent sub-lease to G. and the Plaintiff held under a sub-lease from G, *held* that the sub-lease having been granted under the authority received from B. was a protected interest within the meaning of sec. 160 of the Bengal Tenancy Act.—*Jenkins, C. J.*, and *D. Chatterjee, J.*

AFAJUDDI KHAN *v.* PRASANNA I. L. R. 39 Cal. 138.

Cr. P. Code, sec. 437—Further enquiry without notice to accused and against stranger to proceedings joined as co-accused.

A District Magistrate has no jurisdiction to order further enquiry under sec. 437, Cr. P. Code, without previous notice to the accused and in ordering further enquiry he cannot join a person against whom there is no complaint and no process as a co-accused as though he were a party in a civil case.—*Stephen* and *N. R. Chatterjea, JJ.*

AMBER ALI *v.* ANJAB ALI, I. L. R. 39 Cal. 238.

Correspondence.

[TO THE EDITOR OF THE "CALCUTTA WEEKLY NOTES"]

SIR,—I should like to point out a mistake on page clxii of the issue of your valuable paper for 13th May, 1912. You have printed the communique of the Legislative Department thus: "the Viceroy in consultation with his constitutional advisers." In all the other copies of the communique I have seen, the last word was in the singular. There is a world of meaning in the use of the singular number to those who know what really happened.

18th May 1912. I am &c.,
PEDANT.

Review.

EJECTMENTS UNDER THE BENGAL TENANCY ACT AND THE OLD RENT LAW. By *Janaki Nath Mukerjee, Government Pleader, Alipur. Published by C. L. Chatterjee, Saraswati Press, 76, Amherst Street, Calcutta. 1912. Paper-bound 2-4; cloth-bound 2-8.*

The law of ejectment (as that term is used in this country) embraces a variety of subjects. The author has taken up for treatment in this book the law of ejectment as affecting the relation of landlord and tenant in cases of what may be compendiously (though not quite accurately) be described as the agricultural tenancies of Bengal. This would cover the provisions of the Bengal Tenancy Act bearing directly or indirectly on the subject and the case-law that has grown up around them and similar provisions of the old rent law. A particular provision of the Act is first set out and is then followed by a statement of the case-law. For convenience of reference each case-note is preceded by a brief abstract of the decision in bolder type. The author has had evidently to perform a considerable amount of spade-work for the purpose of this little book which in the result presents a fairly full digest of the law. As such it is bouud to be useful. The get-up of the book is attractive.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter).

CIVIL REVISIONAL JURISDICTION. Before MOOKERJEE and CARNDUFF, JJ. RULE No. 5977 OF 1911. HARI MANDAL AND OTHERS, Petitioners *v.* KESHAB MANNA, Opposite Party. 12th April 1912.

Transfer of appeal—Criminal Procedure Code (Act V of 1898), sec. 195 (7)—Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), secs. 22, 23.

The Opposite Party applied for sanction to prosecute the Petitioners under secs. 182, 193 and 476 of the Indian Penal Code. The Munsif, before whom the application was made, granted the sanction.

Against the order of the Munsif, the Petitioners appealed to the District Judge who, however, transferred the appeal from his own file to that of the Subordinate Judge, for disposal. The Subordinate Judge dismissed the appeal.

The Petitioners then moved the High Court.

Held—That the District Judge had no power to transfer the appeal; applications mentioned in sub-sec. (7) of sec. 195 of the Code of Criminal Procedure are not appeals within the meaning of sec. 22 or sec. 23 of the Bengal, North-Western Provinces and Assam Civil Courts Act.

Babu Monmatha Nath Mukherjee for the Petitioners.

Babu Mohini Nath Bose for the Opposite Party

A. T. M. *Rule made absolute.*

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He described their progress to Mirgi, mentioned their sitting down at a place for smoking and cutting a bamboo from a bamboo hedge, and the fact that they passed persons on the road with whom words were exchanged, and gave details of the attack on the house and his movements after the failure of the attack in detail, which bears on its face the impress of a true story. He said that he got a warning from Mofizuddin after the dacoity that Lalan had been captured and that he had given the names. Lalan's statement as to the persons who took part in the dacoity made in the godown gives the names of all the Appellants excepting Pocha Namasudra and Ganga Charan,—but the former's name is given in his statement made to the Magistrate. It has been argued by the learned Vakil for the Appellants that Lalan did not give the names when he was brought back to Bistoo's godown, but that his statement is the result of a later consultation between the police-officers. The only ground on which this suggestion is founded is that there is a discrepancy between the daffadar and the chowkidar as to the event of the evening. The chowkidar says that he was sent away to lay the first information while the witness Buzlur was writing down the information as to the names of the dacoits which he was obtaining from Lalan. The daffadar says that when he arrived he saw Lalan in custody of the chowkidar in Bistoo's godown, and that he at that time heard that a statement of Lalan's had been written down. Now, would that discrepancy justify the inference that the alleged statement by Lalan is a concoction? It is quite possible that the daffadar may have made a mistake as to the presence of the chowkidar when he arrived, but that the names were given directly after the dacoity by the captured dacoit is, I think, clear from the fact that when the chowkidar laid the first information he mentioned the fact that the captured dacoit had given the names of those who had come to commit the dacoity. Now, this chowkidar clearly started very shortly after the occurrence, and it is quite impossible to suppose that at that time there was a conspiracy between the Inspectors who had not yet arrived on the scene of the occurrence to make out a false list and say that Lalan had given it; and, moreover, though Lalan denied, on April 20th, that he had made any statement to Buzlur Munshi, yet he had made on January 9th to a Magistrate a confession implicating, with one exception, the same people whose names he is said to have given to Buzlur. To my mind the theory that the names might have been concocted by the Inspectors and made up afterwards entirely breaks down because from the first information which was laid long before the Inspectors came, it appears that Lalan did mention who the dacoits were. It has been contended that his statement is inadmissible on the ground that he was in the custody of the police when it was made: but I do not think that was the case. He had been captured by private persons and was in their charge in Bistoo's godown. I am inclined to think the argument for the Crown that the chowkidar was not allowed to know what names were given, so that there should be no ground for saying Lalan was in his custody when he made his statement, is well-founded. We have, therefore, the circumstance that directly after the occurrence the names of the dacoits were given by a man who was engaged with the party, and that those names and the statement made by Lalan

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with respect to the occurrence agree with the evidence subsequently given by the informer. Sajani's statement, also made on the 5th of January, while implicating himself gives not only the names given by Lalan but those of Pocha Mandal and Ganga Charan as well; though there is authority for saying that confession subsequently withdrawn are not evidence against any one except the persons who made them yet, they can be taken into consideration by the Court under sec. 30 of the Evidence Act; and it is impossible to disregard the fact that, immediately after the occurrence, the names of all the Appellants except Ganga Charan were given, and a story was told which agrees with the evidence of the accomplice. Then two of the confessions made before the Magistrate, that of Lalan implicates all the Appellants except Ganga Charan, and that of Sajani all the Appellants, and there is no evidence of any circumstance which would induce both Sajani and the informer to falsely accuse Ganga Charan. Besides these circumstances there is evidence that 5 out of the 19 persons named, namely, the Appellants Lalan, Reajuddi and Sajani with two other persons who are not before the Court were seen together by Subdar Hassain just before the dacoity; and another witness, Kadem Sikdar, also saw 7 out of the 19 whose names have been given sitting close together just before dark on the day of the dacoity and out of these seven Reajuddi, Bepin, Lalan and Sajani are amongst the Appellants on the record. No reason was alleged at first as to why either Lalan or Jagadish or Sajani should give the names of these particular individuals, for there was no evidence that there was any quarrel or ill-feeling between them. It is only late in the proceedings that there is a suggestion that they are named because of an ill-feeling against the Namasudras. There is a striking circumstance that Jagadish says that he got a letter from Mozuffudin stating that Lalan had been captured, and he had given the names of the dacoits. It was, therefore, known to one member of the gang at least that the names of the dacoits had been given. It is to be observed that it is not stated that the name of this or that particular person was given by Lalan, but merely that he gave the names of the persons who took part in the dacoity, and then there is a very significant fact that all the persons whose names were given at once disappeared from their houses. I think myself that all these circumstances sufficiently support the evidence which Jagadish has given. In all cases depending on the evidence of an informer the degree of support that the evidence requires must depend on the amount of credit in each particular case to be attached to the informer. I have pointed out circumstances in this case which leads me to think that the story that the informer is telling is a true one and that view is strengthened by the impression that was obviously made on the Assessors by the informer when he told his story. Then, on the case generally there has been no attempt to strengthen it by exaggeration or by procuring false witnesses. It would have been quite easy, I have no doubt, to get persons to come and give evidence as to seeing the members of the gang together or it might have been possible to adduce false evidence of identification in the village at the time of the attack and to improperly strengthen the case by methods which are not unknown in this country. There seems to me in this case to have been a studious avoidance of anything which savours of bolstering

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up the case. I have no doubt that the evidence given is perfectly true, and that the Appellants before the Court were a dangerous body of robbers.

With respect to the sentences, although the attack on the house failed and the dacoits were unable to appropriate any preperty, yet, nevertheless, the offence is a very serious one because fire-arms were carried by one, at least, of the robbers, and those fire-arms there was no hesitation in using. Several persons have been wounded, more or less seriously, and one man has been murdered. Under these circumstances I am quite unable to say that the Judge exercised his discretion wrongly in passing the sentences he did. The result is that the appeal is dismissed, and the convictions and sentences are affirmed.

BRETT, J.—I agree.

Appeal dismissed.

[PRIVY COUNCIL.]

[APPEAL FROM ALLAHABAD.]

LORD SHAW.	RANI DHARAM
LORD ROBSON.	KUNWAR, Appellant,
SIR JOHN EDGE.	*v.*
MR. AMEER ALI.	BALWANT SINGH,
1912, 23, April.	Respondent.

Hindu Law—Adoption by widow—Authority to adopt, interpretation of—General authority to adopt one son on death of another, not limited to adoption of two only—Widow if may question validity of adoption—Estoppel.

R., a Hindu and the owner of a Raj, died leaving a widow (the Appellant) who was then enceinte. *According to the widow's own admission, R. before his death gave her authority to adopt in the following terms: "If, God forbid, you give birth to a daughter or if a son be born but die after his birth I strictly order you to adopt some boy to me so that he might perform my* shradh *ceremony and yours and perpetuate my name and after your death become the absolute owner and possessor of the whole of my estate. If, God forbid, the son who might be adopted under this authority should die in your life-time you will have power to adopt another boy." A son was born but died shortly afterwards, and three boys adopted one after the death of the other having also died, she adopted a fourth boy, the Respondent, who was the son of a cultivator. Until her quarrel with the Respondent, the Appellant and her advisers invariably regarded the words ascribed by her, according to her recollection, to her husband as giving her a general authority to adopt not limited to or exhausted by two adoptions.*

Held—*That even assuming that she remembered the exact words used by her husband, they expressed a general intention that if one boy died another boy was to be adopted, and the widow had power under that authority to adopt the Respondent.*

That so far as she herself was concerned she was, on the evidence, clearly estopped from questioning the validity of the adoption, and her suit to declare the adoption invalid failed on this ground as also on the ground that the adoption of the Respondent was in fact a valid adoption, being covered by the authority given to her by R.

This was an appeal from a judgment* and decree of the High Court at Allahabad, which confirmed a decree of the Subordinate Judge of Saharanpur, in whose Court the Appellant, as Plaintiff, sued the Respondent to obtain a declaration that she had no power to adopt the Respondent, that in fact she never did

* Reported in I. L. R. 30 All. 549 (1908).

adopt him, and that a document, called a deed of adoption, was null and void. The Subordinate Judge dismissed the suit with costs.

The material facts of the case in addition to those appearing in their Lordships' judgment may be stated as follows :—

The Appellant is the widow of one Raja Raghubir Singh, who died on the 23rd of April 1868, leaving him surviving his mother, Rani Kamala Kuer, and the Appellant. The latter was about 14 years old, and was pregnant, at the time. She remained in a subordinate position in the household during the life-time of her mother-in-law, who died in 1897.

The two Ranis made a joint application for mutation of names in the Revenue Registers on the 4th of June 1868, and subsequently, on the 18th of September 1868, presented a petition to the Board of Revenue in which they said : "Besides, the above Rani Dharam Kunwar, the wife of the late Raja, is in the state of pregnancy, if she will give birth to a male child he will be the rightful heir to the estate, if a female, then in accordance with the permission of the late Raja, as he stated at the time of his death, to take adopted son ; under the above circumstances there is no need of placing the estate under the Court of Wards."

On the 16th of December Rani Dharam Kunwar, the Appellant, gave birth to a son, who was named Raja Jagat Perkash Singh and died in 1870, when he was about a year old.

The younger Rani, therefore, acting on the advice of her mother-in-law, adopted a boy on the 4th of March 1877, and on the death of the son so adopted, made a second adoption on the 20th of January 1883. The boy adopted on the latter date also died, and so did a third male child taken by the Rani for adoption. The three boys mentioned above all died in their infancy.

On the 2nd of June 1898 the Appellant, after the death of her mother-in-law, took over from one Ram Newaz, a Gujar of Jhandera, who was a cultivator by occupation and belonged to the same *gotra*, or tribe as the husband of the Appellant, his two sons, Balwant Singh, the Respondent, then represented to be 14 years old, and Tungal Singh, with the view of selecting, at a future time, the one who should prove to be the more eligible for formal adoption.

The Appellant brought the present suit on the 7th of January 1905, and, in her plaint, alleged that in consequence of information given to her by the manager of the estate, one Tauhawar Ali, that estates held by women would be taken possession of by the Court of Wards, she had directed that a *jalsa* (entertainment) should be held on the 13th of January 1899, to which European officials and respectable people should be invited and at which it should be proclaimed that she had selected the Respondent for adoption. The said manager, however, taking advantage of her position as an illiterate *purdanashin* lady had, on that day, caused a deed to be written out, attested, marked, and later on registered by her, without acquainting her with its contents, which falsely recited that she had actually adopted the Respondent with due ceremonies under authority from her husband, whereas she had not in fact adopted the Respondent, nor had she authority to do so. She further alleged that she came to know of the deception practised on her in July 1904 when the Defendants, in two ejectment suits brought by her, set up the title of Balwant Singh, the Res-

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pondent, as adopted son in answer to her claim. She therefore prayed that—

(1) It might be declared that she had no power to adopt Balwant Singh, Defendant, that she did not in fact make a ceremonial adoption and that the deed, dated 13th of January 1899, was void and ineffectual.

In reply to the plaint the Defendant pleaded (*inter alia*) that on the 13th of January 1899 he was adopted with due ceremonies, that the Appellant had affixed her mark to the deed of adoption prepared on that date with full knowledge of its contents, and that she was estopped from questioning the validity of the adoption.

The following issues were framed for trial by the Subordinate Judge.

(1) Whether the Plaintiff had knowledge of the contents of the deed of adoption when she executed it and got it registered or whether she had no knowledge of them?

(2) Was or was not the Defendant adopted by the Plaintiff?

(3) Had or had not the Plaintiff any authority from her husband to adopt the Defendant?

(4) If the first and second issues be decided against the Plaintiff how will it affect the claim?

Oral and documentary evidence was adduced on behalf of both parties.

On the 26th of February 1906, the Subordinate Judge delivered his judgment and decree. With reference to the first and second issues he decided that the Appellant had duly adopted the Respondent and that she had executed the deed of adoption with knowledge of its contents. On the fourth issue he held that having adopted the Respondent the Appellant was estopped from pleading that she had no authority for making the adoption and that therefore it was invalid: He also held that in view of the above finding it was not necessary to decide the third issue.

The Appellant appealed to the High Court from the decree of the Subordinate Judge. Her appeal was heard by two learned Judges (Stanley, C. J, and Banerji, J.) of the Court who on the 4th August 1908 delivered their judgment* and decree by which they confirmed the decree of the Subordinate Judge and dismissed the appeal with costs.

In the course of their judgment they said:—

"The question then is whether or not in view of these facts the Court below was right in holding that the Plaintiff is estopped from denying her authority to adopt the Defendant?

We are not aware of any case and none has been cited to us in which a Plaintiff has successfully raised such a contention as has been laid before us by the Plaintiff's learned Advocate. In the most solemn way the Plaintiff represented that she had authority to adopt and allowed the adoption of the Defendant to be carried out with the utmost publicity and with great pomp and ceremony. Moreover she executed a document which should serve thereafter as evidence of the fact of the adoption. In the last paragraph of it we find the statement that "this document, which is a deed of adoption, has been executed by me and I have affixed my seal to it with my own hands in order that it may serve as evidence." After the adoption the Defendant lived with the Plaintiff as her adopted son, was married as such at her expense and, as we have said, performed the *shradhs* of her husband

It is contended on her behalf that this conduct of the Plaintiff does not operate as an estoppel; that in order to create an estoppel it must be shown that the person setting it up has suffered some loss or detriment and that in this case the Defendant could not show that he had suffered any loss or detriment; that both families belong to the same *gotra*, and that the Defendant can return to his

* Reported in I. L. R. 30 All. 549 (1908).

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father's house and obtain his share of his father's property; that the fact that he held the position of a Raja for some years was beneficial to him and in no way detrimental. We do not agree as to this. The experience of the Defendant as a Raja would entirely unfit him for the life of a cultivator. But if it were necessary to show pecuniary loss we find that the Defendant incurred heavy liabilities in defending his adoption in the suit brought by Baldeo Singh. In his evidence he deposed and he is not contradicted that Man Singh prosecuted this suit on his behalf and paid the expenses of it and that some of the money expended by him was still due, and further that Lala Niranjan Lal, an Honorary Magistrate, of Saharanpur, had lent him a sum of Rs. 23,000. If he had not been led to believe that he was the adopted son of Raja Raghubir Singh, he would not have incurred these liabilities. Large sums of money would undoubtedly not have been lent to him. So that if it were necessary to prove detriment or loss from the conduct of the Plaintiff on which the estoppel is based these facts are in our opinion sufficient for that purpose."

Then after referring to sec. 115 of the Evidence Act and the decision of the Judicial Committee in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1), their Lordships continued as follows:—

"To allow the Plaintiff to repudiate the adoption would not only, we may observe in this case, be detrimental to the Defendant but to third parties such as the creditors of the Defendant who advanced money to him on the faith of his position as Raja. It is highly probable also that acting on the same assurance his wife's father gave her in marriage to him. We know of no authority and none has been cited to us in which a widow who had taken a boy in adoption to her husband was afterwards successful in a suit for a declaration that the adoption was invalid. Two cases in this High Court were cited to us in which a similar suit failed."

After referring in detail to these cases [*Sukhbasi Lal* v. *Guman Singh* (2) and *Durga* v. *Khushalo* (3)] and to *Thakoor Oomrao Singh* v. *Thakoorani Mehtab Koonwer* (4) which was relied on by the Appellant, but which their Lordships held did not give much support to her contention, their Lordships observed:—

"Upon the whole we are of opinion that the Court below rightly held that the Plaintiff was estopped from setting up the alleged invalidity of the Plaintiff's adoption. Plaintiff represented that she had authority to adopt and this representation was acted on by the Defendant. The ceremony of adoption was carried out on the faith of this representation. The marriage of the Defendant was likewise on the strength of it celebrated and the Defendant performed the *shradh* ceremonies of his adoptive father. In addition to this we have the fact that the Defendant resisted the suit of Baldeo Singh in which the validity of the adoption was impeached and was supported in his defence by the Plaintiff and incurred heavy liabilities in raising funds for the purposes of his defence. These matters appear to us to put it out of the power of the Plaintiff to maintain a suit for a declaration that her solemn act of adoption was without authority. We are supported in this view by the decisions in the following cases: *Kannammal* v. *Virasami* (5), *Ravji Vinayakrav Jaggan Nath Shankarsett* v. *Lakshmibai* (6), *Santappayya* v. *Rangappayya* (7). We might further say that the suit, in so far as it is a suit for a declaration that the Plaintiff had no power to adopt, is one in which it is discretionary with the Court to give or refuse relief. We should hesitate in the circumstances of this case before passing a decree in favour of the Plaintiff for such a declaration, in view of her conduct and of the false position in which the Defendant would be placed if her representation as to authority were held not to be binding on her."

The Plaintiff appealed to the Privy Council.

Sir R. Finlay, K. C., and *Mr. Ross*, for the Appellant, submitted that she was not barred by estoppel from pleading that she had no authority to adopt the Respondent. She had no power to make

(1) I. L. R. 20 Cal. 296 at p. 311 (1892).
(2) I. L. R. 2 All. 366 (1879).
(3) All. W. N. for 1882, p. 97.
(4) N. W. P. H. C. R. (1868), p. 103 A.
(5) I. L. R. 15 Mad. 486 (1892).
(6) I. L. R. 11 Bom. 381 (1887).
(7) I. L. R. 18 Mad. 397 (1894)

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more than two adoptions under the terms of her husband's will. An adoption without husband's authority was of no effect under the Benares school. The law of adoption was based on the Hindu religion, and the doctrine of estoppel was not applicable to such institutions. The object of adoption was the performance of *shradh* and other ceremonies for the spiritual welfare of the deceased. Performance of the necessary ceremonies by a son by estoppel could not possibly be acceptable to the spirit of the deceased. On the contrary it would be terribly disappointing to the deceased if the law of estoppel were held to prevail in the next world. A son by estoppel would be no son under the Hindu Law.

[LORD ROBSON.—The law of estoppel will affect transactions in this world alone.]

The law ought not to be extended to adoption under the Hindu Law which was essentially religious.

The observations of Muthusami Ayyar, J., in *Parvatibayyama* v. *Ramakrishna Rau* (8) support me. If the doctrine of estoppel were engrafted on the Hindu Law, that law as to an invalid adoption would be practically repealed.

[LORD ROBSON.—Is the Appellant not estopped by her deed from denying that she had her husband's authority ?]

The law of estoppel by deed is peculiar to England and does not apply to India.

An estoppel cannot take the place of a religious act on which rests the belief of a Hindu, that a valid adoption generates filial relation and religious competency to perform *shradh*, etc. It was submitted that the decision in *Sukhbasi Lal* v. *Guman Singh* (2) was erroneous. Reliance was placed on *Thakoor Oomrao Singh* v. *Thakoorani Mehtab Koonwer* (4), *Ravji Vinayakrav* v. *Lakshmibai* (6), *Gurulingaswami* v. *Ramalakshmamma* (9). Again, the rule of estoppel will bar the Appellant only. It will not operate against a reversioner who might sue in the future to set aside the adoption. The Courts below have not come to any finding as to the nature of the authority given by the husband. The point for decision on the present appeal is confined to the applicability of the doctrine of estoppel.

[Their Lordships intimated that in their opinion there were sufficient materials on the record to decide all questions arising in the suit.]

Counsel referred to the judgment delivered by another Subordinate Judge of Saharanpur in the suit instituted by Baldeo Singh and who had found that the authority did not extend to validate the fourth adoption or successive adoptions.

Mr. L. DeGruyther, *K. C.*, and *Mr. Bhugwandin Dube*, for the Respondent, were not called on. Their Lordships reserved judgment.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ROBSON.—The Appellant is the widow of one Raja Raghubir Singh, and she sued the Defendant in the Court of the Subordinate Judge of Saharanpur to obtain a declaration that she had not adopted him as a son to her deceased husband, and that if, in fact, any ceremony of adoption had been performed, it was invalid, owing to the absence of authority on her part from her husband to make such adoption. She further prayed that

(2) I. L. R. 2 All. 366 (1897).

(8) I. L. R. 18 Mad. 145 at p. 151 (1894).

(4) N.-W. P. H. C. R., 1868, p. 103 A.

(6) I. L. R. 11 Bom. 381, 383, 396 (1887).

(9) I. L. R. 18 Mad. 53 (1894).

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a document purporting to be a deed of adoption, dated the 13th January 1899, should be declared void as being executed by her without such authority as aforesaid.

The Subordinate Judge dismissed the suit with costs and the High Court of Allahabad confirmed his decree.

Raja Raghubir Singh was the owner of the extensive Landhaura Estate or Raj in the District of Saharanpur, in the United Provinces. He died on the 23rd April 1868, at the age of 20 years, leaving the Appellant, the Rani, his widow and sole heir. She was then only 14 years old, and *enceinte*. Raghubir Singh was a religious man and was desirous of leaving behind him a son who should perform his *shradh* ceremonies and transmit to future generations the name and prestige of the Raj. When, during his last illness, he became hopeless of recovery, recognising the possibility that the child about to be born to his wife might be a girl, or might not survive, he gave formal and emphatic directions to his wife in regard to the adoption of a son. The Rani herself has pledged her word as to the nature and scope of those directions on more than one public and important occasion. She did so particularly in the deed of the 13th January 1899 and in her defence to the action of one Baldeo Singh, which will be hereafter referred to. In the deed, which she undoubtedly executed with full appreciation of its contents, she says :—

"He made this will to me by way of precaution. If, God forbid, you give birth to a daughter, or if a son be born but die after his birth, I strictly order you to adopt some boy to me so that he might perform my *shradh* ceremony and yours, and perpetuate my name, and after your death become the absolute owner and possessor of the whole of my estate. If (God forbid) the son who might be adopted under this authority should die in your life-time, you will have power to adopt another boy."

In her defence to Baldeo Singh's action she informed the Court that she had full oral authority from her husband, and that he had not limited her to one, two, three, or four sons.

The Rani gave birth to a son on the 16th December 1868. He died on the 31st August 1870 leaving the Rani owner of the Raj. In 1877 she adopted a boy named Tohfa Singh, declaring by deed that she did so in accordance with the will of her husband. Tohfa Singh died two years after and the Rani thereupon, in 1883, adopted a boy named Ram Sarup, still purporting to act in accordance with her husband's will. Ram Sarup died in 1885, and in 1893 the Rani made arrangements with a view to adopting a third boy. She executed an agreement in 1893 with one Lada Singh whereby he agreed to give her his son "to comply with the will of her husband," but before the adoption was formally carried out this boy unfortunately died in 1896.

These successive deaths seriously impressed the mind of the Rani, and she consulted her priests as to how the evil spirits might best be propitiated and appeased. Acting on priestly advice she went on pilgrimages to Gaya and other places, and after making religious sacrifices she proceeded to arrange for another adoption. On the 2nd June 1898 she entered into a written agreement with Ram Niwaz, the father of the Respondent, whereby he made over to her his two sons Balwant Singh (Respondent) aged 14 years, and Tungal Singh aged 12 years :—

"In order that she may adopt any one of them she pleases having regard to their capability and her choice. Now the sons of me, the executant, shall live under the protection and custody of the said Rani Sahiba, subject to the fulfilment of the

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further conditions necessary for the validity of the adoption, the enforcement of which depends upon a particular time which may be considered suitable according to the rules of astrology. I shall have no claim as to their protection and guardianship "

The Rani ultimately selected the Respondent, Balwant Singh, and preparations were made for his adoption on an imposing scale. The 13th January 1899 was appointed for the ceremony, and on that day a great entertainment was given by the Rani. The European and Indian officials of the district, together with hundreds of friends, relations, and caste-fellows, were present at the invitation of the Rani, and were hospitably regaled by her. The religious ceremonies proper to an adoption were all carried out and the newly adopted son was conducted to the *gaddi*, or throne, where he was formally installed.

The Rani next proceeded to bring about the marriage of the Respondent and that ceremony was celebrated at her expense and in a manner befitting his new rank. In fact the Respondent was thenceforth treated as a member of the Rani's family and cut off altogether from the family of his natural father.

In the following year Baldeo Singh, claiming as reversionary heir, instituted a suit against the Rani and the Respondent, in which he sought to have it declared that he was entitled to the property on the death of the Rani, and that the adoption of Balwant Singh was invalid. The Rani defended that suit, and, acting upon her instructions, her pleader made the statement as to her authority before mentioned, and she herself executed and filed a written statement alleging that she had in fact adopted the Respondent, and that the adoption was valid in every respect. Baldeo Singh failed in that suit on the ground that he was not a reversioner and had no *locus standi* to impeach the adoption in question, but the allegations of fact by the Rani in regard to the adoption are now very properly pressed against her.

The adopted son and the Rani have since quarrelled, and in this action she seeks to get rid of the adoption altogether.

At one time she stated that the seal affixed to the deed of adoption was not her seal, but she did not attempt to support this allegation by production of the seal regularly used by her, saying that she had mislaid it somewhere. However, documents admittedly executed by her and bearing seal impressions identical with that in dispute were produced and the genuineness of the seal on the deed of adoption was placed beyond doubt.

The learned Subordinate Judge stated the issues or questions arising in the case as follows :—

"1. Whether the Plaintiff had knowledge of the contents of the deed of adoption when she executed it and got it registered, or whether she had no knowledge of them ?

"2. Was or was not the Defendant adopted by the Plaintiff ?

"3. Had or had not the Plaintiff any authority from her husband to adopt the Defendant ?

"4. If the first and second issues be decided against the Plaintiff, how will it affect the claim ? "

With regard to the first of these questions, the Rani pleaded that she was a *purdanashin* lady, and had never understood the contents of the document, or had even known what it was ; but the learned Subordinate Judge formed the opinion that the long examinations to which she had, on different occasions, been subjected, and the extreme shrewdness which she displayed in dealing with the questions, showed that she was an acute and intelligent lady, and that her only difficulties arose from the impossibility of making her statements fit with undoubted facts. The deed was executed by her

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under circumstances of the greatest publicity, and with the assistance of competent and independent advice from many quarters. It was attested by no less than 28 witnesses. It was subsequently registered (on her own admission of execution) and was frequently and openly referred to by the Rani as a deed of adoption. The Trial Judge therefore found that she executed the deed with full knowledge and understanding of its contents, and the High Court agreed with him.

The Rani next denies that the adoption was in fact carried out. The great entertainment of the 13th January 1899 was, according to her, only an intimation to the public that she meant at some future time to carry the adoption into effect. On this point, except for the allegations of the Rani herself, the only evidence worth considering was practically all one way, and as to the Rani's testimony, the learned Judge says, in plain terms, that she had made so many untrue statements that it was impossible to believe her, while the evidence produced on her behalf was utterly unreliable and untrue. The High Court agree with this finding, as to the justice of which there can be no doubt.

The third question, *viz.*, as to whether the Rani had authority from her husband to adopt the Defendant, gives rise to the point which has been argued before their Lordships. The Rani contends that the authority conferred upon her by her husband did not extend, according to its strict wording, beyond the adoption of a second boy, in case the first adopted son should die, and that such authority was therfore exhausted by the adoption of Ran. Sarup. Their Lordships are of opinion that this was not the true effect of the authority, in fact, conferred upon the Rani. She may not have remembered with precision the words used by her husband on his death-bed, but whatever the exact words may have been, undoubtedly the effect they then produced on her mind, and on the minds of those about her, was that which she set forth in her statement in Baldeo Singh's action, *viz*, "that her husband had not limited the authority to make such adoption to one, two, three, or four sons."

That is the meaning on which she has consistently acted until her quarrel with the Respondent, and the words ascribed to her husband, according to her recollection, in the deed of adoption, have always, until this litigation, been regarded by her, and her advisers, as intended to express a general authority. What the deceased Raja intended was that, if necessary, "some boy" should be adopted to him "so that he might perform my *shradh* ceremony, and yours, and perpetuate my name, and after your death become the absolute owner and possessor of the whole of my estate," but in expressing this intention he saw that it might be defeated by death if construed in a restrictive sense as meaning some "one" boy, so he went on to deal with that contingency by directing, in substance, that effect was, in any event, to be given to the general intention, and if one boy died another boy was to be adopted. The Trial Judge did not expressly decide this question of fact. He found, as did the High Court, that in the circumstances of this case the Rani was estopped from alleging want of authority.

Their Lordships, in reviewing the facts of the case, are of opinion that the question may well be decided as one of fact on the Rani's own statements without recourse to the doctrine of estoppel. In

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their view she was speaking the truth in Baldeo Singh's action when she was pleading as to her authority. Their Lordships, however, do not differ from the Courts below in the view they have taken as to the applicability of the doctrine of estoppel in this case. Of course, the estoppel pleaded against the Rani must be taken as purely personal. It does not bind anyone who claims by an independent title, but, in view of the decision now given, that the Respondent was, in fact, duly adopted, further litigation on the point may be taken as happily out of the question. So far as the Rani herself is concerned it would indeed be difficult to have a stronger case of estoppel. She has asserted her authority in the most solemn manner under her hand and seal, and her conduct both before and after that assertion has been of a like unequivocal character. She could not now be allowed to change her story witout grave injustice ensuing to those who have acted in reliance upon her deliberate and repeated representations. The Respondent is now severed from his natural family; he has undergone a change of social status which may or may not be beneficial to him, but which has certainly so altered his mode of life as to make a relapse into his former condition a grievous hardship upon him. He and his friends have been driven to expenses in the maintenance of the privileges with which the Rani purported to endow him. He married on the faith of his adoptive mother's word, and no doubt has creditors who have sold him goods or lent him money in like reliance on her good faith.

Under these circumstances the Rani's argument that the doctrine of estoppel does not apply because the Defendant could show no loss or detriment, is without any substance whatever and she must be held to her word and to the results of her conduct.

Their Lordships will therefore humbly advice His Majesty that this appeal should be dismissed with costs.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors : *Messrs. Barrow, Rogers and Nevill* for the Respondent.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 247 OF 1908.

HOLMWOOD, J.
D. CHATTERJEE, J.
1911,
24, July.

MUNSHI KALI SANKAR SAHAI, and ors., Defendants, Appellants,
v.
MAHARAJA PRATAP UDAI NATH SAHI DEO, Plaintiff, Respondent.

*Title, evidence of, direct proof when not available—Conduct and admissions of Defendant as proof of title—*Mulki *papers, evidentiary value of—Registers kept under Reg. VIII of 1800, entries in—Statements against proprietary interest—Statements in road-cess returns as to character of interest—Burden of proof, when shifted—Effect of erroneous statement as to nature of tenure by unauthorized person—Purchase at execution sale held under sec. 124, Act I (B. C.) of 1879 limited to interests actually sold.*

When owing to lapse of time and other causes direct evidence of title*, e.g., *a* sanad *or grant, is not available, it is enough for the Plaintiff to establish a* primâ facie *case, if the evidence on which it is based is corroborated by the conduct and admissions of the Defendant or his predecessors in interest, or unrebutted by any positive evidence which can be relied on.

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Mulki *papers or returns filed by* elakadars *under the provisions of Regulation VIII of 1800, para. 3, although not of the same evidentiary value as the Registers themselves, inasmuch as they require proof of origin and authentication, are nevertheless good evidence of title, if they contain statements made at a time when there was no dispute and against the proprietary interest of the maker.*

Statements made in road-cess returns by khorposhdars *or holders of a maintenance grant as to the character of their tenure are good evidence of title against a Defendant claiming under them, if not as admissions, certainly as positive evidence in support of Plaintiff's claim.*

A Plaintiff may rely on the admissions of Defendant as to his title in proof of his claim just as much as on any other evidence, and if a Defendant goes into the witness box and admits his title there is no further onus *upon him to prove it, at least as against such Defendant.*

An erroneous statement made without knowledge in an affidavit filed as a matter of routine by a person whose authority to make it was not proved, could not bind a party to a proceeding, nor affect the character of a sale held in such proceeding under the provisions of sec. 124, Act I (B. C.) of 1879, so as to confer upon the auction-purchaser a right which he could not obtain by the sale itself.

JANARDAN SINGH *v.* MAHARAJAH PERTAP UDAI NATH SAHI DEO (1) *referred to.*

This was an appeal preferred on the 5th of June 1908 against the decree of Babu Ram Lal Dutt, Subordinate Judge of Zillah Ranchi, dated the 31st of January, 1908.

(1 R A No. 6 of 1880, *Per* Cunningham and Prinsep, JJ, 24th Nov. 1881).

The suit out of which it arose, was instituted by the Maharaja of Chota Nagpur to resume a maintenance jaghir, or *khorposh*, granted by his father, the late Maharaja to three childless widows, on the death of their husbands, in accordance with the custom prevailing in that part of the country. The last Jagirdar, Deodhari Singh, who died in 1839, had been the holder of an ancient *putra putradik* jaghir comprising twelve villages, and Plaintiff alleged that on Deodhari's death without male issue the late Maharajah had resumed these villages, as he was entitled to do, and made a fresh grant of three of them to the three widows for their maintenance during their lives

As evidence of a fresh grant, of which there was no direct proof, the Plaintiff relied mainly on certain *mulki* papers of the year 1842, which made mention of a *sanad* or grant for life of the three villages in question to the widows. He relied also on the custom of *khorposh* grants which was shown to prevail in his estate, and on a long series of admissions as to the character of their title by the said widows, and by the Defendant Kali Sankar himself. The Defendants on the other hand impugned the genuineness of the *mulki* papers and denied the efficacy of the alleged admissions.

It appeared from a statement in a road-cess return of the year 1889, made by the widows and the Defendant Kali Sankar, who was their nephew, jointly, that the widows had held the said villages free of rent though subject to the payment of road-cess, but only for the term of their natural lives.

On the 18th December 1867, the widows had executed a *hinhayati mokarari* lease in favour of Kali Sankar's father, Mewa Lal, to endure during their life-time, for

a consideration of Rs. 800 and an annual rental of Rs. 24. Mewa Lal having died in 1888 his son Kali Sankar came into possession of the villages as *mokararidar*.

In the year 1895, default having been made in the payment of road-cess, the right, title and interest of the surviving widows was sold under sec. 124, Act I (B. C.) of 1879 and purchased by the Defendant Kali Sankar on behalf of himself and his family for Rs. 570.

The sale was duly held under sec. 124, and was regarded as a sale of the right, title and interest only of the widows by the Collector who registered the transfer. The Defendant, however, claimed to have purchased a permanent jaghirdhari tenure on the strength of a misdescription in the affidavit filed on behalf of the Plaintiff in the execution proceedings by an unauthorized person who was admittedly not acquainted with the facts.

The Defendants relied mainly on this purchase and on a claim by adverse possession originating in the *mokarari* lease of 1867.

Mr. B. Chakravarti and *Babus Jogesh Chandra Roy*, *Joy Gopal Ghosha*, *Provash Chandra Mitter* and *Girija Prasunna Roy Chowdhuri* for the Appellants.

Messrs. Donogh and *A. Chaudhuri* and *Babu Jogesh Chandra Dey* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit brought by the Maharaja of Chota Nagpur for resumption of three villages Koinjara, Dodhra and Kudarkon, on the allegation that the villages were held as a maintenance jaghir for life in joint tenancy by three ladies Deokali Koer, Badam Koer and Khetrani Koer, of whom the last surviving Khetrani Koer died on the 19th August 1901; that the Defendant No. 1 Kali Sankar Sahai, had been holding these mouzahs under a registered *mokarari* deed, dated 18th December 1867, from Badam Koer and Khetrani Koer and on the 19th November 1895 had purchased the right, title and interest of the ladies in a sale under sec. 124, Act I, B. C. of 1879, in the names of himself and his wife and sons, Defendants Nos. 2 to 6. Mesne profits from 1958 S. were also claimed. The defence was that the jaghir of the three villages was not a life jaghir for maintenance of the three ladies but was an absolute jaghir granted to the ancestors of their husbands which the ladies had been holding under the ordinary Hindu law, that even if the tenure was terminable on failure of male issue in the line of the original grantees, as the husbands of these ladies died much more than 12 years ago the Plaintiff's claim is barred by limitation. It was also urged that the Plaintiff had in execution proceedings through his Karpardaj Basant Lal described the villages as ancestral jaghir of the ladies and is therefore estopped from asserting the contrary. It was also urged that the Plaintiff is not entitled to resume without sanction of Government, and that the suit is barred by limitation against the Defendants Nos. 4, 5, 7 and 8 who were made parties more than three years after the order under sec. 145, Criminal Procedure Code, passed on the 10th February 1902. The Subordinate Judge held that the estate of the ladies was a life-tenure for maintenance carved out of a larger *putra putradi* grant of 12 villages given to their husband's ancestors and resumable at the death of the last male representative.

He further held that there was no estoppel in the execution proceedings, that what was sold was the right, title and

interest of the ladies in their life-tenure, that that tenure came to an end at the death of Kherrani Koer and it was not necessary to set the auction-sale aside. On the point of limitation he held that there was no satisfactory evidence to show that the Maharaja had ever denied the ladies' life-interest or tried to oust them, but even if he had, the relationship of landlord and tenant had never ceased and the ladies had never asserted any adverse rights and had paid in the road-cess and filed road-cess returns which was the only act of tenancy they had to perform.

He also found that there was no special limitation in respect of the sec. 145 (Cr. P. C.) proceedings inasmuch as the minor Defendants were not parties to the sec. 145 (Cr. P. C.) proceedings and Defendants Nos. 7 and 8 were not parties to the auction-sale and Defendant No. 8 was made a party within 3 years of his birth. They were made parties at the request of Defendants on 25th February 1905, to avoid future litigation. He further held that the lands not being *lakheraj* the sanction of Government to the resumption was not necessary.

He therefore gave a decree to the Plaintiff for all the reliefs he claimed, *i.e.*, for *khas* possession by ejecting the Defendants with mesne profits from 1958 S. to delivery of possession in execution of the decree, to be determined in execution, with costs and interest at 6 p. c. per annum.

The Defendants appeal and their main contention is that the learned Subordinate Judge has overlooked the principal question in this suit, *viz.* Is the Plaintiff entitled to resume and if so when did his right to resume accrue? The plaint is founded on a life-grant and we have to see if the evidence bears this out. If the life-tenancy is proved the Defendants are admittedly out of Court. No question of custom arises and none is alleged in the plaint.

It is strongly urged that the question of title must be positively proved by the Plaintiff, that he cannot avail himself of the Defendant's admissions. If no life-grant to the ladies is proved their possession becomes adverse as resumption ought to have been made on the death of Deodhari the last male incumbent in 1839. The appeal was in effect argued solely on these points, though great efforts were made to whittle away the effect of the admissions made by the ladies and the Defendant No. 1 himself.

One minor point was argued, *viz*, that the suit is barred by sec. 37 (5), Act I of 1879, because the lease or grant was liable to be cancelled. But we find no such point arises as there is no document on the record to be set aside and a grant made by *sanad* for life would lapse of its own force by the death of the life-tenants and with it any lease granted by the life-tenants. Besides sec. 37 has no application to a title suit of this nature. We have therefore to consider only two main questions. *Firstly*, whether the Plaintiff has *primâ facie* established his title and the factum of a life-grant to the ladies? *Secondly*, what is the effect of the Defendant's admissions and those of the ladies as evidence bearing on the Plaintiff's case? It may be conceded at the outset that owing to lapse of time the Plaintiff's evidence as to the grant to the ladies is not very strong, but such as it is, it is unrebutted except by the affidavit of Basant Lal, Ex. H, p. 110A, and it is strongly corroborated by the conduct of the ladies themselves and by the admissions of the Defendant No. 1.

The principal evidence on the side of

the Plaintiff is that of certain *mulki* papers of the year 1842 copies of which, Exs. 14 and 15, have been produced from the office of the Deputy Commissioner and Exs. 40-41, duplicates apparently from the office of the Commissioner. Now these documents appear to have been returns filed by the then Maharaja in respect of his zemindari in Chota Nagpur under orders of the Court, filed by the *elakadars* under Regulation VIII of 1800, para. III. They are not the registers prepared under that Regulation which would be authenticated by the Collector and have not therefore the very high evidential value placed upon them by the learned Subordinate Judge. They require proof of origin and authentication by the Maharaja and this is furnished by the signature of his Mukhtear Jubraj Lal and by a monogram forming the word "Sahi" which is identified by the record-keeper as being the authentic mark of the former Maharaja found upon all his papers filed in the Government Record Room.

Similar papers were admitted and used as evidence by the High Court in their judgment in R. A. 6 of 1880, dated the 24th November 1881, which will be found on page 15 of Paper Book C. It was held that it was a statement made on the requisition of a public officer regarding matters connected with the estate of the Maharaja which were well-known to him and long before any adverse claim had been set up, but still it was open to the objection that it is not necessarily the best evidence that was procurable and there is nothing to show the source of the information on which the history of the grant was supplied. Prinsep, J, therefore, said that if the Plaintiff's case depended on this evidence he should not be inclined to accept it as conclusive. Cunningham, J., the other learned Judge, appears to have placed a much higher evidentiary value upon it and to have treated it as a register under the Regulations.

It is strongly criticized here on the ground that in this case it appears that a dispute had already commenced as to the nature of the grant, and that the notes on the nature and history of the grant are in a different handwriting and ink in columns 7 and 13 to the rest of the return. Further it is stated as regards Kadarkan that a copy of the *sanad* was filed with the return and no such copy is produced though it is contended that such a copy must exist in the Maharaja's *sanad* register. Now it clearly appears from a judgment of the Personal Assistant to the Agent to the Governor-General, Lohardagga, dated 3rd May 1842, that one Panday Ganpat Rao who had charge of the Maharaja's papers as hereditary Panda had wrongfully detained them and he was put in the Civil Jail for a month in consequence and is said to have died there. The judgment further shows that the Maharaja had been unable to supply his *mulki* forms on the 2nd February 1842, owing to this man's conduct. From a petition Ex. 19 on page 44A, it appears that the papers had been ordered to be filed on the 9th December 1839 and that the Maharaja submitted a list (*firist*), the very word used in the heading of Exs. 40 and 41 showing the names of the *elakadars*, the names of the villages and the amount of rent, but was unable to fill in the gross produce and the area of cultivated and uncultivated lands owing to the absence of the tenants. It was ordered that a copy of the forms be sent to the Maharaja on the 28th August 1840 to fill in the form in respect of his zemindari within one month under heavy penalties

and if the Maharaja be ignorant of the particulars of the *sanads* of *elakadars*, the column in which the specifications of the *sanads* are to be given should be left blank, a remark being made in the Remark Column to the effect that particulars of the *sanad* are not known. Now this is what appears to have been done and is the explanation of the notes appearing in a different handwriting. We can have no doubt however that that handwriting is contemporary and of the same age as the rest of the document. There is no sign of subsequent interpolation and the other entries which are of a similar character throughout the books are not disputed. There is absolutely no reason to suppose that these entries were not made in 1842 and authenticated by the Maharaja.

The *rubakari* of the Commissioner on which a judgment of the Assistant Agent in 1843 is based that these papers are not rulings or documents in respect of civil suits and that they will be of no use in the case, is in no sense a declaration that they have no evidentiary value, for no such declaration could be made by the agent of the Governor-General who had executive charge of them, and in 1858 Col. Dalton, the Commissioner, ruled that there could be no objection to any party getting copies of them but that the meaning of the Agent in 1843 was that they were books to be bound and carefully preserved as estate records and the Agent could not allow the originals to be used as evidence in any Court. This order which in itself appears to be *ultra vires* is certainly nothing more than an assertion of privilege for the documents on the part of the Agent who held their custody, and adds to rather than detracts from their evidentiary value. This fully explains the *rubakari*, dated 29th January 1844, Ex. F. F, on which great stress has been laid by the Defendants, it being nothing more than a note handing on the orders of the Agent to Assistant Executive Officers for communication to Mukhtears who are forbidden to use these papers as documents in any matter. It is clear that there was not and could not be any objection to their contents being used as evidence, but the authorities objected to the originals being bandied about in the Courts so as to run the risk of being tampered with. The original order of the Agent states that they had not then been bound and asks for their immediate return for that purpose. All this goes to show that they were very carefully kept and it is not at all likely that any interpolations were made. We have seen that Colonel Dalton found them intact in 1858, and from 1862 onwards we have the sworn testimony of the old retired Record-keeper, Baikantha Nath Ray, that they were in his custody and he had them re-bound and labelled. It is sought to show that this witness was on bad terms with Mewa Lal and Kali Sankar, but that was at a later date than 1862, and both Mewa Lal and Kali Sankar had made admissions consistent with the entries in these papers and there is no suggestion nor on the face of the papers is there any possibility that the notes were added after 1862. They are, as we have said, clearly contemporaneous with the filling up of the forms in 1842.

Then as to the copy of *sanad* said to have been filed in regard to Kodarkon, there seems to be no reason why such a copy should not have been filed but the *sanad* book is shewn to have been removed by Ganpat Rao. The original *sanad* must have been with the ladies and the Plaintiff cannot be said on any evidence to

be holding back any copy of the *sanad* now in his hands.

As regards the contention that the dispute about this tenure had already begun in 1842, there is not a particle of evidence to show that there was any dispute. The contention rests on an assumption that the ladies were holding on as Hindu widows after the death of Deodhari and claimed an absolute estate. There is nothing to show this and if the story of the *sanad* be true it was obviously granted before 1842.

We find the *mulki* papers of 1842 authentic, sufficiently proved, and to contain statements made by the Maharaja at a time when there was no dispute against his own proprietary interest. The Maharaja's case clearly is that the ladies' husbands had 12 villages in *putra putradik* tenure and it is proved that this is the customary form of tenure in the Raj and in the absence of any evidence whatever of a permanent grant the statement of the ladies themselves clearly made in 1889 must be accepted. Ex. 4 is a road-cess return filed by the Mukhtear of the ladies Ramdhari Pershad on the 9th November 1889. It recites the whole history of the taluk and is undoubtedly genuine. On p. 60 (Paper Book A), Musst. Badam Koer admitted the signatures on oath. She gives the usual lame explanation of blank papers being given. But to whom were they given ? To the Defendant No. 1 himself who was her nephew, son of her brother and vakil and himself holding a *mokarari* of the villages under her which it would be to his interest to show was a *mokarari* of a permanent and not of a resumable tenure. The genuineness of the signature is clearly shown by the fact that Badam Koer swears to her signature on the *vakalatnama* given to Mewa Lal to file the road-cess return of 1882, Ex. 9; while the signatures of the ladies appearing on the document itself are obviously in the handwriting of a scribe and not of the ladies. We have satisfied ourselves that the signatures of Badam Koer on the *vakalatnama* of 1882, and on the road-cess return of 1889, Ex. 4, are of the same person and that person a lady of only moderate penmanship. That this Ex. 4 is the work of Kali Sankar, Defendant No. 1, himself is shown by the fact that Part I of the return of which Ex. 4 is Part III was filed by Kali Sankar himself, (Ex 22, p. 47A) as *mokararidar* of the ladies. When he intervened in the rent suits in 1891, he filed copies of these returns of 1882 and 1889 in Court, and he admits that he filed Part III of the return for 1899 himself as *mokararidar*. Against these papers it is contended that the history of the tenure set out in the preamble is surplusage and unnecessary. We find it is the universal practice in all road-cess returns filed in this case and as far as we can gather in all cases.

Then it is said that the admissions of the ladies cannot be used against the Defendant No. 1 as he is now claiming as auction-purchaser at a sale for arrears of road-cess and not as their *mokararidar*. But the very fact that the ladies had to pay road-cess shows that they were still tenants of the Maharaja and not holding adversely to him and his own evidence shows that the statements made are his own statements entered, as Badam Koer says, on blank papers signed by her and given to him. The writing of the return Ex. 4 is proved by the writer Iswar Dayal W. P. 4 and he says he wrote at the request of the ladies. He proves that Ramdhari Pershad was the Mukhtear and he gave him the *mukhteatnama* signed by

the ladies. The ladies were living in Kali Sankar's house and were then on good terms with him. He himself had been a servant of Kali Sankar Sahai. Ramdhari Pershad, the Mukhtear, himself proves the return Ex. 4 and the due execution of his *mukhteatnama*. He acted as Mukhtear for Defendant No. 1 and is P. W. 6.

If the statements are not admissions we think they are positive evidence of the Plaintiff's title coming from the ladies themselves and authenticated on oath. No better evidence for the Plaintiff could be imagined and it is futile to contend that the Plaintiff cannot use them as evidence of his title but only as admissions after he has proved his title affirmatively.

Both Ex. 4 and Ex. 9 were used by Kali Sankar in litigation for his own purposes and he is bound by them.

Accepting these documents as evidence, the Plaintiff's case is proved up to the hilt. But there are a long series of admissions by Kali Sankar himself. Among these we may mention Exs. 17, 16, 44, 46, 10, 11, 13 and 20.

Ex. 17 is a petition filed by Kali Sankar in the Maharaja's office on the 24th May 1890. It is dated 29th March 1890, but it is proved that it was filed on the later date by an entry made at the time in the Maharaja's petition register where it is numbered 2592 which number appears on the face of the document. In this he applies for registration in the landlord's sherista as *mokararidar* of the ladies, *khorposhdars* as long as their right and title will be enforceable.

Madho Prakas, mohurrir of the Maharaja since 1889, proves the filing and entry in the petition register. He fixes the date but could not be said to establish affirmatively that Kali Sankar himself filed it. This however is established by Lal Iswar Nath Sah Deo, a respectable talukdar and a relative of the Maharaja, who was Naib Manager for him in 1890.

He is clear as to the presence of Kali Sankar and that the order on it was written by him and initialled by Mr. Peppe now deceased on the very same day. The initial is undoubtedly that of Mr. A. Peppe which cannot be mistaken. In addition to this Kali Sankar's own mohurrir who wrote the petition at his orders deposes to it though he says this is the only paper of Kali Sankar's that he knows of that does not bear his seal and signature. That Mr. Peppe or Lal Iswar Nath Sah Deo forged this document, as they must have done on 24th May 1890, there is no possible reason to imagine. Nothing then turned on it.

Ex. 16 is the *mokarari pattah* to Mewa Lal which both Mewa Lal and Kali Sankar acted upon. It clearly recites that the tenure is *khorposhi*.

Defendant No. 1 now asserts that this was a colourable document as he discovered after his father's death, and was only given to enable Mewa Lal the better to manage the property for his sisters. But Kali Sankar's own conduct puts him out of Court on this point. It is true that Mewa Lal was always good to the ladies and appears never to have stinted them for money, but Kali Sankar acting on this *pattah* confined them strictly to the Rs. 24 rent due under it and used the property as his own. This is proved by his intervention in the rent suit brought by the ladies in 1891 against some tenants in which he claimed absolute *mokarari* right as vested in his father and himself and denied their right to collect rent. This is Ex. 10, dated 19th January 1891. Ex. 11 is a petition of objection, dated 17th March 1892, in pursuance of this

intervention and may be read with it as emphasizing the previous petition. Ex. 20 is a petition by Mewa on behalf of his sisters, dated 13th June 1884, in which they clearly admit the *khorposh* grant. The *vakalatnama* Ex. 21, dated 6th June 1884, to Mewa Lal by the ladies was admittedly signed by them.

It is urged that Mewa Lal was a servant and friend of the Maharaja and deliberately gave the ladies away in this transaction. When a Defendant has to make such criminal aspersions on the memory of his own father against whom nothing appears on the record, his case must be indeed a bad one.

Ex. 46 is a petition of Kali Sankar, dated 15th August 1893, which by comparison of handwriting clearly appears to be entirely in his hand and is proved to have been personally filed by him. The handwriting is proved by a pleader, Dinesh Prasad, P. W. 13, who was engaged in most of his cases and against whom nothing is shown. Also by Lal Iswar Nath Sah Deo who knew his handwriting well. Kali Sankar denies this document on oath but he admits Ex. 44 which clearly shows his handwriting as well as other colourless documents referring to the same matters but not containing admissions. It is clear that Kali Sankar did make a petition on 15th August though in Ex. 44 he gives the date 14th August and Ex. 46 is that petition. It is said that the word "orally" is not in accordance with facts but there is nothing on the record to show this.

Exs. 12 and 13, dated 10th July 1889 and the 20th February 1892, respectively, clearly show that Kali Sankar filed copies of Exs. 4 and 9 in Court as documents in support of his case and got them returned. There are numerous other admissions but they were not of such importance. We confess that we are unable to understand the contention that these documents which are filed and proved by the Plaintiff and are part of his case are of no avail to him in discharging the onus of proof of title which lies upon him.

Surely if the Defendant goes into the witness-box and admits Plaintiff's title there is no further onus upon him to prove it as against such Defendant. The proved dealings of the Defendant No. 1 and hi father with the property are as much positive evidence of Plaintiff's title as sworn testimony thereto would be.

In the lower Court the contention was that these admissions were used as secondary evidence of a restricted grant to the ladies without sufficient foundation for not producing primary evidence of the grant. The Subordinate Judge has fully dealt with this technical question which was not pressed before us. It is sufficient for us to say that if they were only to be treated as secondary evidence, it is clearly shown that the original *sanad* could not be with the Maharaja and that his *sanad* book had been stolen. The existence of a casual copy of one *sanad* in his office would not throw any further burden upon him especially as that copy is shown to have been filed in the Deputy Commissioner's office.

The documents are direct evidence of the nature of the ladies' tenure which is the point in issue and if, as is contended, the existence of a *sanad* is not proved they would be unanswerable evidence of Plaintiff's title. On the other hand, the Defendants have completely failed to adduce any evidence whatever of a permanent grant to the ancestors of the ladies' husbands and the Plaintiff's case stands unrebutted.

The only point they make is in regard

to an affidavit of one Basant Lal in 1895 in execution proceedings stating that the villages were the *putra putradik* jaghir of Musstts. Badam Koer and Khetrani Koer. This was affirmed on the 8th July 1895.

But this witness had sworn on the 30th March 1895, Ex. P. P., that the ladies were jaghirdars and it is in this indefinite form that the decree and sale certificate are drawn up. The Maharaja did not go to sale on this specific allegation. He went to sale on the allegation that it was his *milkiyat* and gave the value of that *milkiyat* as the basis for the valuation in execution which was for arrears of Road-cess. What is important is what was sold and we do not think that this affidavit is any evidence of that.

If the sale was under sec. 124, Act I of 1879, B. C., what passed was the right, title and interest of the judgment-debtors. If it was not, the sale was either under the general law by virtue of sec. 129 of the Act or it was no sale at all and the Defendants acquired nothing. If it was under the general law the same right, title and interest would pass. We have never heard that an error of fact in an affidavit which was never acted upon and which could not affect the character of the property sold confers a right on the purchaser which he could not obtain by the actual sale. Basant Lal deposes that he filed the affidavit as a routine matter without personal knowledge, but the plaint in the suit signed by the manager described the property in suit as life-tenure for maintenance and the decree could not and did not go beyond the prayer in the plaint.

The decision in *Mookhya Huruckraj Joshee* v. *Ram Lal Gomastha* (2) with which we entirely agree does not touch this case. The authority of Basant Lal is not shown and we do not find the Maharaja bound by his statement. As regards the alleged attempts by the Maharaja to dispossess the ladies which are urged as a ground for holding that their possession was adverse we cannot find that the Maharaja was in any way responsible for the acts of Bhuka Singh or Kapil Nath Lal, while Mewa Lal's conduct as brother and pleader of the ladies certainly cannot be saddled on him. The non-production of the registers of leases granted by the Maharaja has been made much of. But the order-sheet though not so precise as it ought to be seems to show that the Maharaja made full disclosure of all papers he had in the office. See order 69, dated 6th January 1908. The Subordinate Judge was right not to issue further process on Bhuka Singh *vide* order No. 84, da ed 10th January 1908. We have looked at the Road-cess papers filed in 1889 by the manager wherein an interpolation appears against the ladies' names "in wrongful possession" and we find that these papers are full of subsequent additions and interpolations, many being made in pencil.

The entry in question is obviously in different ink of a later date, and in the same hand as numerous other emendations apparently made by clerks in the Road-cess office. The returns in their present state are worthless as evidence of anything. On all other minor issues which are not pressed before us we agree with the Subordinate Judge. The Defendants have elected to stand or fall on the proved nature of the grant and we find that it was a maintenance life-grant to the ladies. On this footing no question of limitation arises. As regards the remarks of Jenkins, C. J., in *Lakhamgavda* v. *Keshhav Annaji* (3), we may say we fully agree with them but

(2) 14 W. R. 435 (1870).

(3) I. L. R. 28 Bom 305 at p. 309 (1901).

they have no bearing on this case in which the evidence appears to be ample and one-sided and in which there is no combination of circumstances to be proved but a simple fact which is in itself probable and consistent with the history of the tenure namely that the ladies held a life-grant.

We find that the decision of the lower Court is correct and the appeal is dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 121 OF 1911.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
18, April.

RUTNESSUR SEN, Plaintiff, Appellant,
v.
KALI KUMAR BIDYABHUSAN, Defendant, Respondent.

Revenue Sale Law (Act XI of 1859), sec. 37—Purchaser's suit for recovery of possession—Defendant's plea that land included in howla *which is protected—Onus.*

Where a suit for recovery of possession of land by a purchaser of an undivided share in an estate at a revenue sale was resisted by the Defendants on the plea that the land in suit was included within their **howla** ***which was a protected interest,***

Held—*That the onus lay on the Defendants to prove their allegation.*

RHIDOY KRISTA *v.* NOBIN CHUNDER (2), RAJENDRO KUMAR *v.* MOHIM CHUNDER (1) *explained.*

SHEODENI ROY *v.* CHATOORBHUJ ROY (3) *approved.*

(1) 3 C. W. N. 763 (1894).
(2) 12 C. L. R. 457 (1883).
( ) 12 C. L. J. 376 (1894).

This was an appeal preferred on the 19th of June 1911 under sec. 15 of the Letters Patent against a decree of the Hon'ble Mr. Justice Coxe, dated the 25th of May 1911, passed in Second Appeal No. 2416 of 1909 which had been preferred against a decree of Babu Umesh Chandra Sen, Subordinate Judge of Dacca, dated the 9th of August 1909, reversing that of Babu Annoda Proshad Majumdar, Munsif at Munshigunge, dated the 20th of March 1909.

The material facts will appear from the judgment of COXE, J., which was as follows :—

COXE, J.—This was a suit for recovery of possession of an undivided half share of certain land, on the ground that this share was included within the taluk Ram Ram Sen of which the Plaintiff was a purchaser at a revenue sale.

The defence was that the land fell within a certain *howla* named Ram Mohan De, which was a protected interest.

The lower Appellate Court held, *firstly*, that it was incumbent on the Defendants to prove that the land in suit lay within their *howla*; and, *secondly*, that even if it did lie within the *howla* the Defendants had no title to it and could not successfully resist the Plaintiff's suit.

It appears to me that the decision of the learned Subordinate Judge cannot be sustained on either of these points.

It has been found that the *howla* Ram Mohan De is a protected interest and the only question that arose was, whether the land in suit fell within that *howla* or not. That being so, the burden of proof rested upon the Plaintiff in accordance with the law as explained in the case of *Rajendro Kumar Bose* v. *Mohim Chunder Ghosh* (1). No doubt, when the Defendants

(1) 3 C. W. N. 763 (1894).

plead that they have a protected tenure and the question is whether they have or have not such a tenure within an estate, the burden of proof rests on them, but when it is found that they have such a tenure, and the only question is one of parcel or no parcel, the burden rests on the Plaintiff. It does not appear to me that the terms of sec. 37 of the Revenue Sale Act, 1859, make any difference so far as this question of the burden of proof is concerned, as the learned Vakil for the Respondents has argued.

On the second point, the learned Subordinate Judge finds that the Defendants are not entitled to this land, because in his opinion, the *howla* Ram Mohan De was partitioned between two persons named Sadhu Ram and Ramuttam: and the lands which fell to Sadhu Ram were included within the taluk Ram Ram Sen, of which the Plaintiff is now owner, and the land attached to Ramuttam fell within the taluk Bisseswar Sen. The Defendants are the ultimate successors in interest of Ramuttam: and therefore they cannot, according to the learned Subordinate Judge, have any right or title to the lands included in the taluk of Ram Ram Sen, which fell on partition to Sadhu Ram. On the facts found, this argument appears to me to be perfectly logical; and it would ordinarily dispose of the Defendants' case. But the learned Subordinate Judge has overlooked the fact that this theory of the partition of the lands of the *howla* between Sadhu Ram and Ramuttam is entirely opposed to the plaint. According to the plaint the lands are still joint and the Plaintiff sues only for an undivided half share. That being so, it was not open to the learned Subordinate Judge to hold that, as a matter of fact, the lands had been partitioned and that separate land had been assigned to the two taluks, Ram Ram Sen and Bisseswar Sen.

It has been argued by the learned pleader for the Respondent that the Subordinate Judge did not intend to find that the *howla* had been partitioned, but merely that there had been so much of a division between Sadhu Ram and Ramuttam as amounted to a separate collection of rent from their joint tenants. But this view is not supported by a single word in the judgment of the learned Subordinate Judge, and, in my opinion, is entirely opposed to the whole purport of that judgment. I may observe that the Subordinate Judge in coming to this decision in respect of partition, relies on the evidence of the witness, Kaly Prosanna Sarkar, which is to the effect that the lands were not only partitioned but separated. It appears to me, therefore, that on the first point the learned Subordinate Judge was wrong in laying the burden of proof on the Defendants and that on the second point his decision is not *secumdum allegata*.

I think, therefore, that the case must go back for rehearing. The learned Subordinate Judge will dispose of the case on decision of the point, whether the Plaintiff has succeeded in proving that these lands are not included within the *howla* Ram Mohan De. If he succeeds in provthis, he will, of course, be entitled to a decree: if not, the case must be dismissed as against the Appellants: and it will be for the learned Subordinate Judge to decide to what relief, if any, the Plaintiff may be entitled as against the Defendants who have not appealed. The materials before me at present are not sufficient to enable me to come to any decision on that point.

The costs will abide the result.

RUTNESSUR SEN *v.* KALI KUMAR BIDYABHUSAN.

[The Plaintiff preferred this appeal under sec. 15 of the Letters Patent.]

Babus Jogesh Chandra Roy and *Gunoda Caran Sen* for the Appellant.

Babu Jogendra Chandra Ghosh for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—In my opinion we must set aside the judgment of Mr. Justice Coxe and restore the decree of the lower Appellate Court. The suit is one for the recovery of possession of an undivided half share of certain land, on the allegation that this share was included within a taluk Ram Ram Sen, of which the Plaintiff was a purchaser at a revenue sale. The defence of the Defendants was that as they were in possession they were entitled to retain that possesssion by virtue of a permanent tenure created by a certain *howla*. The lower Appellate Court has come to the conclusion that the Defendants have failed to prove that the disputed land appertains to this particular *howla*. On appeal, however, Mr. Justice Coxe did not think that he was bound by that finding of fact, for it appeared to him that there had been an erroneous decision by the learned Judge as to the incidence of the onus of proof. He considered that it was incumbent upon the Plaintiff to show that the lands in dispute were not in the *howla*. The authority for this view is said to be found in *Rajendro Kumar* v. *Mohim Chunder* (1). That case does not profess to lay down any new law. The Judges make it clear that they only proposed to follow the decision of this Court in *Rhidoy Kristo* v. *Nobin Chunder* (2). An examination of that case makes it clear that all that the Court said or determined was that a Plaintiff must prove his allegations. In that case, the Plaintiff sued his tenant for *khas* possession. He admitted the tenants' holding but he alleged that the land in dispute was an encroachment beyond the proper boundaries of the holding and therefore it appeared to the Court that it was for the landlord to prove the encroachment. That was because the encroachment was the case made by the landlord in his plaint. That this is so is made abundantly clear by the contrast drawn in the judgment between these cases where the burden of proof lies upon the Defendant and where it lies upon the Plaintiff, in circumstances which have a superficial resemblance, one to the other, but which differ by reason of the particular allegations made by the Plaintiff in each case, and by reason of that which it is necessary for the Plaintiff to allege and prove. This is so apparent from the judgment itself that I need say no more than refer to the decision of Mr. Justice Banerjee in *Sheodeni Roy* v. *Chatoorbhuj Roy* (3) as giving the sanction of his high authority to this view. In my opinion, therefore, in the circumstances of this case there is a finding of fact by the Subordinate Judge vitiated by no error of law, and by that finding this case is concluded. I do not overlook the ingenious argument advanced by Mr. Jogendra Chandra Ghosh, based upon a reference to long possession, but I cannot find that adverse possession or even length of possession, as distinct from possession under the *howla* was ever the Defendant's case : and so far as limitation goes, it is apparent from the judgment of the Munsif that this was abandoned in the Court of first instance. Moreover, the judgment of Mr. Justice

(1) 8 C. W. N. 763 (1894).
(2) 12 C. L. R. 457 (1883).

(3) 12 C. L. J. 376 (1894).

Coxe as well as that of the Subordinate Judge, indicate in the clearest manner the lines within which this case proceeded. We cannot, therefore, give effect to this argument, and we must accordingly set aside the judgment of Mr. Justice Coxe, restore the decree of the Subordinate Judge, and direct that the Respondents do pay to the Appellant the costs incurred in the High Court.

N. R. CHATTERJEA, J.—I agree.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION].

REV. No. 230 OF 1912.

HOLMWOOD, J.
SHARFUDDIN, J.
1912,
8, March.

JHARU SHEIKH,
Petitioner,

THE KING EMPEROR,
Opposite Party.

Misjoinder of charges—Charge under sec. 457, I. P. C., conviction under sec. 456, illegality of—Indian Penal Code (Act XLV of 1860), secs. 456, 457—Criminal Procedure Code (Act V of 1898, sec. 263—Summary trial, charge in a case of.

An accused person who was being tried on a charge under sec. 457 for house-breaking with intent to commit theft, could not be convicted under sec. 456, I. P. C., without amendment of the original charge.

Although it is not necessary under sec. 456, I. P. C., to specify any particular offences intended to be committed, when a particular offence is specified under sec. 457, I. P. C., it is incompetent for the Court to convict the accused of house-breaking with some other intent.

Although in a summary trial the Magistrate need not frame a formal charge, still he must specify the offence charged in such a way as will give sufficient notice to the accused.

This was a Rule granted on the 19th of February 1912 against an order of Babu M. N. Mukerjee, Sub-Divisional Magistrate of Uluberiah, dated the 17th of January 1912, convicting the Petitioner under sec. 456, I. P. C., and sentencing him to 3 months' rigorous imprisonment, an application for revision of which order was rejected by C. F. Payne, Esq., District Magistrate of Howrah, on the 23rd of January 1912.

The facts material to the report will appear from the following extract from the judgment of the lower Court :—

"The story of the theft is groundless as a perusal of the statement of the complainant and his daughter-in-law will at once show ; but the story of the trespass has been proved satisfactorily. The accused got into the daughter-in-law's (P. W. No. 2) room through the opening between the thatch and the wall. She is a young childess woman and she was sleeping with her infant sister-in-law only. Her husband also was absent. He works in Calcutta in the press. All these facts go to show that the motive was not theft but something else which is not far to seek. The accused had apparently knowledge of these facts he having worked as a labourer for the complainant and had access into the zenana and was even on speaking terms with the complainant's wife (P. W. No. 3). It is absurd to assume that the complainant would bring a false case against the accused and take the risk of harassing his *purdanashin* women by dragging them into Court and lowering himself among his caste men. The motive for superadding the charge of theft is obvious. He did not like to let his neighbours know that the accused trespassed into the room of his daughter-in-law with an object other than that of theft. The accused pleads malice and ill-feeling against the

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NOTES.

THE VEXED AND SOMEWHAT DELICATE QUESTION of the right of solicitors to act for the antagonist of his original client in a later stage of the same case came up for the consideration of the Court of Appeal in *Rakussen* v. *Ellis*, *Munday and Clarke*, a note of which decision is published at page clxxxiv of this issue. In this case the Defendant firm of solicitors had in a previous stage of the case acted for the Plaintiff. At that time the case was in sole charge of Mr. Munday, one of the partners, while Mr. Clarke, the other partner, was away. At a later stage of the case the same firm was engaged by the Plaintiff's opponent and the Plaintiff sued for an injunction to restrain them from so acting. On behalf of the solicitors it was argued that the case was now in charge of Mr. Clarke who was a stranger to the case of the Plaintiff and that Mr. Munday would have nothing to do with it. The first Court had granted the injunction but the Court of Appeal set aside that decision.

THERE IS NO QUESTION THAT A CLIENT CAN claim that his solicitor, who has possession of confidential information which he could not be compelled to disclose in evidence, should not be a solicitor for the opposite party, because, as the Master of the Rolls observed in this case, "he could not clear his mind of information given to him confidentially." But in the circumstances of the case there could be no question of Mr. Clarke conveying confidential information to his new clients. The Plaintiff's case was therefore placed on the ground of a general principle that solicitors who had acted for the Plaintiff in a particular matter could not afterwards act for the opposite side in the same matter in any circumstances whatever.

NO DOUBT THE DECISION OF LORD ELDON IN the leading case *Cholenondeby* v. *Clinton*, 19 Ves. Jur. 261, lays down the law in somewhat broad terms in the case of a solicitor who had discharged himself from the case without deciding the case of a solicitor who had been discharged by the client. But Lord Eldon himself was disposed to take a somewhat qualified view of the case in *Beer* v. *Wend*, Jacob 77 and *Bichams* v. *Thorp*, Jacob 300, in which last case he looked into the facts of the case to consider whether in the circumstances of the case there was any reasonable apprehension of the Plaintiff being prejudiced on account of some confidential knowledge possessed by the Defendant solicitor and as it was not clear that he had such knowledge injunction was refused. No doubt in that case the Defendant had never been a solicitor for the Plaintiff but had been a clerk of the Plaintiff's solicitor. But even in the case of solicitors the same principle has since then been generally acted upon. In *Little* v. *Kingswood Collieries Co.*, 20 Ch. D. 733, Hall V. C. laid down the general proposition that a solicitor might be restrained from acting for the opponent of his former client in the same case or in any transaction which flows out of or is connected with that in which the solicitor was formerly engaged. But the decision was disapproved by the Court of Appeal and by consent the injunction was withdrawn on the solicitor undertaking not to communicate any confidential information to his new client. This would show that in the opinion of the Court of Appeal a solicitor might act for his client's opponents unless in the special facts of the case there was anything making it unjust to the Plaintiff. The present decision would in this view seem to be in accordance with the inclination of the Court of Appeal in that case.

THE COURT IN SUCH CASES HAS A DELICATE DUTY to perform. As Lord Eldon pointed out in *Bricheno* v. *Thorp*, the Court had to take care that a solicitor was not unduly restrained from taking up a work. It is a question of balancing the interests of litigants against the reasonable liberty of the solicitor to act in any case. And the question is always a very delicate one and solicitors and other classes of lawyers would surely be on the safe side not to change sides. The enquiry into the actual state of the solicitor's knowledge is bound to be more or less futile; for the facts can never be fully discussed in open

Court as that would be precipitating the anticipated evil. And it may be presumed that the Courts would look upon such cases with considerable jealousy and except in very clear cases would be slow to permit any class of lawyers to change sides. There is no question in this view that the Master of the Rolls in this case lays down the correct principles according to which these cases should be decided. The decision therefore has some interest for the profession here where cases of this character, though happily rare, are not altogether unknown.

The decision of the Secretary of State for India in Council to retain the Board of Revenue for Bengal as also for Behar, each being placed under the charge of a single member, is indeed a very wise one. That the previous decision of Lord Morley to abolish the Board did not arouse much opposition, was because there was a widespread belief in the reconstitution of the Province and until this was done people did not care much about the changes in details of administration. It was also well-known that even if the Board was abolished, it would be so only in name, the duties of the members of the Board being transferred to a member of the Executive Council. But we entertained serious doubts whether such a delegation of the Board's duties to a member of the Executive Council would have improved matters in any way. A member of the Executive Council has to attend to various administrative questions and has to exercise a considerable amount of thought and deliberation over them. The duties of the member of the Board are *quasi*-judicial. So it would hardly have been either practicable or desirable to combine in one member both these executive and judicial functions. In Madras where these are combined the decision of the member has sometimes elicited severe comment from the Judicial Committee of the Privy Council. (See *Fischer* v. *Secretary of State*, 3 C. W N. 161). We are therefore of opinion that Lord Crewe has been very well advised in bringing about this modification in the scheme of his predecessor.

The Board of Revenue, it must be remembered, is a fairly ancient institution, and its origin can be traced back almost to the time when Lord Clive secured the grant of the Dewani to the East India Company. When in 1771, the Court of Directors sent out instructions "to stand forth as Dewan and by the agency of the Company's servants to take upon themselves the entire care and management of the revenues," and the Naib Dewans at Patna and Murshidabad were in consequence removed, a Board of Revenue consisting of the Governor and Members of Council and an Accountant-General with assistants was constituted to supervise the work of the "Collectors." The Board as so constituted however could do nothing as the Collectorships were not properly constituted until 1786, when an inquisitorial body, styled the Committee of Revenue, was instructed to divide the *huzuri mehals* into Collectorships in such manner that no one Collectorship should exceed in *jama* the sum of eight lakhs of rupees. In the result as many as 24 Collectorships were constituted, and a Board of Revenue was thereupon on the 21st June of the same year formally constituted and substituted for the "Committee of Revenue." One of the members of Government was made the President of the Board and by rules framed in 1788, the Board was vested with the general functions of "deliberation, superintendence and control" and was charged with the duty to take care that the officers under its authority should perform their assigned duties with regularity, integrity and assiduity. The rules were subsequently embodied in statutory form in Reg. II of 1793, the essential portions of which are still in force. (See Field's Introduction to the Regulations, p. 91).

Since the date of this Regulation changes have taken place in the constitution of the Board, and whilst its position as defined above, *viz.*, as the supreme provincial authority exercising "supervision and control" over Collectors, Commissioners and other revenue officers, has been preserved, it has acquired very large judicial and *quasi*-judicial powers under statutes passed in the main by the Provincial Legislature. A glance at these statutes would at once show how jealous the Government has been to preserve the power of supervision and control of the Board, for even where rights of appeal have been conferred on the parties, and it is laid down that that right is to be availed of within a particular period of time, the power of the Board to interfere *suo motu* in revision and irrespective of the periods of limitation is very often retained.

The judicial functions as exercised by the Board are thus largely tempered by equitable powers of a discretionary nature, and although there are manuals issued under its authority laying down rules of procedure with a minuteness unknown even to the codes framed for the guidance of our Civil Courts, in practice the "foot" of the member for the time being often furnishes the measure of justice dealt out to the parties. The members of the Board have up to now been recruited exclusively from the executive line. There can be no doubt that one who has served as a Collector in the districts and held the position of a Divisional Commissioner is very well posted in revenue matters. But it would be a distinct advantage if future members of the Board combined also some judicial experience acquired at some part of their career.

Although it has now been finally decided to maintain the Board, still we believe it is in the contemplation of Government to distribute some of its functions amongst the Divisional Commissioners. If we were not apprehensive that the process of decentralisation favoured by the Government at the present moment has a general tendency to instal the Collector as a local autocrat (a position which he never held at any stage of British occupation except in the imagination of a particular class of political writers), we would concede that there are directions in which the Board's power may without prejudice be transferred to Commissioners. But what power may be so delegated would require very careful consideration. The revenue legislation of the province furnishes to litigants too many opportunities of review and revision, and this even where the decision of the Revenue authorities must be inconclusive and the final settlement must rest with the Civil Courts. Land Registration cases furnish an apt illustration. The various Revenue manuals, though they are edited with a care which is hardly ever bestowed on private compilations, are a real terror to lawyers practising in Civil Courts who may at short notice be called upon to advise a client, owing to the complicated maze of statutory provisions and rules, and instructions, and circular orders, and rulings of the Hon'ble Board which it presents to those not familiarised with the details by extended use and practice. We shall certainly welcome the appointment by Government of a small committee of Government officials and pleaders possessing Mofussil experience to examine the whole matter and formulate possible modes of simplification, which we are sure can be found so as not to affect the Board's authority, before any important steps are taken for the distribution of the Board's powers amongst Commissioners and Collectors.

THE TRANSFER OF OCCUPANCY HOLDING—WHETHER VOID OR VOIDABLE.

II

Confining attention solely to the sections of the Bengal Tenancy Act and without referring to the case law on the subject, one is led to the conclusion that there is no statutory provisions concerning the transfer of ocupancy holdings by act of parties and that such transfers are regulated only by custom. It seems further that the Bengal Tenancy Act creates no presumption either in favour of its transferability or of its non-transferability. The fact that there is no provision in Ch. V, such as we find in the two preceding chapters relating to tenures and ryoti holdings at fixed rates, declaring occupancy holding to be transferable, might at first sight lead one to suppose that the Legislature by this omission intended to make occupancy holdings non-transferable in law. But a careful study of sec. 183, specially its illustration (*a*), would seem to militate against the imputing of such intention to the Legislature. That illustration says "A usage under which a ryot is entitled to sell his holding without the consent of the landlord is not inconsistent with, and is not expressly or by necessary implication modified or abolished by, the provisions of this Act. That usage, accordingly wherever it may exist will not be affected by this Act." If the omission by necessary implication indicates that occupancy holdings are non transferable in law, evidence of custom of transferability, would be inadmissible inasmuch as no custom can override the express or implied provisions of the law unless the law itself expressly saves such custom. In this connection it is to be borne in mind that sec. 183 saves only those customs which are not inconsistent with or not expressly or by necessary implication modified or abolished by its provisions. Thus the omission amounts to mere silence only. If there could be still any doubt as to the intention of the framers of the Act, it is set at rest by the actually recorded expression of these intentions in the report of the Select Committee. It is stated there, "Turning now to the incidence attached to the right of occupancy it will be seen that we have made a most important change (*i.e*, in the 2nd Bill which proposed to legalise the transfer of occupancy holdings) in regard to one of these incidents—transferability. Instead of legalising it and regulating it by law, we have left it everywhere to custom" (S. C. R. III).

So there is no statutory law on the subject and the whole thing is to be regulated by custom. Now the custom may conceivably be different in different localities. For instance, there may be a custom of transfer of occupancy holding without the consent of the landlord. In such a case the transfer is valid and quite binding even on the landlord who must recognise the transferee in the place of the original tenant. *Secondly*, there may be a custom of transfer of occupancy holding with the consent of the landlord. In such a case the transfer by the original tenant to the purchaser should be interpreted having regard to the principle referred to by Mr. Justice Mookerjee in the Full Bench case *Ashutosh Sikdar* v. *Behari Lal Kirtunia* (11 C. W. N. 1011) as a voidable transaction, *i e*, quite binding as between the vendor and the vendee but voidable at the option of the landlord. *Thirdly*, there may exist a custom under which occupancy holdings are not transferable at all and the transfer if made is void *ab initio* so that the purchaser acquires no title by purchase. If he is allowed to retain possession of the holding an entirely new tenancy is created. Where such custom prevails the tenant can successfully raise the objection of the non-transferability of his holding upon a sale of the holding in execution of an ordinary money decree against him. *Lastly*, there

may be a custom under which the transfer of the holding of an occupancy ryot would pass to the purchaser the holding alone (*i.e.*, minus the right of occupancy). In the case of a *Girish Chandra Choudhury* v. *Kedar Nath Roy*, 4 C. W. N. 569, their Lordships Macpherson and Stevens, JJ., said "It does not seem possible on any principle to hold that in the case of a non-transferable occupancy holding, the holding can be sold without the right of occupancy so as to give the transferee a right to retain possession of it." But supposing that such a custom actually exists somewhere, does the Bengal Tenancy Act interfere with or abolish such a custom? It is not contended that all these customs actually exist in some place or other but arguing on probabilities only we cannot say that the transaction is either valid, void or voidable without referring to the particular custom of the locality in which the holding is situated.

N. CHANDRA.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Rakusen* v. *Ellis, Munday and Clarke*. Before the MASTER OF THE ROLLS AND LORDS JUSTICES MOULTON AND BUCKLEY. 19th March, 1911.

Solicitors—Whether a firm of solicitors which acted for the Plantiff in a cause ought to be allowed to subsequently act for the Defendants in the same cause.

This was an appeal from a decision of Warrington, J. The Defendants were a firm of solicitors. The Plaintiff was formerly in the employ of a company which gave him a notice of dismissal. The Plaintiff then consulted the firm of solicitors (*i.e.*, Defendants) but afterwards gave them up, and engaged other solicitors to conduct the action of wrongful dismissal. The action was referred to arbitration, but meanwhile the company which was sued by the Plaintiff engaged the Defendants, solicitors, to act for them. To this the Plaintiff objected as he said he had given to his former solicitors some confidential information, and moved for an injunction to restrain the Defendants from acting as solicitors for the company. The Defendants pleaded that their partner Mr. Munday alone attended to the Plaintiff's business; and that another partner would be conducting the company's case. The Court below granted the injunction holding that it was not proper to allow a firm of solicitors which had acted for a Plaintiff in a particular cause to act subsequently for the Defendants. The judgment was reversed on appeal. In the course of his judgment the MASTER OF THE ROLLS said:—

It was of vast importance that no doubt should exist as to the position of solicitors or as to the jurisdiction of the Courts over solicitors. Solicitors enjoyed great privileges and were subject to corresponding liabilities. Of these privileges no better example could be given than the absolute privilege which existed with regard to communications between solicitor and client. The Court expected and exacted from solicitors a higher standard of conduct than it ever could exact from those who were not officers of the Court. Solicitors could be restrained from disclosing any secrets of a confidential nature, and in that respect their position did not very much differ from the position of other persons standing in a confidential relation to their employers. But it was said that, in addition to this obligation not to disclose secrets, there existed a general principle laying down that solicitors who had acted for a Plaintiff in a particular matter could not afterwards act for the opposite side in the same matter under any circumstances whatever; and that this was so much a general rule that the Court ought not to have regard to the special circumstances of the case.

He did not doubt for a moment that there might be cases where the circumstances were such that a solicitor ought not to be allowed to act for the other side because he could not clear his mind of information given to him confidentially by his former client; but the Court ought to treat each of these cases as a matter of substance on the particular facts and consider, before applying this special jurisdiction, whether there was real mischief and prejudice.

His Lordship said that if this had been a case where Mr. Munday, having obtained confidential information from the Plaintiff, then sought to act for the Defendants, he should have said it was a case in which the solicitor could not discharge his duty to the Defendants without availing himself of the information of the Plaintiff. But what were the facts here? The communications were all made by the Plaintiff to Mr. Munday at a time when Mr. Clarke, the other partner, was away for his vacation, and Mr. Clarke knew nothing about the matter. Before his return the firm ceased to act for the Plaintiff, and in these circumstances was there any reason why Mr. Clarke should not be allowed to act in the arbitration for the company? There could be no resulting prejudice or mischief, and, having regard to the undertaking given by the Appellants that the name of the solicitors on the record should be changed from the firm name to that of Clarke alone, there was no ground whatever for granting an injunction.

Mr. Cozens-Hardy for the Appellants.

Messrs. Cave, K. C., and Simonds for the Respondents.

B. D. *Appeal allowed.*

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complainant but the plea has hardly been proved by the uncorroborated and vague statement of Sariatullah (defence witness No. 1). It is also in evidence that he absconded after the occurrence. In these circumstances I find a charge under sec. 456, P. C., has been brought home against the accused."

Mr. Donogh and *Babu Jyotish Chandra Hazra* for the Petitioner.

The JUDGMENT OF THE COURT was as follows :—

This was a Rule calling on the District Magistrate of Howrah to show cause why the conviction and sentence passed on the Petitioner should not be set aside on the ground that before convicting under sec. 456 the charge under secs. 457 and 380, I. P. C., should have been amended.

We think that there can be no doubt on the authorities that the charge under sec. 456 of entering the house with an object not specified but which is presumed to be criminal cannot be sustained when the person is being tried for the specific charge of theft in a dwelling-house and house-breaking with intent to commit theft. It is obvious that he must be seriously prejudiced by not knowing what really is the charge against him. Although it is not necessary under sec. 456 to specify any particular offence, when such particular offence is specified under sec. 457 it is incompetent in our opinion to convict of house-breaking with some other intent.

The question then arises whether there should be a retrial in this case considering that the Magistrate in the lower Court thought that the case was one that he was competent to try summarily and therefore must have regarded it as a petty case and that the accused has already been one month eight days in jail. We do not think it necessary to order a retrial.

We would remark with reference to the explanation of the learned Magistrate that he is wholly in error in supposing that because the case is tried summarily that a charge under the Penal Code is not necessary. No formal charge need be drawn up but the accused must be called upon to answer to the particulars of the offence charged, whether the proceedings be summary or otherwise. Sec. 263 says that the Magistrates need not frame a formal charge but they must specify the offence complained of and that must be in our opinion sufficient to give the accused notice of what is charged against him. It cannot be said that in a summary trial misjoinder of charges can be made without remedy. The same rules of law as apply to charges in warrant cases must apply to the particulars set out in sec. 263 in a summary record.

The Rule is made absolute. The conviction and sentence are set aside and the Petitioner will be released of his bail, unless he is liable to be detained for any other matter.

B. C. *Rule made absolute.*

[PRIVY COUNCIL.]

[APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.]

LORD MACNAGHTEN.
LORD SHAW.
LORD MERSEY.
LORD ROBSON.
1912,
Heard, 18, January.
Judgment,
21, February.

ROWLAND VALENTINE WEBSTER
v.
WILLIAM DAVID BOSANQUET.

Penalty or liquidated damages—Test—Contract, breach of—Damages real but difficult to assess and prove—Stipulation in contract to pay a liquid-

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ated sum as damages for breach when reasonable to be enforced—Language used if material—Plaintiff if should be asked to prove actual damage —Contract, interpretation—Language used by merchants in their trade, interpretation of.

Plaintiff and Defendant, who were partners in a business of exporting and selling tea grown upon certain estates belonging to the Defendant, in 1895 dissolved their partnership by a deed in which it was stipulated inter alia *that for 10 years after the 30th July 1896, when the Plaintiff took over the whole business, the Defendant should sell the whole or any part of the crops grown on the said estates to the Plaintiff at a valuation so long as the Plaintiff should pay to the Defendant yearly a sum of £75 for the use of the names of the Defendant's estates and should express his intention of purchasing the whole or any part of the crops, and that "if the Defendant should fail or neglect or refuse to sell the whole or any part of the crops of the Defendant's estates as above provided Defendant should pay to the Plaintiff the sum of £500 as liquidated damages and not as a penalty." The Defendant having in the first half of the year 1906 sold to other persons five parcels of tea amounting in the aggregate to 53,315 lbs. without offering the Plaintiff the option of buying the same the Plaintiff sued the Defendant for £500 as liquidated damages in respect of this breach. The Defendant having contended that the stipulation was by way of penalty,*

Held—*That whatever the expression used in the contract in describing such a payment, the question must always be whether the construction contended for renders the agreement unconscionable and extravagant when made and one which no Court ought to allow to be enforced.*

That, in this case, it was impossible for the parties when making the contract to foresee the extent of the injury which might be sustained by the Plaintiff on breach, that it was obvious that sales in breach of the contract would seriously affect his business, and that having regard to the very uncertainty of the loss likely to arise and to the fact that damages of this kind, though very real, might be difficult of proof and that the proof might entail considerable expense, it was most reasonable for the parties to agree beforehand as to what the damages should be.

THE CLYDEBANK ENGINEERING COMPANY, LIMITED *v.* DON JOSE CASTANEDA (1) *followed.*

That the payment stipulated was by way of liquidated damages fixing once for all the sum to be paid and not merely a penalty covering the damages though not assessing the same; and the Plaintiff, under the circumstances, could not be called upon to adduce evidence of damage actually sustained by him.

That the parties to the agreement were merchants using language in the sense in which it is used in their trade, and the expression "part of the crop" did not mean parcels which might to sold over a grocer's counter but parcels such as were in fact sold in the present case. Nor was it intended that if successive parcels forming parts of the same crop were sold a right to claim £500 in respect of each sale would accrue.

This was an Appeal from a judgment of the Supreme Court of Ceylon, dated the 21st of December 1909, reversing a judgment of the District Court of Colombo, dated the 1st March 1909.

The facts of the case in so far as they are material will appear from the judgment.

(1) [1905] App. Cas. 6 (1904).

ROWLAND VALENTINE WEBSTER *v.* WILLIAM DAVID BOSANQUET.

Messrs. A. Grant, K. C., and Thompson for the Appellant.

Messrs. Upjohn, K. C., and Corbett for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MERSEY.—This is an appeal from a judgment of the Supreme Court of Ceylon, dated the 21st December 1909, reversing a judgment of the District Court of Colombo, dated the 1st March 1909. The question raised by the appeal is whether a payment stipulated by deed to be made by the Defendant to the Plaintiff is to be regarded as a payment by way of liquidated damages or merely as a penalty.

The Court of first instance held that the stipulation was for a payment by way of liquidated damages; the Supreme Court took a different view and held that the stipulation was for a penalty only.

There is no dispute about the facts of the case, and they are as follows :—

In 1891 the Plaintiff and the Defendant entered into partnership for the purpose of exporting and selling Ceylon tea, and particularly tea grown upon certain estates in the island belonging to the Defendant and known as the Palamcotta and Marawilla estates. The part of the Plaintiff in connection with the enterprise was to travel for the purpose of pushing the sale of the tea, and this he did so successfully that by the year 1895 he had established a valuable trade. In that year the partnership was dissolved, the Plaintiff buying the Defendant's interest in the goodwill for a sum of 3,500*l.* and taking over the assets at a valuation. The dissolution was effected by a deed, dated the 14th February 1895, which contained among other things a provision that the Defendant should for a period of ten years after the 30th July 1896 sell the whole or any part of the crops of the Marawilla and Palamcotta estates to the Plaintiff at a valuation so long as the Plaintiff should pay to the Defendant yearly a sum of 75*l.* for the use of the names of the two estates, and should express his intention of purchasing the whole or any part of the said crops. The deed then provided as follows :—

"And the said Bosanquet shall not be at liberty to sell during the period aforesaid the whole or any part of the tea crops of the Marawilla and/or Palamcotta estates to any person other than the said Webster without first offering to the said Webster the option of buying the same, so long as Webster shall pay to Bosanquet the yearly payment of 75*l* ; and if the said Bosanquet shall fail, neglect, or refuse to sell the whole or any part of the crop of the Marawilla and/or Palamcotta estates as hereinbefore provided to the said Webster, he shall pay to Webster the sum of 500*l.* as liquidated damages and not as a penalty."

The Plaintiff duly performed his part of this agreement, but in the first half of the year 1906, the Defendant, in breach of the agreement, sold to persons other than the Plaintiff five different parcels of tea of the Palamcotta crop, amounting in the aggregate to 53,315 lbs., without offering to the Plaintiff the option of buying the same. In February 1908, the Plaintiff issued his writ in the present action, claiming the sum of 500*l.* as liquidated damages in respect of the said breach. It was alleged (and found as a fact at the trial) that the sales had been made by the Defendant under a mistake of fact as to the date on which the obligation to give the option of purchase to the Plaintiff terminated, but the learned Judge held this to be immaterial, and being of opinion that the stipulation for the payment of the 500*l.* meant what it said, namely, that it should be by way of liquidated damages, gave judgment for the amount claimed. The Supreme

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Court overruled this decision and sent the case back to the Court of first instance to ascertain the actual damage sustained by the Plaintiff by reason of the breach. On the rehearing the Plaintiff offered no evidence as to damages, and the Court awarded the Plaintiff by way of nominal damages the sum of 10*l.*, which amount the Defendant had brought into Court in satisfaction of the Plaintiff's claim. The question is which view of the contract is right.

The cases in which the Courts have had to consider whether a stipulated payment in respect of the breach of a contract should be regarded as liquidated damages fixing once for all the sum to be paid or merely as a penalty covering the damages though not assessing them, are innumerable and perhaps difficult to reconcile. But it is unnecessary to examine them for their effect is sufficiently and very clearly stated in the case of *The Clydebank Engineering Company, Limited* v. *Don Jose Castaneda* (1). From that case it appears that whatever be the expression used in the contract in describing the payment, the question must always be whether the construction contended for renders the agreement unconscionable and extravagant and one which no Court ought to allow to be enforced. After stating this principle Lord Halsbury proceeded as follows :—

"It is impossible to lay down any abstract rule as to what it may or may not be extravagant or unconscionable to insist upon, without reference to the particular facts and circumstances which are established in the individual case."

And Lord Davey, in delivering his opinion, says :—

"You are to consider whether it is extravagant, exorbitant, or unconscionable at the time when the stipulation is made—that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract."

Applying the principle to be found in these judgments to the facts of the present case the proper construction to be put upon the contract appears to their Lordships to be plain. When making the contract it was impossible to foresee the extent of the injury which might be sustained by the Plaintiff if sales of the tea were made to third parties without his consent. That such sales might seriously affect his business was obvious, and the very uncertainty of the loss likely to arise made it most reasonable for the parties to agree beforehand as to what the damages should be. And, furthermore, it is well known that damages of this kind, though very real, may be difficult of proof, and that the proof may entail considerable expense. This consideration also afforded a reason for fixing the amount beforehand. It was suggested in the course of the argument that to treat the 500*l.* as liquidated damages might involve such extravagant consequences as to render the agreement absurd, for the sum might be claimed in respect of every pound of tea sold in breach of the stipulation. Their Lordships, however, are of opinion that the stipulation is not capable of such an interpretation. The parties to the agreement were merchants using language in the sense in which it is used in their trade. When they speak of a "part of a crop" they are not contemplating packets which might be sold over a grocer's counter, but parcels such as were in fact sold in the present case. Moreover, the breach consists of the selling to third parties. It matters not whether the sale is of the whole or of part of a crop, nor whether it is made in one lot or in many. The agreement neither says nor means that, if suc-

(1) [1905] App. Cas. 6 (1904).

cessive parcels forming parts of the same crop be sold, a right to claim 500*l.* in respect of each sale shall accrue; all such parts put together cannot amount to more than the whole crop, and the penalty for the sale of the whole is limited to the 500*l.*

For these reasons their Lordships are of opinion that the contract stipulates for what in words it says, namely, for a payment of money by way of liquidated damages and not by way of penalty.

They will therefore humbly advise His Majesty that the appeal should be allowed, that the judgment of the Supreme Court should be set aside, and the original judgment of the District Court restored. The Respondent must pay all the costs in the Courts below and also the costs of this appeal.

Solicitors. *Messrs. Abbott and Hudson* for the Appellant.

Solicitors: *Messrs. Stannard and Bosanquet* for the Respondent.

B. D. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 521 OF 1910.

BRETT, J.
SHARFUDDIN, J.
1912,
18, April.

NILAMBAR SAHA, Appellant,
v.
KUMAR SATYAPRIYA GHOSAL BAHADUR, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 65—Co-sharer landlords—Separate decrees for rent for the same period—Sale of the tenure in satisfaction of one of the decrees—Subsequent sale of the same tenure in execution of the other decree, if permissible—Charge, first—Priority.

Where two co-sharer landlords obtained separate decrees for rent for the same period (each making in his own suit his co-sharer a party) and the tenure was sold in satisfaction of the decree obtained by one of them:

Held—*That the other co-sharer landlord could not execute his decree by sale of the same tenure after it passed into the hands of the auction purchaser and all that he was entitled to was to recover the sum due to him which from being a first charge on the tenure itself had, on the sale of the tenure, passed as a first charge on the surplus sale-proceeds.*

When two persons have charges on a property of equal priority, the first who takes out execution is entitled to satisfy his decree by sale of the property and the other person loses his right to proceed against that property.

This was an Appeal preferred on the 21st of November 1910 against an order of Mr. P. E. Cammiade, District Judge of Zillah, Backergunge, dated the 31st of July 1910, reversing that of Babu Kunja Behary Roy Munsif at Backergunge, dated the 21st of March 1910.

The facts of the case are briefly as follows:—

The Respondent who was a co-sharer landlord brought a suit for rent No. 821 of 1906 on the 17th April 1906 for arrears of rent for 1309 to 1312 making his co-sharers parties Defendants to the suit. A similar suit for rent was brought for the same period by his co-sharers, Satya Bhusan Ghosal and others, on the same day in the same Court (Suit No. 752 of 1906) making their co-sharer a party Defendant to the suit.

The appeal arises out of proceedings taken by the Respondent for execution of the decree, to which the Appellants, who had meanwhile purchased the tenure in execution of the decree of the Respond-

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ent's co-sharers, objected on the ground that the property purchased by him could not be sold again, and that the Respondent's remedy was to proceed against the surplus sale-proceeds.

The dates and the other facts material to this report will appear from the following portion of the judgment of the first Court.

" Both the suits were in respect of the same tenure in question. Suit No. 821 was decreed on the 21st July 1906 while the other suit was decreed on the 17th August 1906. Neither the tenant Defendants nor the co-sharer Defendants appeared in any of the cases and consequently they were decreed *ex parte* for the Plaintiff's share of the rent. It was alleged in the plaint in Suit No. 752 that the co-sharer Defendant refused to join as his share of rent was realised by him and the Plaintiff prayed that in case the latter's share of rent be found also due, a decree might be passed for that amount too. The Plaintiff in the other suit alleged that the co-sharers refused to join in the plaint and hence were made parties Defendants with a similar prayer as in Suit No. 752. In execution of the decree passed in Suit No. 752 the whole tenure was sold in execution and purchased by the applicant Nilambar Saha for Rs. 1,200 on the 15th March 1909 and the sale was confirmed on 7th May 1909. The applicant then obtained the sale certificate and took possession of the tenure through Court in August 1909. This tenure is the property No. 1 in the present execution case."

The first Court allowed the objection of the Appellant, Nilambar Saha, and remarked as follows :—

" The question is whether the decree in Suit No. 752 was a rent decree or a money decree. Both the decrees were virtually of the same nature and if they were money decrees, the objector has no better right to put up the property for sale than that of the decree-holder in the said suit. Both the decrees were passed before the Eastern Bengal and Assam Tenancy (Amendment) Act came into operation. If they were not rent decrees, the whole tenure passed to the auction-purchaser and the objector has no right to put it up again for sale. Considering the nature in which the plaint in Suit No 752 was framed I think that the decree passed therein was a rent decree. The proceedings in execution of that decree appear to have been started under the provisions of the Tenancy Act (*vide* sale certificate, Ex. 3). The sale also took place under these provisions. The objector did not raise any objection to the same at that time."

The Respondent thereupon preferred an appeal to the lower Appellate Court and the said appeal was allowed and the learned Judge remarked as follows :—

" The suit instituted by the Appellant was certainly a rent suit and I very much doubt if that instituted by his co-sharer was one. The plaint filed by the Appellant is practically the facsimile of the plaint, the effect of which was discussed in *Pergash Lal* v. *Akhowri Balgovind Sahoy* (1). The plaint was therefore framed in conformity with the provisions of the Tenancy Act ; and the suit must be treated as a suit for the entire rent of the tenure with an alternative prayer for the Plaintiff's share of the rent, in case the share of the co-sharer had already been realised. There is nothing before me to show that the Appellant at any stage of his suit was aware that the share of the rent due to his co-sharer was unpaid. I find that

(1) I. L. R. 19 Cal. 735 (1890).

the Appellant's suit was a suit for the entire rent of the tenure and that the decree obtained by him was a rent decree. The fact that the co-sharer's suit was registered before the Appellant's does not in my opinion affect the Appellant's right to proceed against the tenure. The Appellant's decree was granted before his co-sharer's ; and that decree created a legal charge on the property which the decree subsequently obtained by the co-sharer could not in any way affect. This charge was subsisting at the time the property was purchased by the Respondent and it could not be avoided by a notice under sec. 165.

"In these circumstances I find that the Respondent has no right to object to the sale of the tenure in execution of the Appellant's decree, even if, which I doubt, there is any provision in the law for such an application as the Respondent.

"I accordingly set aside the orders of the lower Court and order that the execution be proceeded with."

Nilambar Saha then preferred the present appeal.

Babus Surendra Chandra Sen and *Trailakhya Nath Ghose* for the Appellant.

Babu Ram Charan Mitter for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The present appeal is against an order in certain execution proceedings taken by the Respondent for realisation of a decree for rent which he obtained against his tenant.

It appears that the Respondent is a co-sharer landlord and he brought a suit (No. 821 of 1906) to recover his share of the rent from 1309 to 1312 making the other co-sharer landlord a party Defendant. On the same day, the other co-sharer landlord brought a suit (No. 752 of 1906) to recover his share of the rent making his co-sharer, namely, the present Respondent, a Defendant in that suit. The claim of the present Respondent was decreed on the 21st July 1906 and that of his co-sharers was decreed on the 17th August 1906. The other co-sharer landlord, however, took out execution of his decree first, put up the tenure to sale and, on the 15th March 1909, it was purchased by the present Appellant for Rs. 1,200. The sale was confirmed on the 7th May 1909 and possession was given in August 1909. The decree under which the tenure was sold was for recovery of Rs. 665 due as rent. After all these proceedings, the present Respondent took out execution of the decree which he had obtained and an objection was then put in by the present Appellant, the auction-purchaser, that the same property could not be sold again, as the right of the tenant in the property had been lost and that the only remedy open to the present Respondent was by proceeding against the surplus sale-proceeds obtained in execution of the other co-sharers' decree.

The Court of first instance allowed the objection but the lower Appellate Court has disallowed it and has directed that execution should proceed of the decree obtained by the present Respondent by sale over again of the tenure.

The auction-purchaser has appealed to this Court and the question which we have to determine is whether, when two co-sharer landlords have obtained separate decrees for rent for the same period and when the tenure has been sold in satisfaction of the decree obtained by one of them, the other co-sharer landlord can

come forward and claim to execute his decree by sale of the same property after it has passed into the hands of the auction-purchaser. The lower Appellate Court has been influenced by the fact that rent is a first charge on the tenure. But in the present instance, the charges of both the co-sharers were equal in priority and strength and the learned pleader who appears on behalf of the Defendant has not been able to indicate to us any provision of the law which provides that, in such a case, either of the decrees shall have priority over the other. The only principle which it seems possible to apply in a case like the present where two persons have decrees equal in priority is that the first who takes out execution is the first who is entitled to satisfy his decree by sale of the property and that the other person who delays to take out his execution loses his right to proceed against the property itself. The learned pleader for the Respondent has argued that as the charge under the Respondent's decree was a first charge on the tenure and, as such, bound the tenure, therefore, when the property was sold in satisfaction of the other decree, it must be taken to have been sold subject to the charge existing on it by reason of the decree obtained by the Respondent. We are unable to find any authority for this contention and, in our opinion, the only possible view to take in a case like the present is that, where each of two persons has an equal charge on a property, the person who is the first in time to apply for execution of his decree is entitled to satisfy his decree by sale of the property and the person who comes later and applies for execution after the tenure has been sold is not entitled to sell the tenure again as the tenure has then ceased to be a tenure of the tenant and has passed into the possession of the auction-purchaser. All that he is entitled to is to recover the sum due to him which from being a first charge on the tenure itself has, on the sale of the tenure, passed as a first charge on the surplus sale-proceeds. In these circumstances, we are of opinion that the view taken by the lower Appellate Court is wrong and that the appeal must be decreed and the application of the Respondent, so far as it seeks to execute his decree by resale of the tenure, must be disallowed and it must be left to him to execute his decree otherwise against the property of his debtor. The Appellant is entitled to recover his costs from the Respondent in this Court and in both the lower Courts. We assess the hearing-fee in this Court at two gold mohurs.

H. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDERS
Nos. 58, 49, 57 AND 59, OF 1910.

MOOKERJEE, J. CARNDUFF, J. 1911, Heard, 12, June. Judgment, 11, July.	KABILANUND THAKUR and others, Appellants, *v.* PIRTHI CHAND LAL CHOWDHURI, Respondent.

Execution sale—Joint decree—Application to set aside sale by some of judgment-debtors, if whole sale can be set aside—Sale proclamation, gross under-statement of value by decree-holder, if by itself vitiates sale—Waiver by judgment-debtor of fresh sale proclamation, if amounts to waiver of other irregularities.

Where a decree was obtained jointly against several persons and their respective liabilities were not ascertained therein, and the decree-holder proceeding against them

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jointly had their property sold in execution, held, *that upon good cause shown the whole sale should be set aside although only some of the judgment-debtors applied within time to set aside the sale.*

The application of the other judgment-debtors though made out of time could very well be treated as applications to be added as parties to the previous application of their co-judgment-debtors having regard to the fact that all the applications were tried together and were thus virtually consolidated.

Where on the date fixed for the sale of immoveable property in execution of a decree, the judgment-debtor applied for a postponement and agreed that if the decree was not paid up by the adjourned date the sale might be held without the issue of fresh proclamation, and the decree not having been paid up the sale took place on the adjourned date,

Held—*That in the absence of evidence to show that they were aware of the contents of the sale proclamation it could not be said that the judgment-debtor had waived any irregularities in the sale proclamation which contained a gross understatement of the value of the attached properties.*

GIRIDHARI SINGH *v.* HURDEO NARAIN (2), ARUNACHELAM *v.* ARUNACHELAM (6) *distinguished.*

Where with the object of seizing a very valuable property for the smallest possible price, the decree-holder grossly understated its value in the sale proclamation with the consequence that he was able to purchase the propery without competition at a fraction of its real price,

Held--*That the deliberate misstatement of value in the sale proclamation was by itself a sufficient ground for vacating the sale.*

SADATMAND KHAN *v.* PHUL KUAR (7) *followed.*

ABDUL KASHEM *v.* BENODE LAL (8) *not followed.*

These were Appeals preferred on the 11th of February 1910 against the order of Babu N. N. Dhar, Subordinate Judge of Zillah Purneah, dated the 10th of January 1910.

The facts of the case will appear from the judgment.

Babus Umakali Mukherjee, *Satis Chandra Ghose*, *Joy Gopal Ghose*, *Mohini Mohun Chatterjee* and *Surendra Chandra Bose* for the Appellant.

Mr. S. P. Sinha, *Dr. Rash Behari Ghose* and *Moulvi Mahomed Taher* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

No. 58 of 1910.

This appeal is directed against an order by which the Court below has dismissed an application for reversal of the sale of a Putni Taluk held in execution of a decree for arrears of rent. The putni was created on the 11th July 1882, by two instruments, under each of which the annual rent was fixed at Rs. 3,400 and a bonus of Rs. 6,800 was paid to the zemindar. It appears that the tenants committed default in the payment of rent, with the result that, on the 2nd July 1908, the landlord obtained a decree for rent against seven Defendants, for a sum of Rs. 7,000. Of these Defendants, the first

(2) L. R. 3 I. A. 230 : 26 W. R 44 (1876).
(6) L. R. 15 I. A. 171 : S. C. I. L R. 12 Mad. 19 (1888).
(7) I. L. R 20 All. 412 : S. C. L R. 25 I. A. 146 ; 2 C. W. N. 550 (1898).
(8) 12 C. W. N. 757 (1908).

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three were interested to the extent of a five-twelfths share in the tenancy right; the next two, to the extent of a three-eighths share, and the remaining two, to the extent of a five-twenty-fourths share. The landlord, however, had not recognised this distribution of shares, and he was entitled, under his decree, to bring the entire putni to sale. On the 2nd December 1908, the decree-holder applied for execution, and for realisation of the judgment-debt, which at that time exceeded Rs. 7,735. At the instance of the landlord decree-holder, the value of the property was stated in the sale proclamation as Rs. 4,000. The Court directed the simultaneous issue of attachment and sale proclamation; returns of services of the writs were filed on the 21st December and the sale was fixed for the 3rd February 1909. On that date, an application was made on behalf of the judgment-debtors for adjournment of the execution proceedings for one month to enable them to pay the decretal amount. In this application it was stated that if they failed to pay on the 1st March 1909, the sale might be held without the issue of a fresh proclamation to which the Petitioners would not raise any objection on the ground of irregularities etc. The Court thereupon recorded the following order :—"Judgment-debtors' petition to stay sale put in; but as it is not consented to by the decree-holder, the petition is rejected; on 4th February 1909, (that is, the day following) for orders and sale." On the next day, the judgment-debtors renewed their application. It was stated that the application made on the previous day had been rejected, because it had not been made on behalf of all the judgment-debtors. The second application was therefore made on the strength of a power-of-attorney purporting to have been signed by all the judgment-debtors, and it was prayed, as before, that the sale might be postponed till the 1st March 1909; it was stated that, if meanwhile the decree was not satisfied, the sale might be held without the issue of a fresh proclamation, to which the Petitioners would not take objection on the ground of irregularity. The decree-holder assented to this application, and the Court thereupon recorded the following order :—"Judgment-debtors' petition consented to by the decree-holder, the sale is stayed till noon of the 1st March 1909 for sale. Fresh sale notice waived by judgment-debtors." The money was not paid and, on the 1st March 1909, the Court directed the property to be sold on the day following. On the 2nd March the properties were sold for Rs. 20,000 and purchased by the decree-holder who was the sole bidder present. On the 1st April 1909, the fourth and fifth Defendants applied for reversal of the sale, and two similar applications were subsequently made by the first three judgment-debtors on the 22nd April and by the 6th and 7th judgment-debtors on the 24th April. On the 29th April a fourth application of a similar character was made by one Janak Kishori who claimed to be interested to the extent of an one-eighth share out of the three-eighth share of the fourth and fifth Defendants. The Subordinate Judge has held, upon the evidence, that there have been grave irregularities in connection with the proceedings antecedent to the sale. He has held, *first*, that the decree could be executed only as a money decree and, consequently, the writs of attachment and proclamation of sale could not be simultaneously published; *secondly*, that the writs were not published at the proper thana and Mal Katchari; *thirdly*, that the

processes were not published at the Katchari of the zemindar according to law; and, *fourthly*, that there was a gross understatement of the value of the property in the sale proclamation. The Subordinate Judge has further held that there was great inadequacy in the price fetched at the sale, because the real value of the property is at least twice as much as the sum paid by the decree-holder. The Subordinate Judge, however, has negatived the contention that the conduct of the decree-holder was fraudulent. He has finally dismissed the application on the ground, that the judgment-debtors had waived all objections to irregularities in connexion with the execution proceedings, and that the applications of all the judgment-debtors except the fourth and fifth were barred by limitation. As regards these two judgment-debtors the Subordinate Judge has held that their application was obviously in time. As regards Janak Kishori the Subordinate Judge has held that there was no waiver of irregularities on her part, but that although she did not become aware of the sale or of the execution proceedings before the 7th April 1909 and her petition was made on the 29th April, it was nevertheless barred by limitation as she had not brought her case within sec. 18 of the Limitation Act. In this view the Subordinate Judge has dismissed all the applications and confirmed the sale. The judgment-debtors have preferred separate appeals against this order, and we shall first consider the appeal of the fourth and fifth judgment-debtors. In so far as they are concerned their application is not barred by limitation and the only ground on which it has been dismissed is that they waived all objections on the ground of irregularity in the execution proceedings. This view has been assailed on their behalf on the ground they waived a fresh sale notice but did not waive any objections which might legitimately be taken in respect of the first sale proclamation. In our opinion this contention is well-founded and must prevail.

It was pointed out by this Court in the case of *Dhanukdhari Singh* v. *Nathuni Sahu* (1) that whether there has been a waiver or not of the rights of the judgment-debtors and if so to what extent depends upon the circumstances of each case; the existence of an intent to waive is a question of fact, and the best evidence of intention is to be found in the language and conduct of the parties; the Courts cannot lay down any stereotyped and inelastic rule by which all cases of waiver must be governed. Now, in the case before us, when the judgment-debtors applied on the 4th February 1909 for adjournment of the sale for one month, it became obligatory upon the Court, if the application was granted, to issue a fresh sale proclamation under the provisions of the Code. R. 69, sub-r. (2) of Or. XXI provides that where a sale is adjourned under sub-r. (1), that is, in the exercise of the discretion vested in the Court and for a longer period than seven days, a fresh proclamation under r. 67 shall be made, unless the judgment-debtor consents to waive it. It is clear, therefore, that, if a sale is adjourned for one month, the decree-holder must either obtain a waiver from the judgment-debtor or cause a fresh proclamation to be issued. The only reasonable interpretation which can be placed upon the application of the 4th February 1909, read with the order of the Court recorded on the same date, is that the judgment-debtors consented to

(1) 6 C. L. J. 62: s. c. 11 C. W. N. 848 (1907).

waive merely a fresh proclamation of sale. Indeed the order of the Court placed the matter beyond the region of controversy. The contention of the decree-holder that the judgment-debtors waived not merely the issue of a fresh proclamation but also all irregularities that might have taken place in connection with the writs of attachment and proclamation of sale previously issued cannot be supported. Much reliance was placed upon the decision of their Lordships of the Judicial Committee in *Giridhari Singh* v. *Hurdeo Narain* (2). That case, in our opinion, is clearly distinguishable. There the judgment-debtor had agreed that, if a postponement of one month was granted, the attachment and the notification of sale would be maintained. The sale was postponed on this condition and their Lordships of the Judicial Committee held that as the judgment-debtor had agreed that the attachment and notification of sale should be maintained he could not subsequently take objection to the notification by stating that there was an error in it. The petition amounted to an admission on his part, that the notification was correct, or that, at any rate, there was no such mistake or irregularity as would be likely to mislead. On this ground it was ruled that the judgment-debtor could not impeach the validity of the sale proclamation on the allegation that the amount of the revenue payable for the property sold had been incorrectly stated therein. Similarly, in the case of *Raja Thakur Barham* v. *Anantaram Marwari* (3), the judgment-debtor in his petition for adjournment of the sale, had agreed not to urge any irregularity in the service of the sale proclamation. It was consequently held that he had waived all irregularities in the service of the sale proclamation previously issued. The cases of *Noorul Hossain* v. *Oomatool Fatima* (4) and *Taran Singh* v. *Girija Kripa* (5) are distinguishable on a similar ground. The decision of their Lordships of the Judicial Committee in *Arunachelam* v. *Arunachelam* (6) is of no assistance to the decree-holder purchaser, because there the judgment-debtor, though aware of the misdescription of the property in the sale proclamation on which he relied in support of his application for reversal of the sale, had intentionally kept silent; under such circumstances it was ruled that it would be very difficult to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold which he knew well but of which the execution creditor or decree-holder might be perfectly ignorant. In the case before us, we are clearly of opinion that the judgment-debtors waived the issue of a fresh proclamation of sale, they did not waive any objection in respect of the proclamation previously issued, nor, indeed, is there any evidence that they were aware of the contents of such proclamation. The ground, therefore, upon which the Subordinate Judge has dismissed the application for reversal of the sale cannot be upheld.

The question next arises, whether the sale can be supported. As already explained the Subordinate Judge has found that the value of the property exposed for sale was grossly understated in the sale proclamation. The decree-holder landlord

(2) L. R. 3 I. A. 230 ; 26 W. R. 44 (1876).
(3) 2 C. L. J. 584 (1905).

(4) 25 W. R. 34 (1875).
(5) 2 C. L. J. 589n (1902).
(6) L. R. 15 I. A. 171 : s. c. I. L. R. 12 Mad. 19 (1888).

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deliberately stated the value to be Rs. 4 000. A bonus of Rs. 13,600 had been paid at the creation of the putni and deducting the rent reserved the annual profit was between Rs. 4,000 and Rs. 5,000. To value a property of this description for which a substantial premium had been paid at one year's purchase, was obviously inexcusable. There were no bidders present and the decree-holder who had valued the property at Rs. 4,000 offered a first bid of Rs. 20,000 and purchased it for that sum. The Subordinate Judge has held that the value is at least Rs. 40,000; according to the Appellants the value ought to be taken to be a lac of rupees at twenty years' purchase upon the net annual income. The case, therefore, falls within the principle recognized by their Lordships of the Judicial Committee in *Sadatmand Khan* v. *Phul Kuar* (7), because unquestionably there was a deliberate and gross misstatement of the value of the property calculated to mislead intending purchasers. Our attention, however, was invited to the decision of this Court in *Abdul Kashem* v. *Benode Lal* (8) in which a contrary view appears to have been maintained. But the learned Judges there overlooked the decision of their Lordships of the Judicial Committee and the view taken is consequently not binding upon this Court. [See *Basanta Kumari* v. *Ram Kanai* (9), *Nanda Kumar* v. *Gobinda Mohan* (10) and *Sivadurga* v. *Rajmohan* (11)]. In our opinion, it is plain that the object of the decree-holder was to seize a very valuable property for the smallest possible price; that it was with this object in view that he deliberately misstated the value, and that, in the sale which followed, he secured for Rs. 20,000 without any competition what is worth at least twice if not four or five times the sum he paid. Apart from the question, therefore, whether or not there were other irregularities in connexion with the sale the judgment-debtors are entitled to have the sale vacated on the one ground mentioned.

The question finally arises, whether upon the application of two of the judgment-debtors the sale should be set aside in its entirety. The sale was, as we have already stated, of the entire putni; the landlord decree-holder was not bound to recognise and did not as a matter of fact recognise any distribution of shares amongst the tenants. Under these circumstances in our opinion the sale ought to be set aside in its entirety. It was ruled by a Full Bench of this Court in the case of *Unnada* v. *Erskine* (12) that in a suit brought by a sharer in a putni to set aside the sale thereof held under the Putni Regulation, the suit ought to be so framed as to seek the reversal of the sale of the entire property. This principle was also applied in the cases of *Ram Churan* v. *Drobomoyee* (13), *Suresh* v. *Akkori* (14), *Gangadhar Sarkar* v. *Khaja Abdul Azij* (15) and *Bideshar* v. *Srikissen* (16). No doubt, it may be urged that the other judgment-debtors have not been joined as opposite parties to the application now before us. But there is no force in this contention. The other judgment-debtors as we have explained, preferred separate applications and as the applica-

(7) I. L. R. 20 All. 412 : s. c. L. R. 25 I. A. 146 ; 2 C. W. N. 550 (1898).
(8) 12 C. W. N. 757 (1908).
(9) 13 C. L. J. 192 (1910).
(10) 13 C. L. J. 812 (1910)
(11) 15 C. W. N. 577 (1910).
(12) 21 W. R. 68 ; 12 B. L. R. 370 (1873).
(13) 17 W. R. 122 (1872).
(14) I. L. R. 20 Cal. 746 (1893).
(15) 14 C. W. N. 128 (1909).
(16) 9 C. W. N. 805 (1905).

tions were heard together and tried as if they constituted one proceeding, they may, in substance, be taken to have been consolidated. In this view, there can be no room for controversy that the sale should be set aside in its entirety.

The result is that this appeal must be allowed, and the order of the Subordinate Judge discharged. The application of the fourth and fifth judgment-debtors is granted and the sale is set aside. The Appellants are entitled to their costs from the decree-holder both in this Court and in the Court below. We assess the hearing fee in this Court at ten gold mohurs.

Nos. 49, 57 and 59 of 1910.

These appeals are directed against orders of the Subordinate Judge by which he has dismissed the applications of two sets of judgment-debtors and of the representative-in-interest of another set of judgment-debtors for reversal of the sale which we have just set aside. As regards these applications the objection was taken in the Court below that they were barred by limitation, as they were made more than thirty days after the date of the sale. The judgment-debtors sought to bring their case within sec. 18 of the Limitation Act. That section provides for an extension of time only when it is established that the applicant has been kept by means of fraud from the knowledge of his right or of the title on which it is founded. In view of the decision of this Court in the case of *Kailash Chandra Halder* v. *Bissonath Paramanic* (17), it is difficult to hold that the applicants have brought themselves within the scope of sec. 18, and in this view their applications cannot be maintained. But as we have already explained, the proper way to consider all these applications is to treat them as consolidated, the first in point of time, that by the fourth and fifth judgment-debtors, as the principal application and the subsequent ones by the other judgment-debtors, as applications by them to be made parties to the proceeding then pending before the Court. From this point of view the applications by these judgment-debtors may be treated as in support of the application by the fourth and fifth judgment-debtors and, as that application has been successful, no other question arises for consideration. These appeals, therefore, must also be allowed, and the orders of the Court below discharged. The sale will stand reversed in its entirety. In these appeals, however, the parties will pay their own costs both here and in the Court below.

(17) 1 C. W. N. 67 (1896).

Appeal allowed.

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE
No. 2459 OF 1911
AND
RULE No. 5181 OF 1911.

BRETT, J. CARNDUFF, J. 1912, Heard, 11, March. Judgment, 13, March.	RASH BEHARI GHOSHAL and anr., Defendants Nos. 2 and 3, Appellants, *v.* J. C. STALKART, Respondents.

Bengal Municipal Act (III of 1884), sec. 15, Rules under—Commissioners, election of, qualification for—Person 'authorised' to vote for corporation if eligible for election.

Any one possessing qualifications set out in Rule 2 of the Rules framed under sec. 15 of the Bengal Municipal Act and duly registered as a voter as provided by Rules 4 to 12 of the said Rules is eligible under those Rules for election as a Commissioner;

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and the fact that such a person is registered as voter under Rule 8 as a representative of a corporation instead of being registered in his own capacity does not disqualify him for election.

This was an Appeal preferred on the 2nd of September 1911 against the decree of Babu Ambika Charan Mukherjee, Subordinate Judge, 3rd Court of Zillah Hughly, dated the 9th of August 1911, affirming the decree of Babu Baroda Kinker Mukherjee, Munsif, 3rd Court of Howrah, dated the 19th of April 1910.

The facts of the case were as follows :—

The suit out of which the appeal arises was instituted by J. C. Stalkart for a declaration that the Plaintiff was a qualified voter and as such entitled to stand as a candidate for election as a Municipal Commissioner for Ward No. I in the town of Howrah and for a perpetual injunction restraining Rash Behari Ghosal and Kanai Lal Sadhukhan (Defendants Nos. 2 and 3) from considering themselves as duly elected and from acting as Municipal Commissioners of the town of Howrah. The Plaintiff further prayed in the suit for another perpetual injunction restraining the Chairman of the Howrah Municipality (Defendant No. 1) from allowing Defendants Nos. 2 and 3 to act as Commissioners.

The Plaintiff was a candidate for election as a Municipal Commissioner and sent in two nomination papers (Exs. 5 and 7) in favour of himself as representing Harton & Co. The Vice-Chairman rejected these nomination papers on the ground that the fact of Mr. J. C. Stalkart being authorised to vote did not under the Election Rules make him qualified to stand for election as Commissioner. Mr. Stalkart however further claimed that even in his personal capacity he was qualified for election as he paid the requisite amount of rates and that he was no other than the person entered as C. Stalkart in the voters' list as a qualified voter.

The Vice-Chairman disallowed both these claims of the Plaintiff and rejected the nomination papers. His decision was confirmed by the Chairman.

The Plaintiff's case in this suit was that C. Stalkart who was shown in the voters' list as a qualified voter was no other than the Plaintiff and that his nomination papers (Exs. 5 and 7) both of which were in favour of J. C. Stalkart as representating Harton & Co. and which complied with the Election Rules ought not to have been rejected by the Vice-Chairman of the Municipality.

The Munsif who tried the suit found (*i*) that the Plaintiff, J. C. Stalkart and C. Stalkart, in the Voters' list was one and the same person, (*ii*) that the Vice-Chairman should have known this, (*iii*) that as representative of Messrs. Harton & Co., the Plaintiff was qualified to be elected a Commissioner, although the Plaintiff's case as made in his plaint was that he was entitled to stand for election in his own capacity, and (*iv*) that of the two exhibits relied upon by him (the others having been admitted by his counsel as invalid), one, Ex. 5, in favour of J. C. Stalkart as representing Harton & Co., fulfilled the requirements of the Election Rules but the other own Ex. 7 was time-barred. On these findings, the Munsif declared that the Plaintiff was a qualified voter and as such was entitled to stand for election, and that the election of Defendants Nos. 2 and 3 was illegal and *ultra vires*, and also issued an injunction on Defendants Nos. 2 and 3 restraining them from acting as Municipal Commissioners.

The lower Appellate Court confirmed the decree of the Court of first instance and also granted an injunction on Defendant No. 1 as prayed for by the Plaintiff.

Reliance was placed on both sides on the following rules framed under sec. 15 of the Bengal Municipal Act.

R. 2. "Every male person shall be eligible to vote who has attained the age of 21 years, has been resident within the limits of the Municipality for not less than 12 months, immediately preceding the election, has been duly registered as provided in rr. 4 to 12 inclusive, and who. . . .

R. 8. "The Chairman shall not less than 30 days before the date of election, send a letter to every incorporated Company entitled to vote, requesting it to fill in a form, which shall accompany such letter with the name of the person authorised to vote on behalf of such corporation and to return the same within seven days. Upon receipt of the form the Chairman shall cause the name stated therein to be entered in the register revised under r. 9, and the person whose name is thus entered shall be deemed to be duly authorised to vote on behalf of the said corporation."

"R. 13. "Any person qualified to vote under these rules, and not disqualified under sec. 57 of the Act, shall be qualified to be elected a Commissioner."

Babu Mahendra Nath Roy (with him *Babus Prokash Chandra Mitra* and *Manmatha Nath Roy*).—Having regard to to the statutory provisions of sec. 15 reproduced in r. 2, *viz.*, that a male person alone is entitled to vote, and that the rules must be consistent with the provisions of the Act, r. 8 is *ultra vires.* Assuming that an incorporated Company has a power to vote, Plaintiff was not qualified to stand for election. According to r. 13, only such persons as were qualified to vote under these rules could stand for election; the Plaintiff was not eligible to vote under r. 2, he was only authorised to vote under r. 8. The Plaintiff ought not to have been allowed to make a new case. In the plaint he relied on his own capacity; he could not afterwards come in as representative of Messrs. Harton & Co., and succeed on the strength of Ex. 5 which described him as representing "W. H. Harton & Co., Ratepayers."

Mr. K. B. Dutt (with him *Babu Manmatha Nath Mukherjee*).—J. C. Stalkart being duly authorised could of course stand. Refers to r. 11 of the Election Rules:

R. 11. "The register thus prepared and amended shall be the final register of persons entitled to vote whether at a general election or at any bye-election &c." The name of J. C. Stalkart having being entered in the register, he was entitled to vote, and therefore was qualified to be elected a Commissioner under r. 13. R. 8 is not *ultra vires.*

Babu Manmatha Nath Roy in reply.—Although according to r. 11, the Plaintiff was entitled to vote, it did not entitle him to vote in his own capacity, but only authorised him to vote as a representative. R. 13 refers to a case where a person is qualified to vote in his own capacity.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff-Respondent in this appeal, Mr. J. C. Stalkart, was a candidate for election as a Municipal Commissioner in Ward No. I of the Howrah Municipality in 1909 and in compliance with Rule 14 of the Election Rules framed by the Local Government under secs. 15 and 69 of

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the Bengal Municipal Act III of 1884 as amended by Act IV of 1894 and Act II of 1896 submitted 5 nomination forms to the Chairman in form B. These were numbered 3, 4, 5, 6, and 7 and of these all but No. 5 were rejected as failing to comply with the provisions of the law. The nomination form No. 5 was in due course placed before the returning officer. In column 2 of the forms the name of the candidate was entered as J. C. Stalkart and in column 4 in which the particulars of qualification as a voter have to be stated the entry was "representing W. H. Harton & Co., ratepayers." This information was required as Rule 13 of the Rules provides that "any person qualified to vote under these Rules and not disqualified under sec. 57 of the Act shall be qualified to be elected as a Commissioner." The returning officer held that Mr. J. C. Stalkart was not qualified for election as a Commissioner because the ground on which he claimed to be entitled to a vote was that under Rule 8 of the Rules he had been authorised to vote on behalf of a corporation, *i.e.*, the firm of Messrs. W. H. Harton & Co. The returning officer held that a person authorised to vote under Rule 8 was not a qualified voter as required by Rule 2 and Rule 13.

Rule 2 provides, every male person shall be eligible to vote who has attained the age of 21 years, has been resident within the limits of the Municipality for not less than 12 months immediately preceding the election, has been duly registered as provided in Rules 4 to 12 inclusive and has paid rates and taxes up to a certain amount during the year preceding the election. Mr. J. C. Stalkart represented that he was the same person who was entered in the ratepayers' roll as Mr. C. Stalkart, that he had paid rates and taxes aggregating some thousands of rupees and was fully qualified under Rule 2 of the Rules. The returning officer in his order recorded that he was not satisfied that Mr. J. C. Stalkart was the same person as Mr. C. Stalkart and being of opinion that on that account Mr. Stalkart was not qualified in his personal capacity as a voter he held that he was not entitled to stand as a candidate for election as a Commissioner of the Howrah Municipality. Mr. Stalkart applied against this order under Rule 29 of Rules to the Chairman of the Municipality who was also the District Magistrate. The Chairman upheld the order of the returning officer on two main grounds, *first*, that a person authorised under Rule 8 to vote for a corporation could not be considered on that account a qualified voter, and, *secondly*, that from the Vice-Chairman's report it was clear that he had ample grounds for his belief that C. Stalkart was not a mere clerical error for J. C. Stalkart but that the names referred to different persons. The Chairman went on to say that in his opinion the Vice-Chairman's action in the matter was perfectly regular and that he had acted throughout in good faith. He therefore rejected the application. It is to be noticed that in dealing with the question under Rule 8 read with Rule 2 the Chairman appears to have questioned the legality of the Rules passed by the Local Government and in dealing with the second question he expressed no opinion at all of his own on Mr. Stalkart's representation.

Mr. Stalkart having been rejected as a candidate for election the election was duly held with regard to the other candidates who were held to be qualified for

election and Defendants Nos. 2 and 3 in the present suit were duly elected as Commissioners for Ward No. I.

Mr. Stalkart then instituted a suit in the Court of the Munsif of Howrah against the Chairman of the Howrah Municipality as Defendant No. 1 and the two elected Commissioners as Defendants Nos. 2 and 3, to have it declared that he was a qualified voter in the Municipality of Howrah and as such entitled to stand for election as a Municipal Commissioner for Ward No. I of the Municipality, and to obtain a perpetual injunction restraining Defendant No. 1, the Chairman of the Municipality, from declaring Defendants Nos. 2 and 3 to be duly elected as Commissioners under Rule 16 of the Election Rules and allowing them to act as Commissioners of the Municipality of Howrah, and also to obtain a perpetual injunction against Defendants Nos. 2 and 3 restraining them from acting as duly elected Commissioners of the Municipality of Howrah.

The Munsif found that the Plaintiff, Mr. J. C. Stalkart, was the same person as Mr. C. Stalkart who was entered in the register of ratepayers, and that in fact from the records in the Municipal office there could not be a shadow of doubt that he was so. He further held that the Vice-Chairman who was acting as returning officer at the election must have known that Mr. J. C. Stalkart and Mr. Stalkart were the same person, and he further found that Mr. Stalkart was a qualified voter in his personal capacity, as he fulfilled all the requirements of Rule 2 of the Election Rules. He held accordingly that the Vice-Chairman was not justified in rejecting the nomination form put in by Mr. Stalkart. He held that the Chairman of the Municipality had before him the same information as the returning officer and that he was not justified in rejecting the application made to him by Mr. Stalkart under Rule 29 of the Election Rules. He further held that the construction put on Rule 8 by the Chairman was not correct. He held that Rules 2 and 8 must be read together and that Mr. Stalkart was a qualified voter and therefore eligible for election as a Commissioner under Rule 13 and gave him a declaratory decree to that effect. He further held that no injunction could issue against Defendant No. 1, the Chairman of the Municipality, as prayed for, but he granted an injunction against Defendants Nos. 2 and 3 restraining them from acting as Commissioners of the Municipality.

Defendants Nos. 2 and 3 appealed, and a cross-appeal was preferred by the Plaintiff against the judgment and decree of the Munsif so far as he refused to grant an injunction against the Chairman of the Howrah Municipality. The lower Appellate Court confirmed the judgment and decree of the Munsif granting Mr. Stalkart a declaratory decree that he was a qualified voter of the Municipality and so eligible for election as a Commissioner and granting an injunction against Defendants Nos. 2 and 3. He decreed the cross-appeal, set aside the decision refusing to grant an injunction against the Chairman of the Municipality and granted the injunction prayed for by the Plaintiff.

Defendants Nos. 2 and 3 have appealed to this Court and the Appeal was admitted on the 5th September 1911. On the same date the same Defendants obtained a Rule from this Court on the Plaintiff and Defendant No. 1 to show cause why the operation of the injunction should not

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be suspended or stayed during the hearing of the Appeal. This Rule came on for hearing before us on 26th February last and as it was then represented to us that the period for which the election of the Commissioners would hold good would expire on the 1st April last we directed that the Appeal and Rule should be brought on for hearing before us as soon as possible. We have now heard the Appeal.

The substance of the arguments which have been advanced before us on the Appeal is that Rule 8 of the Rules for election passed by the Government is *ultra-vires*, having regard to sec. 15 of the Municipal Act; that a person authorised to vote for a corporation under Rule 8 need not necessarily be a voter qualified in his personal capacity under Rule 2, and that Mr. Stalkart, as he entered in his nomination roll that his qualification was that he was authorised to vote under Rule 8, could not be regarded as a qualified voter. On the facts as found by both the lower Courts the argument is in our opinion futile. Obviously Rules 2 and 8 must be read together and we see no ground to accept as reasonable the hypothesis suggested by the Chairman of the Municipality in his order that under Rule 8 a corporation might authorise a female or a minor to vote for it. The Munsif has dealt with this argument very properly in his judgment and we do not think it necessary to add anything to what he has recorded.

It was the duty of the returning officer and of the Chairman to apply the Rules to the facts before them and it was no part of their duty to criticise the Rules.

The facts as disclosed by the Munsif's judgment are perfectly clear that Mr. Stalkart fulfilled all the conditions required by Rule 2 and we agree with the Munsif that it is at least surprising that the Vice-Chairman and Chairman should have disregarded information that was before them to identify Mr J. C. Stalkart with Mr. C. Stalkart, the registered ratepayer.

Rule 2 is in our opinion perfectly clear. Any one possessing the qualifications set out in that Rule which in fact embodies the provisions of sec. 15 of the Act and having been duly registered as provided by Rules 4 to 12 is a qualified voter and as such eligible under Rule 13 for election as a Municipal Commissioner. It is idle to argue that registration under Rule 8 in fact amounted to a disqualification.

We agree, therefore, in the findings and decree of the lower Appellate Court and confirm them and dismiss the appeal with special costs, including 5 gold mohurs hearing-fee and interest at 6 per cent. up to date of realization. The Rule will also stand discharged with costs, 2 gold mohurs. At the same time we feel bound to express our regret that it should have been necessary to waste so much time and money over a matter which was perfectly simple on the facts.

Appeal dismissed:
Rule discharged.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1652 OF 1909.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
Heard, 7, February.
Judgment, 3, April.

HEM CHANDRA SARKAR, Plaintiff, Appellant,
v.
LALIT MOHON KAR and anr., Defendants, Respondents.

Guardians and Wards Act (VIII of 1890), secs. 29, 30—Mortgage by guardian without Judge's authority—Ward benefited—Suit to enforce mort-

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gage—Minor's remedy—Restitution of benefit—Equitable obligation of Defendant.

A mortgage of a minor's property executed by a certificated guardian without permission taken from the District Judge is voidable only.

But it is not necessary that the person affected should sue to set aside the transaction, it is sufficient if he declares his will to rescind by way of defence in an action to enforce the mortgage against him.

Where it was found that the money raised by the mortgage was for the benefit of the minor the latter cannot avoid the mortgage without restoring the benefit which he had received under it, this equitable doctrine being applicable as well to a Defendant in an action on the mortgage as to a Plaintiff seeking to avoid the mortgage.

THE EASTERN MORTGAGE AND AGENCY CO. *v.* REBATI KUMAR RAY (1) *followed.*

This was an appeal preferred on the 7th of August 1909 against the decree of Babu Bidhu Bhusan Banerjee, Subordinate Judge of Hughly, dated the 8th of May 1909, reversing that of Babu Hemendra Lal Sinha, Munsif of Hughly, dated the 17th of July 1908.

The Plaintiff in the suit out of which this appeal arose sued on a mortgage-bond executed by Radha Rani, the diseased mother of the Defendants. Plaintiff alleged that Radha Rani who was the certificated guardian of the minor Defendants took a loan of Rs. 200 for satisfaction of debts owed by the Defendants' father and for Defendants' maintenance, that the bond was executed by Radha Rani as such guardian and the Plaintiff prayed for the usual mortgage decree for sale of the properties mortgaged.

(1) 8 C. L. J. 260 (1906).

The defence set up was that there was no legal necessity for the alleged loan, that Radha Rani had not obtained the sanction of the District Judge for executing this mortgage, that Radha Rani purported to bind herself only by the deed, and that the minors' properties would not be affected by the mortgage.

The Munsif decreed the suit holding that the mortgage was executed by Radha Rani for the benefit of the minors and on their behalf.

On appeal the Subordinate Judge found that the loan had been contracted by Radha Rani for legal necessity, but that in the bond Radha Rani purported to deal with the property as her own so that she was personally bound by the mortgage which did not in any way affect properties belonging to the minors, that under the circumstances the Defendants were not bound to restore any benefits received by them under the mortgage.

In this view he dismissed the suit.

The Plaintiff preferred this second appeal.

Babu Dwarka Nath Mitter for the Appellant.

Babus Ram Chandra Majumdar and *Chunder Sekhor Banerjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit upon a mortgage-bond executed by the mother of the Defendants while they were minors in favour of the Plaintiff. The Defendants' mother was their guardian appointed under Act VIII of 1890, but she did not obtain permission of the District Judge for the mortgage.

The learned Subordinate Judge held

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that the mortgage bond was executed by the mother in her personal capacity. We are of opinion, however, upon a consideration of the bond as a whole that the mother executed the bond on behalf of her minor sons though it is not so mentioned in it. The statement in the bond that she would make over the permission granted by the District Judge to the mortgagee makes the point clear.

A mortgage executed by a guardian appointed under Act VIII of 1890 without the permission of the Court is not absolutely void, but as laid down in sec. 30 (read with sec. 29) it is only voidable. It has been held in the case of *The Eastern Mortgage and Agency Co.* v. *Rebati Kumar Ray* (1), that it is not necessary for a person in the position of the Defendants to bring an action to set aside the transaction and that it is sufficient if he declares his will to rescind by way of defence when an action is brought to enforce the mortgage against him. It has been found in the present case by both the Courts below that the money raised on the mortgage by the mother was for the benefit of her minor sons. It was held in the case cited above that under such circumstances a person in the position of the Defendants cannot avoid the mortgage without restoring the benefit which he had received under the mortgage and that the said equitable doctrine applies not only when he as a Plaintiff seeks a declaration that the mortgage is not binding but also when he is a Defendant in an action upon the mortgage. We are bound by that decision.

We accordingly hold that the Plaintiff is entitled to enforce the mortgage against the Defendants, and set aside the decree of the lower Appellate Court and restore that of the Munsif with costs in both Courts. We extend the period of redemption to six months from this date.

Appeal allowed.

(1) 3 C. L. J. 260 (1906).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1471 OF 1909.

D. CHATTERJEE, J. N. R. CHATTERJEA, J. 1912, Heard, 29, February. Judgment, 22, April.	ABDUL KADER, Plaintiff, Appellant, *v.* ALI MIA and ors., Defendants, Respondents.

Civil Procedure Code (Act XIV of 1882), secs 278, 283—Suit by defeated claimant who had purchased property attached pending creditor's suit—Plea in defence that transfer fraudulent, if competent—Creditor if may act for himself—Transfer of Property Act (IV of 1882), sec. 53—Property of greater value than debt—Relief, form of.

Where in a proceeding under sec. 278, C. P. C., the Court held that the judgment-debtor and not the claimant was in possession,

Held—*That a suit by the claimant under sec. 283, C. P. C., should be decreed if it is found in that suit that the claimant was in possession after a purchase for valuable consideration—unless there is anything in the pleadings outside the scope of sec. 283, C. P. C., to restrain or restrict such a result.*

It is competent to the Defendant in such a suit to set up the defence that the transfer to the Plaintiff was with intent to defraud him and so in effect was not binding as against him.

CLOUGH *v.* LONDON AND NORTH WESTERN RAILWAY CO. (8), THE EASTERN MORTGAGE AND AGENCY CO. *v.* REBATI KUMAR RAY (9) *referred to.*

(8) L R 7 Exch. 26 (1871).
(9) 3 C. L. J. 260 (1906).

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A creditor who has already recovered judgment on his debt is entitled to show that a transfer by the debtor was void as against his own claim ; he is not bound to act on behalf of all the creditors.

SMITH *v.* HURST (2), SPIRETT *v.* WILLOWS (3), BLENKINSOPP *v.* BLENKINSOPP (4) *referred to.*

When the property transferred is larger than what would satisfy the creditor's demand, the latter cannot complain if his right to avoid the transfer is confined to that part of the property or if the transferee be made to satisfy his demand.

The title of the Plaintiff in the property purchased by him was declared subject to a direction that he should pay the amount of the Defendant's decree within a period specified, failing which the property was to be sold and the surplus left after paying off the Defendants paid to the Plaintiff.

This was an Appeal preferred on the 20th of July 1909 against the decree of Babu Nikunja Behari Roy, Subordinate Judge of Zillah Chittagong, dated the 24th of May 1909, reversing that of Babu Susil Chandra Mittra, Munsif of Sadar, dated the 11th of July 1908.

The facts of the case were briefly as follows :—

The Defendant No. 1, Ali Meah, got a decree against Defendant No. 2, Fateh Ali, on a note-of-hand on 6th May 1907. In execution of that decree he attached the homestead of Fateh Ali with a tank and a dwelling-house thereon. The Plaintiff, Abdul Kader, put in a claim on the allegation that the attached property was sold to him by Fateh Ali for Rs. 700 on 18th April 1907, by a *kobala* which was registered. The claim was disallowed. Abdul Kader then brought the suit which gave rise to this appeal for confirmation of his possession of the attached land and for a declaration that the property was not liable to be sold for the debts of Fateh Ali. Pending the suit, the property was sold and purchased by the Defendant for Rs. 40 only.

The defence in substance was that the *kobala* was without consideration and was a collusive transaction intended to defeat the claim of Ali Meah.

The first Court decreed the suit. On appeal the decree was reversed and Plaintiff's suit was dismissed. Plaintiff preferred this second appeal.

Dr. Rash Behari Ghose and *Babu D. L. Kastgir* for the Appellant.

Moulvi Syed Shamsul Huda and *Babu Khitish Chandra Sen* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

During the pendency of a suit on a handnote by the Defendant No. 1 against Defendant No. 2, the latter sold his homestead with a tank to the Plaintiff for a consideration of 700 rupees. The Defendant No. 1 subsequently obtained a decree on the handnote and attached the said land. The Plaintiff put in a claim under sec. 278 of the Civil Procedure Code and it was disallowed and the property was sold and purchased by Defendant No. 1 for 40 rupees only, his decree being for 348 rupees odd. The Plaintiff brings this suit under sec. 283 of the Civil Procedure Code for declaration of title and confirmation of possession. The Defendant pleaded that the purchase of the Plaintiff was *benami* for the debtor and fraudulent.

The first Court held that the purchase

(2) 10 Hare 30, 39 (1852).
(3) 11 Jur. N. S. 70 (1865).
(4) 1 DeG. M. & G. 495 (1852).

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was not *benami*, and that there was no evidence that the Plaintiff knew of the decree or the suit and decreed the Plaintiff's suit.

The learned Subordinate Judge has set aside the decree of the first Court holding that although consideration had been paid and Plaintiff was in possession, the Defendant No. 2 living on some other land, the Defendant No. 2 made the sale with the object of defeating the claim made by Defendant No. 1, that the Plaintiff was aware of the fraudulent motive of Defendant No. 2 in selling the property to him and helped him in carrying out the fraudulent object.

It is contended in second appeal before us (1) that the case has been decided on a point not raised by the pleadings, (2) that the purchase of the Defendant No. 1 was made after the present suit of the Plaintiff and is therefore subject to the result of the present suit, (3) that upon the findings the suit should have been decreed, (4) that the Defendant No. 1 cannot as a Defendant acting for himself and not for the whole body of creditors avoid a transfer that was only voidable under sec. 53 of the Transfer of Property Act, (5) that the Defendant's claim being only for 348 rupees odd under his decree his purchase could be impeached only to the extent of 348 rupees and he was ready to pay the same.

As regards the first ground, there can be no doubt that the written statement of Defendant No. 1 does raise the point although not precisely in the words of sec. 53 of the Transfer of Property Act. The section was relied upon by the Munsif in the claim case and must have been in the contemplation of the Defendant although his main case was that the *kobala* was a *benami* transaction. It is clear however that the only issue framed in this connection was the issue of *benami* and the evidence was directed almost entirely to the question of *benami*. The ostensible object of the creation of the *benami* however being the defeating of the prospective execution of a prospective decree the issue actually raised in the case may be taken to have been comprehensive enough.

The execution purchase of Defendant No. 1 was after the institution of the present suit and must be subject to the result of the suit. This disposes of the second ground.

In order to decide on the third ground we must consider the scope of the suit and the effect of the findings.

The suit was one under sec. 283 of the Civil Procedure Code. The scope of such a suit was the subject of discussion in the Privy Council in the case of *Phul Kumari* v. *Ghansyham Misser* (1) and the Judicial Committee held that a suit under sec. 283 was essentially a suit for the review of a summary decision. The summary decision in a claim case is confined to a consideration of the possession of the judgment-debtor at the time of the attachment: any other discussion in such a decision is material only so far as it is relevant to the determination of that essential matter.

In this case the summary decision was that the judgment-debtor was in possession and not the claimant (Plaintiff) and the finding of the learned Subordinate Judge is that the Plaintiff was and has been in possession after a purchase for valuable consideration and not the judgment-debtor, Defendant No. 2. Upon this finding the suit under sec.

(1) I. L. R. 35 Cal 202: s. c. 12 C. W. N. 169 (1907).

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283 should have been decreed unless there was anything in the pleadings outside the scope of sec. 283, Civil Procedure Code, to restrain or restrict such a result.

The fourth ground resolves itself into two parts (*i*) whether one creditor can take action for himself or must he act on behalf of the whole body of creditors, (*ii*) whether he can take action by way of defence to a suit brought against him or must he proceed by an independent suit. The first part of the question does not arise in this case for two reasons : the first is that upon the findings there was but one creditor in this case : and the second is that the Defendant No. 1 having already obtained a decree for his debt is entitled to act for himself—he may have a declaration that the conveyance was void as against his own claim. See *Smith* v. *Hurst* (2), *Spirett* v. *Willows* (3), *Blenkinsopp* v. *Blenkinsopp* (4). The reason is that he is more than a creditor, he is a judgment-creditor. As regards the second part of the ground there is some apparent difficulty in coming to a satisfactory answer that would meet all cases. If there are more creditors and the particular creditor impleaded as a Defendant stands on the same footing as other creditors, he must plead for all and may perhaps be allowed to do so even as a Defendant if the Court has jurisdiction to entertain a claim for the claims of all the creditors. That however is a larger question that does not arise in this case. Here the Defendant No. 1 is the only creditor and he has already obtained judgment and taken out execution. He could bring an independent suit for himself; but can he do as Defendant what he could have done as a Plaintiff? There are two reported cases which have a bearing on this point. *Ishan Chandra Sarkar* v. *Bishu Sardar* (5), Maclean, C. J., and Banerjee, J., and *Rajani Kumar Das* v. *Gour Kishore Shaha* (6), Mitra and Caspersz, JJ. In both these cases the plea under sec. 53 was raised by a Defendant and no objection was made to the competency of the plea by way of defence although the parties were ably represented. It is true the question was not raised and discussed and these cases would not stand in the way of our overruling the plea as incompetent : but is there any reason why we should do so? The section says the transfer would be voidable at the option of the party delayed etc, it is not *ipso facto* void and is therefore valid until it is avoided. If he does not care to avoid the transfer but waits until his debt or decree is barred by limitation, he loses the right. See *Re Maddever Three Towns Banking Co.* v. *Maddever* (7). If he takes advantage of his legal right to avoid, he may do so by way of suit which is the most unequivocal way of doing it or he may express his determination by way of defence to a suit brought against him. See *Clough* v. *London and North Western Railway Co* (8). See also *The Eastern Mortgage and Agency Co.* v. *Rebati Kumar Ray* (9) and *Hem Chandra Sarkar* v. *Lalit Mohon Kar* (10). In this case the election was made for the first time when the Plaintiff made a claim in the execution taken out by Defendant No. 1 and Defendant No. 1 insisted on his determination in his defence in this case. He

(2) 10 Hare 30, 39 (1852).
(3) 11 Jur. N. S 70 (1865).
(4) 1 DeG. M. & G. 495 (1852).

(5) I. L. R. 24 Cal. 825 (1897).
(6) I. L. R. 35 Cal. 1051 (1908).
(7) L. R. 27 Ch. D. 523 (1884).
(8) L. R 7 Exch 26 (1871).
(9) 3 C. L. J. 260 (1906).
(10) 16 C. W. N. 715 (1912).

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NOTES.

WHENEVER A QUESTION ARISES AS TO WHETHER a stipulation in a contract fixing the amount of damages to be paid on breach is to be treated as a penalty or as liquidated damages, Courts are invariably invited to consider an array of decisions which are supposed to furnish the true test for the proper solution of such a question. But the question is and must always be a question of fact, and the solution in each case must depend upon the special circumstances of that case. That being so, precedents more often than not tend to cloud the real issues in the case instead of helping towards their solution, and the result is a growing crop of precedents often in conflict with their predecessors and not always consonant with either justice or common sense.

IN *Rowland Valentine Webster* v. *William David Bosanquet*, 16 C. W. N. 697, Lord Mersey in delivering the judgment of the Privy Council noticed that "the cases on this question are innumerable and perhaps difficult to reconcile." If this can be said of cases in English Courts, the condition of things in India where the equitable principle upon which the so-called distinction between penalty, and liquidated damages is based is less clearly apprehended, is obviously very much worse. His Lordship cites the case of *Clydebank Engineering Co., Ld.* v. *Don Jose Castanedy*, [1905] App. Cas. 6, as laying down the true principle with sufficient clearness and precision. That principle is, shortly, that the distinction is not capable of arbitrary definition. The question must always be whether the construction contended for in any case renders the agreement unconscionable and extravagant *when made* and one which the Court ought to allow to be enforced.

THE DIFFICULTY NOT MERELY OF ASSESSING BUT of proving damages actually incurred upon a breach, may induce the parties to agree from beforehand to fix a certain amount as furnishing a measure of prospective damages, and it would be obviously unfair, if the amount is not exhorbitant, to drive the parties to adopt the very course which from motives of prudence they had sought to avoid by the stipulation. The case under notice furnishes a very instructive application of the principle to the facts of the case and it is sincerely to be hoped that it will help materially to lay at rest the innumerable puzzles which lie embedded in the decisions of the Courts in this country concerning the supposed distinction between liquidated damages and penalty.

IN THE CASE OF *Danzly* v. *Metropolitan Bank*, a short note of which is published in this number, the Court had to consider the validity of an agreement between a solicitor and a client which made the solicitor's costs dependant on the success of the litigation. There seems to be little doubt that under the older English decisions agreements like these would be void as champertous; for the law of champerty and maintenance as laid down in the older cases was a great deal more stringent than under recent decisions which have to a certain extent mitigated the rigour of the statutes on champerty and maintenance by regarding them as merely affirming the Common Law. The tendency of modern decisions is practically to make a champertous agreement legal in all cases where it does not run counter to public policy and does not in the words of Knight Bruce, L. J., constitute a "traffic or merchandising in quarrels, of huckstering in litigious discord" which is the business of "breedbates barretors, counsel whom no Inn will own and solicitors estranged from every roll." [*Reynell* v. *Sprye*, 1 D.G. M. and G. at pp. 686, 680]. There is really a tendency to approximate English law to a sound rule of public policy such as was laid

down by the Privy Council for India in a series of cases beginning with *Ram Coomar Coondoo's* case [L. R. 4 I. A. 23] and ending with *Rai Bhagwat Dyals'* case in 10 C. W. N. 564.

EVEN IN MODERN CASES HOWEVER THE AGREEMENT of solicitor with client for a consideration of a share in the profits of the litigation has been held to be void. The leading modern case is that of *Stanley* v. *Jones*, 7 Bing. 369, where the solicitor was to have advanced funds and supplied evidence; but even without such services a mere agreement to supply professional services for a share of the profits of litigation in case of success was held to be void by Jessel M. R. in *Re Attorney and Solicitors Act, 1870*. In *Earle* v. *Hopwood* [30 L. J., C. P. 217] an agreement by which a Solicitor was to have advanced funds for the expenses and to be remunerated in the event of success "according to the interest and profit" acquired by the client was held to be void as champertous; this would be so even if he was not himself the solicitor in the suit. *Strange* v. *Brennan* [15 L. J. Ch. 389]. It is perfectly allowable for a Solicitor to charge nothing for a case [*Jennings* v. *Johns*, L. R. 8 C. P. 425] but if this agreement is in any way made dependant on the result of the suit it would seem to be bad on the authorities.

IT MAY BE SAID THAT THERE IS NOTHING CLEARLY against public policy in a solicitor making his costs depend on success in the litigation and laymen may possibly look upon such an agreement as a perfectly innocuous commercial arrangement which is calculated to promote zeal and efficiency in the law agent. Possibly the Courts have in the case of solicitors exacted a more rigorous avoidance of "huckstering of litigation" than in the case of the layman and while the law has been relaxed to a certain extent in the case of laymen it continues to press with all its weight against solicitors alone. But it would seem that there are good grounds of public policy, in keeping persons whose profession it is to deal with litigation from going shares with their clients in the proceeds of litigation and otherwise speculating in law suits.

WHILE THE LAW PREVENTS SOLICITORS FROM FOMENTING litigation with a view to profiting out of it it does not altogether prevent their starting speculative actions. In *Sadd* v. *London Road Car Co.*, [*Times* March 24, 1900], Lord Russel, C. J., observed "It is perfectly consistent with the highest honour to take up a speculative action in this sense—*viz.*, that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a *bonâ fide* cause of action, it was consistent with the honour of the profession that the solicitor should take up the action." What the law both in the Statute and the Common Law seeks to prevent is the solicitor agreeing to participate in the profits of the litigation. It may not be very much against public policy for the solicitor to be remunerated in the event of his client succeeding in such honest though speculative suits. But that might open the door to a vigorous campaign on the part of solicitors to bolster up cases not quite so honest and to trade in litigation in their own interest.

IT IS NOT QUITE CLEAR HOW FAR THE LAW LAID down in these cases would be applicable to India. So far as legal practitioners subject to the Legal Practitioners Act are concerned it seems that any agreement with their clients making their remuneration depend on the result of the litigation would be void [1907, Punj. Rec. No. 1]. But in the case of others there is some difficulty. The illegality of these contracts is expressly laid on the ground of their being champertous but it has been held by the Privy Council that the English law of champerty does not apply to India. But where the contract is against public policy it may be avoided on that ground even without applying the English law. As the latest cases on the action of solicitors were based largely on grounds of public policy it may be presumed that the same rules of public policy will prevail to prevent such contracts being legal even in India.

LOCAL INSPECTION BY MAGISTRATES.

Our judicial system gives to the Court only power to adjudge the existence of facts according as they are deposed to on the evidence before it (*Babban Sheikh* v. *King-Emperor*, 14 C. W. N. 422, per Woodroffe, J.). But in some cases it may be difficult to appreciate the evidence without a complete model showing the property in dispute and its surroundings or without local inspection.

The law makes no provision for such an inspection by a Magistrate in a case which is being tried by himself (*Queen-Empress* v. *Mani Ram*, I. L. R. 19 Mad. 263; *Hari Kishore Mitter*, I. L. R. 21 Cal. 920), and the only sections of the Code of Criminal Procedure which allow of local inspections and investigations of any kind are secs. 148, 202 and 293, which last provides for jurors or assessors in a Sessions trial viewing the place of occurrence or any other place in which any other transaction material to the trial is alleged to have occurred (*Hari Kishore Mitter*, I. L. R. 21 Cal. 920, per Rampini, J.; *Babban Sheikh*, 14 C. W. N. 422, per D. Chatterjee, J.).

Though there is no express statutory provision in that respect the case-law and the practice of

the Courts appear to establish that a Magistrate may take a view of the *locus in quo* in order to enable him to understand the evidence that is laid before him.

In the case of *Nidani Mandal* v. *Alaboxa Sirkar*, 9 C. W. N. 222n., Woodroffe, J., observed that "local investigation except where expressly provided by law is not advisable," but in the above-mentioned case of *Babban Sheikh* v. *King-Emperor*, 14 C. W. N. 422, the learned Judge is reported to have said that his language in the former case was not sufficiently guarded and must be taken in connection with the particular facts of that case. In the aforesaid case of *Babban Sheikh* v. *King-Emperor*, D. Chatterjee, J., was of opinion that the Legislature in the Code of 1898, in amending the explanation to sec. 556 and enacting that a Magistrate shall not be disqualified from trying a case "by reason only that he has viewed the place in which an occurrence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred and made an enquiry in the case" overruled those cases (*Girish Chandra Ghosh*, I. L. R. 20 Cal. 857; *Hari Kishore Mitter*, I. L. R. 21 Cal. 920; *Queen-Empress* v. *Mani Ram*, I. L. R. 19 Mad. 263; *Sudhama Upadhyay*, I. L. R. 23 Cal. 328), which had held that by viewing the *locus in quo* the Magistrate made himself a witness in the case and could not try it. In the same case Stephen, J., held that the Code of Criminal Procedure is not exhaustive and it cannot by omitting to justify a certain course of action on his part deprive the Magistrate of powers which he otherwise possesses.

In English law the only provision for a local inspection is one which corresponds to sec. 293 of our Code of Criminal Procedure. The jury in a criminal trial may have a view of the *locus in quo* if it is within the same country as that in which the trial takes place and if the Court thinks that a view would be of service to them (Halsbury's Laws of England, verse 9, p. 369). It is competent for the Judge to permit the jury to view the *locus in quo* at any time during the trial even without the consent of the prosecutor and even after his summing up but he should take precautions not to allow improper communications being made to them at the view (Archbold's Criminal Pleading, 23rd Edition, p. 212).

Local inspections, however, must be strictly subject to the limitations that have been laid down. In the first place the enquiry should be strictly an inspection of the *locus in quo* with a view to understand the evidence on the record (*Babban Sheikh*, 14 C. W. N. 422, per Woodroffe, and D. Chatterjee, JJ.; *Hari Kishore Mitter*, I. L. R. 21 Cal. 920; *Queen-Empress* v. *Mani Ram*, I. L. R. 19 Mad 263; see also *Satra Dulali*, 3 C. W. N. 607). It is highly improper for a Magistrate to take evidence on the spot without observing all the safeguards by which evidence on which a Judge may act is protected by law. "Such a proceeding" to quote the words of Petheram, C. J., in *Hari Kishore Mitter*, I. L. R. 21 Cal. 920, "is not contemplated by any provision to be found in the written law of this country and is one which must have a tendency to shake the confidence of the people in the administration of justice."

Secondly, an immediate report of what is seen should be placed on the record and laid open to the scrutiny of the parties (*Babban Sheikh*, 14 C. W. N. 422, per D. Chatterjee, J.; see also *Nidani Mandal*, 9 C. W. N. 222n; *Lal Behari Saha*, 10 C. W. N. 181; *Kundro Mohan Panigrahi*, 12 C. W. N. 153n.).

Thirdly, the Magistrate should invariably be accompanied by both the parties or their representatives (*Queen-Empress* v. *Mani Ram*, I. L. R. 19 Mad. 263; *Queen-Empress* v. *Chaubasapa Madiapa*, Ratanlal's Unreported Bombay Cases, p. 854).

The question arises, can the Magistrate test the sworn testimony on the record by the light of his own observations? In the aforesaid case of *Babban Sheikh*, 14 C. W. N. 422, Stephen and D. Chatterjee, JJ, take the view that he can and D. Chatterjee, J., relies on *In re Lalji*, I. L. R. 19 All. 302, and *Lal Behari*, 10 C. W. N. 181.

As laid down by their Lordships of the Judicial Committee in *Harprossad*, 3 Indian Appeals 259, a "Judge cannot without giving evidence as a witness import into a case his own knowledge of particular facts."

"There is no authority for holding," says Woodroffe, J., in *Babban Sheikh* v. *King-Emperor*, 14 C. W. N. 422, "that a Court may take a view of the locality for any purpose other than that of understanding the evidence" for example, to see whether the complainant or the accused is speaking the truth on a certain point. If it were permissible, his Lordship adds, there would appear to be in such a case "no necessity for evidence at all as regards this particular fact."

It goes without saying, however, that if the Magistrate has seen a certain state of things and if witnesses examined before him testify to the contrary it is natural that he should believe the testimony of his own senses and disbelieve the sworn testimony. It seems to be a psychological impossibility that he should do otherwise and inspite of all possible safeguards the fact of local inspection by the Magistrate, particularly when the idea of such inspection emanates from the Magistrate himself, may very often give rise to a not unreasonable apprehension in the mind of either of the parties concerned. In the famous words of Lush, J. (*Sergeant* v. *Dale*, 2 Q. B. D. 558), the law in laying down the strict rule regarding the

disqualification of Judges "has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibility of the litigant parties. One important object at all events is to clear away everything which might engender suspicion and distrust of the tribunal and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

Two recent decisions of the Calcutta High Court require more than a passing notice. In *Radha Madhab Paikra* v. *King-Emperor*, 15 C. W. N. 414, where in the course of the trial a Sub-Deputy Magistrate was deputed by the trying Magistrate to hold a local investigation and was examined as a witness after he had made the investigation the learned Judges held that it was at most an irregularity.

In *Abar Rai* v. *Jhingur Tewari*, 16 C. W. N. 426, it is laid down that besides those authorised or directed by the Code of Criminal Procedure there is a class of local inspection under which very many cases fall and for which there is express provision in the Code of Civil Procedure, and reliance is placed on *Joy Coomar* v. *Bandhu Lal* a decision in a civil case. In that case no doubt reference was made to the definition of the word "proved" in the Evidence Act, but their Lordships clearly laid it down that the Code of Civil Procedure expressly provided for local inspections and this was the main ground on which their Lordships held that the Court was justified in acting on the result of such local inspection. In the case under review (*Abar Rai* v. *Jhingur Tewari*), the learned Judges practically extend the provision of the Code of Civil Procedure to criminal trials and justify local inspections by Magistrates though in doing so they also rely on the circumstance that the Magistrate in this country has to perform the functions of both Judge and jury and as Judge of facts he ought to have the same liberty of viewing the *locus in quo* as the jury. In this view they are supported by the definition of the word "proved" in the Evidence Act which indicates that a Court may rely not only on evidence given on oath but also on its personal observation of matters brought before it in evidence. "The judicial system in this country," their Lordships conclude, "of which the Evidence Act is a most important factor gives the Court power to adjudge the existence of facts on matters before it as well as according as they are deposed to in the evidence."

SURESECHANDRA MUKHERJI,
Vakil, High Court.

THE TRANSFER OF OCCUPANCY HOLDING.

III

The cases *Narendra Narain Roy* v. *Ishan Chandra Sen* (22 W. R. 22) and *Bhiramali* v. *Gopinath* (I. L. R. 24 Cal. 355) are often referred to as authorities on the present law relating to the transfer of occupancy holding, and they may no doubt be cited as being opposed to the view I have ventured to put forward, namely, that the transfer of occupancy holdings is regulated by custom alone and that there is no presumption either in favour of transferability or of its non-transferability.

In the case *Bhiram Ali* v. *Gopinath* (I. L. R. 24 Cal. 355), which was decided after the passing of the Bengal Tenancy Act, Mr. Justice Banerjee raised the question "whether a raiyati-holding in which the raiyat has only a right of occupancy is transferable in the absence of any custon or local usage in favour of its transferability" and gave his answer in the negative implying thereby that there is a strong presumption in favour of its non-transferability. His Lordship after discussing the significance of the silence of the Bengal Tenancy Act on the point, observed as follows: "Of course, if occupancy-holdings were transferable under the law as it stood before the passing of the Bengal Tenancy Act they would continue to be transferable as there is nothing in the Act to the contrary. If on the other hand they were not transferable before the Bengal Tenancy Act came into operation, then as the result of an examination of the Bengal Tenancy Act shows they have not been rendered transferable by that enactment, the old law in that respect continues unaltered. This brings us to the consideration of the old law on the subject and that need not detain us long as the old law on the subject is clearly and conclusively laid down by a Full Bench of this Court in the case *Narendra Narain Roy* v. *Ishan Chandra Sen* (22 W. R. 22). In that case it has been held that the right of occupancy is a right personal to the raiyat and cannot be transferred by sale."

Does this decision then mean to lay down the proposition that inasmuch as the Bengal Tenancy Act is silent on the point, the old Rent Law which has expressly been repealed, would still govern the subject? The question hardly concerns important vested rights. Nor is the Bengal Tenancy Act a mere amendment on the old Rent Law. There has been a most substantial if not through change in the law relating to landlord and tenant made by the Act VIII of 1885.

Nor can the applicability of the Full Bench case, *Narendra Narain Roy* v. *Ishan Chander Sen*, at the present time be supported on the ground that it was decided on general principle, for it was not; nor was this decision intended to be one of universal application. The question that was referred to the Full Bench was whether the right of occupancy *which was a mere creation of Act VIII of 1869* was transferable and it was answered in the negative "*solely with reference to the words of sec. 6 of Act VIII (B. C.) of 1869.*" "This is a

law which imposes a restriction upon the proprietary rights of the zemindar or landlord and the ryot cannot claim under it anything more than the words clearly give to him." Thus putting the most strict interpretation on the words of sec. 6, their Lordships came to the conclusion that the occupancy right which was a mere creation of the law was not transferable. But this answer did not in any way affect the right of occupancy which was based on custom. "In answering it," remarked the learned Chief Justice, "I wish particularly to be understood as not giving any opinion respecting rights of occupancy where there is a custom to transfer them." The decision of the Full Bench case was more clearly explained in the case *Kripa Nath Chakee* v. *Dayal Chander Pal* (22 W. R. 169) in which Sir Richard Couch, C. J., said "we have held recently in a Full Bench that in the absence of any custom a right of occupancy is not transferable—*i.e.*, that a right of occupancy which is a mere creature of the Act and does not depend upon custom cannot be transferred."

Thus it is clear that the case of *Narendra Narain Roy* v. *Ishan Chander Sen* (22 W. R. 22) drew a distinction between an occupancy right which was a mere creation of statute law and a similar right based on custom and declared that the former was non-transferable in law. But as to the incidents of the latter the decision kept perfect silence. (It is to be noted in this connection that in the case of a transfer of the former kind of right no evidence of custom would be admissible inasmuch as no custom can ever override the law). The distinction above referred to was not altogether a novel one. For in the *Great Rent case* (3 W. R. 29 at 70, Act X, Campbell, J., in the concluding part of his judgment said "all occupancy ryots are not necessarily of one class. While some have high customary rights, others may possibly be mere tenants-at-will recently converted into occupancy ryots."

If this be the true exposition of the case law one may reasonably doubt the applicability of the cases of *Narendra Narain Roy* v. *Ishan Chandra Sen* (22 W. R. 22) and *Bhiram Ali* v. *Gopinath*, I. L. R. 14 Cal. 353, at the present day, and their applicability in any case in all circumstences.

N. CHANDRA.

RIGHT OF PARTY TO IMPEACH WITNESS CALLED BY HIMSELF.

The rule that one cannot impeach his own witness undoubtedly originated in the duties of the early Anglo-Saxon compurgators who were chosen by each litigant to vouch for his cause (Wigmore, Evidence, sec. 896; 1 Pollock and Maitland, Hist. of English Law, 139, 140). The success of his case thus depended upon their credibility and their impeachment would have meant his defeat. But under the modern theory of evidence as a method of bringing facts to the knowledge of the Court or jury, the idea that a party guarantees the trustworthiness of his witnesses, though often advanced even now as a reason for the continuance of the rule, (*Pollock* v. *Pollock* [1877] 71 N. Y. 137; *Comw* v. *Hudson* [Mass. 1858] 11 Gray 64) is contrary to the fact. A litigant nowadays has no limited choice of witnesses. On the contrary, he must take those who know the facts upon which he intends to rely, whatever their character, and the summoning of persons known to be unreliable, or who are likely to give testimony to some extent adverse, may therefore often be necessary and entirely consistent with good faith. (*Brooks* v. *Weeks* [1877] 121 Mass. 433). It is widely established, indeed, that in cases where a party is under a legal duty to summon certain witnesses, he may impeach them, since he had no choice; (*Denneth* v. *Dow* [1840] 17 Me. 19; Wigmore, Evidence, sec. 917; Greenleaf, Evidence, [16th ed] sec. 443. At one time a party was not allowed to introduce evidence even on a material point for the purpose of contradicting other evidence given by one of his witnesses, but this is universally allowed now even though the effect is to impeach his own witness. Wigmore, Evidence, sec. 897; *Bradley* v. *Ricarda* [1831] 8 Bing 57; Starkie, Evidence [10th Am. ed.] 244, but, as just suggested, necessity may equally restrict his choice and should lead, to the same result.

This historical reason having thus long since lost its force, it remains to enquire if the rule can find support to day. It is clear, at least, that its abrogation could afford no greater opportunities for collusion than now exist, (*Wright* v. *Beckett* [1838] 1 M. & Rob. 414) but it has been urged that if an attack upon one's own witness were allowed, they might be coerced into giving any testimony desired. (Wigmore, Evidence, sec. 899). It would seem, however, that to give to one party an unlimited right of impeachment while denying it to the other, as in the recent New York case of *Power* v. *Brooklyn Heights Ry.* (1912) 40 N. Y. L. J. No. 126, (The rule that in case of surprise a party may cross-examine his own witness as to prior contradictory statements, but may not prove them by them other evidence, obtains in some jurisdiction, while other jurisdictions allow such to be proved by extrinsic testimony. Chase's Stiphen's Digest, 330, 2nd footnote), might well induce a witness to favour the former, from whom alone he had anything to fear. Such inequity would then actually open the way to coercion by an adversary, whereas if both sides might impeach, neither would be at a disadvantage in this regard. Accordingly, there seems to be little danger of coercion unless a litigant be at liberty

to blacken the character of his witness whenever they fail to satisfy his wishes.

But a consideration of the true aim of our modern trial by jury will lead, it is submitted, to the formulation of a rule which escapes this difficulty. Formalism is no longer an object in itself, but the purpose of evidence is to discover the truth and merits of the case; and everything should therefore be submitted to the jury which will aid them in determining the actual facts. (*Bradely* v. *Ricardo*, supra). Evidently an indiscriminate vilification of the general character of a witness could only confuse the jury in weighing his testimony, and accordingly impeachment of this broad type, which apparently presents the only possible opportunity for coercion, should be forbidden. (*U. S.* v. *Vansickle* [1840] 2 McL. C. C. 219; *Atwood* v. *Impson* [1869] 20 N. J. Eq. 150; Wigmore, Evidence, secs. 922, 923; *contra*, *Bakeman* v. *Rose* [N. Y. 1837] 18 Wend. 146).

But it is of the greatest importance that a jury should measure as accurately as possible the credibility of the witness; and it is hardly consistent with the search for the merits of cases that the truth should be welcomed if brought to light by one side of a controversy, but forbidden if sought to be shown by other. (If both parties had to use an unscrupulous witness, both would be at his absolute mercy under the rule as applied. (*Coulter* v. *Am. Merchant's Express Co.* [874] 56 N. Y. 585; and see *Comw* v. *Hudson*, supra; *Story* v. *Saunders* [Tenn. 1848] 8 Humph. 663). Indeed, the unduly damaging force of adverse testimony given by one's own witness would constitute an additional penalty in such a case. Only some grave offence, it would seem, could justify this discrimination, but the party calling a witness, as pointed out over, can be guilty of nothing reprehensible in so doing. It follows, then, that it should be open to both parties alike, as it now admittedly is to an adversary, (Starkie, Evidence, [10th Am. ed.] 246.) to show lack of veracity in witness. There could be but little cause for fear to an honest witness in such a rule, and surely justice requires that any deception on the stand should be exposed. Similarly any facts tending to disprove or weaken particular testimony, such as prior contradictory statements, (*Wright* v. *Beckett*, supra; *Selover* v. *Bryant* [1839] 54 Minn. 434; *Hullburt* v. *Bellows* [1870] 50 N. H. 105, argument for Plaintiff) or interest and bias, (*Dunn* v. *Aslet* [1838] 2 M. & Robb 122) or fraud or subornation, (see Wigmore, Evidence, sec. 901; *Wright* v. *Beckett*, supra) should be brought to the attention of the jury. It must be borne in mind, however, that this evidence should be admissible only to counteract adverse testimony actually given, and for the sake of impeachment alone. To permit such facts to be shown where a witness simply failed to testify as expected, would be indirectly to bring in, because of its inherent force, evidence not properly admissible as such. (*Peyple* v. *Mitchell* [1892] 94 Cal. 550).

The view that the rule forbidding impeachment of one's own witness is an arbitrary and needless obstruction of justice is borne out by the marked tendency to modify it either by decision (*Hurlburt* v. *Bellows*, supra; *Selover* v. *Bryant*, supra) or by legislation. [(Mass] Rev. Laws, cl. 175, sec. 24; [Eng.] 17 & 18 Vict., cl. 125, sec. 22; [V] [1886]; Pub. Stat. 1906, sec. 1597 [Ind.] Burns Anno. Stat. sec. 531; [Cal.] Cod Civ. Pro. secs. 2049, 2052; [Ore.] Lord's Ore Laws, sec. 861). The Massachusetts statute, which permits such impeachments either by cross-examination or by extrinsic testimony, irrespective of surprise, but forbids general attacks upon character, is typical of the better view.—*Columbia Law Review*.

CURRENT INDIAN CASES.

Chota Nagpur Tenancy Act, secs. 87, 224, 264—Second appeal.

There no second appeal from the decision of the Judicial Commissioner of Chota Nagpur in a suit under sec. 87 of the Chota Nagpur Tenancy Act.

Stephen and *Coxe*, *JJ.*

RAGHUBAR *v.* PRATAP, I. L. R. 39 Cal. 241.

Amendment of decree—Successive applications—Assignee of decree, position of.

Where an application for amendment of a decree has been heard and disposed of *on the merits* a subsequent application in respect of the same matter may not be barred under sec. 13 of the Civil Procedure Code of 1882 but it may be barred upon general principles of law upon which an interlocutory order may be as binding on the parties on a final judgment. But where such an application is dismissed for default or because the Court considered amendment unnecessary there is nothing to prevent the Court entertaining another application on the same matter. Apart from statute every Court has inherent power to correct a mistake of its ministerial officers and to amend the decree so as to correctly express its judgment, at any time.

Mookerjee and *Carnduff*, *JJ.*

LANGAT SINGH *v* JANKIKOER, I. L. R 39 Cal. 265.

Religious Endowments Act, secs. 7, 10—Suit by sole surviving member of a committee if maintainable.

Where a committee is appointed under the Religious Endowments Act, it is in the nature of a corporation aggregate and is not dissoloved by the death of any member. In case of the death of members of the committee the surviving member or members are competent to perform the functions of the committee. A suit brought by the surviving member of such a committee where no successor to the deceased member has been appointed is therefore maintainable.

D. Chatterjee and *Teunon*, *JJ.*

RAGHUNANDAN *v.* BIBHUTI, I. L. R. 39 Cal. 304.

Decree, order dismissing appeal for default if is.

An order dismissing an appeal for default is not a decree within the meaning of sec. 2 of C. P. Code of 1908 and no appeal lies against it

Mookerjee and *Carnduff*, *JJ.*

RUKMINI *v.* PARAN CHANDRA, I. L. R. 39 Cal. 341.

Reviews.

THE INDIAN LIMITATION ACT. Act IX of 1908, ith notes. *By the late H. T. Rivaz. 6th Edi-'on. By H. G. Pearson and B. K. Acharyya, B. A, L. B. Calcutta: Thacker, Spink & Co. 1912. Price Rs. 12.*

Rivaz's Limitation Act has been a standard work n the subject. Standing midway between the assical treatise of Mr. U. N. Mitter and other an-otated editions of the Act it has furnished legal ractitioners with a handy and reliable guide and a ook of reference. The case-notes are arranged nd classified with reference to principles, and 1 this way the book is more a commentary than digest. The present volume has been carefully dited and brought up-to-date. But although on he whole we find ourselves in a position to com-iend this edition whole-heartedly to the profes-ion, we feel bound to notice one or two omissions which are merely due to inadvertence. For in-stance, the important Privy Council decision, *'hakur Tirbhuwan* v. *Raja Rameshar*, 10 C. W. I. 1065, has not been cited at all.

LEGAL LATIN FOR INDIA. *Compiled by F. J. Varley, Esq., M. A., (Oxon) I. C. S. Thacker, Spink & Co., Ld., Bombay. Price Re. 1.*

This is small book of 37 pages, neatly bound, which one may carry in one's coat pocket. It con-ists of two parts. The first part purports to give ll the common Latin words and phrases that occur n judgments or law books within the compass f 8 pages. Glancing through them we find that nly very ordinary words and expressions have been iven and for these hardly any Indian lawyer equires any reference to any work of this kind. The author might have left out such expressions s *Ibidum*, *e. g.*, *N. B.*, *Viz*, which are not trictly speaking legal terms and are commonly nderstood by persons who are familiar with the English language and he might with profit to his eaders have inserted some important expressions which, although of common occurrence, we miss in his work. For instance under the heading *Res* we find only two expressions *Res Judicata* and *Res Integra* and note that the expression *Res Gestæ* finds no place. The maxim portion of this work which extends from page 9 to page 37 is of much greater importance. The author has followed system in collecting the maxims which is ery commendable. He has culled them mostly rom the Indian judgments. They have all been riefly and sufficiently explained and the references iven in their connection to the Indian statutes and he Indian Law Reports would prove very useful.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL.—*Rex* v. *Newton.* Before JUSTICES DARLING, CHANNELL AND COLERIDGE. 3rd April 1912.

Jury's verdict of "guilty" set aside because it was not based upon a strict consideration of the evidence, but upon suspicion of his antecedents.

This was an appeal from conviction. The Appellant together with another prisoner was charged with receiving stolen propery, and was tried before a Judge and Jury.

During the trial one of the Jurors said to counsel for the Appellant, "Your client has not called any evidence as to his previous character, and he has not gone into the box to say whether he knew the other prisoner." The Judge there-upon said "He is not bound to." That having taken place the trial proceeded, and on the next day the jury returned into Court and in answer to the clerk the foreman said they found the prisoners Guilty." After the Foreman had said that the following conversation took place:—

A Juror.—My Lord, the jury wish, if it is possible, for you to deal with the prisoners under the First Offenders' Act. They will appreciate it.

Judge.—One of your number was anxious yesterday, I think it was yourself, Mr. Foreman, to know the character of John Newton as a first offender.

The Foreman of the jury.—Quite true.

Judge.—He has been convicted 18 times. You, of course, were not allowed to know that at all.

The Foreman.—My Lord, I might tell you I have only made use of this remark on purpose to get the jury to agree. I had my own sus-picion, as I asked the counsel yesterday if he would bring any witnesses as to his previous be-haviour."

The appeal was allowed. In the course of his Judgment Mr. Justice Darling said—

In the opinion of the Court what that came to was this: that the foreman, who suspected the Appellant to be an old offender, put the ques-tion he did without, so far as the Court could see, letting his fellow-jurymen know his object, in order to elicit whether his suspicion was correct, so that he might get the jurors who did not think the Appellant an old offender to come round to his opinion. It seemed as if what then occurred was this: that the jury should find the Appellant guilty, not upon the evidence, and then asked the Judge to treat him as a first offender; if the Judge yielded to that the Ap-pellant would not be punished but would simply be bound over, and therefore the fact that some of the jurors had yielded their opinion would

not matter. If, however, the Appellant was an old offender he would be punished.

In these circumstances, where the evidence against the Appellant was very slight, the verdict having been arrived at not upon a strict consideration of evidence but upon a consideration of other matters which ought to have been taken into account, the trial was in the opinion of the Court so unsatisfactory that the conviction could not be allowed to stand.

Mr. Purchase for the Appellant.

Mr. Woodgate for the Crown.

B. D. *Appeal allowed.*

KING'S BENCH DIVISION.—*Danzey* v. *Metropolitan Bank of England and Wales.* Before MR. JUSTICE DARLING. 19th March, 1912.

Solicitor's agreement with his client to share a proportionate amount of the claim in the event of success—Held it was misconduct.

This was an application by the Defendants against a solicitor praying that he should be ordered to pay the costs of an action in which he appeared for the Plaintiff.

The applicant's claim was based on three grounds. *First*, that knowing from the first that the claim was bad the Respondent, with a client who could not pay costs, had gone on with the action. *Secondly*, that this was his action; he was a partner; and, *thirdly*, that the agreement was champertous, and within 3 Edw. I, c. 25, which was specially directed against champerty by officers of the King. He referred to *In re a Solicitor* 1 ([1912] K. B., 302, 312); *In re Attorneys and Solicitors Act*, 1870 (1 Ch. D, 573, 575); and *Hutley* v. *Hutley* (L. R, 8 Q. B., 112); and to the Attorneys and Solicitors Act, 1870, sec. 11. It was submitted that the action was brought, in the hope that the Defendants would rather settle than fight, and that the Court had jurisdiction to make the order under its summary disciplinary powers. *Young* v. *Toynbee* (1910) 1 K. B., 215, 235).

The Plantiff went to the Solicitor who undertook to act for her under the following agreement:—

Re your claim against the Metropolitan Bank of England and Wales. Inasmuch as you have agreed to pay me 25 per cent. of whatever you may succeed in recovering . . . I agree that such percentage shall cover all my costs and expenses in any action . . . taken in respect of your claim, and in the event of your failing to recover anything I undertake to make no claim against you for my costs or charges.

The Defendants contested the claim, but the Plaintiff withdrew it subsequently, and judgment for the Defendants with costs was entered against the Plaintiff who was unable to pay any part of it. Hence this petition which was allowed In the course of his judgment MR. JUSTICE DARLING said:—

That was an absolutely illegal agreement; it was the very thing called champerty and forbidden by 3 Ed. I., c. 25, which specially prohibited officers of the King from maintaining suits in order to have a part of the proceeds themselves, which was a monstrous public wrong. It was to say nothing against that statute to say that it dated from the reign of Edward I., for that only showed how necessary it was. It could be wished that all modern statutes were expressed as clearly and were as beneficent in their operation. But the matter had been dealt with recently. In the Attorneys and Solicitors' Remuneration Act, 1870 (33 and 34 Vict., c. 28), sec. 11, it was provided that:—"Nothing in this act shall be construed to give validity . . . to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action, stipulates for payment only in the event of success in such suit, action or proceeding." That section governed the *status* of the Respondent, and he must have known of it.

In his judgment the agreement was illegal at Common Law and under the Statute of Edward I. It was illegal by whomsoever made, but doubly so if made by a solicitor. The Respondent knew from a very early period that there was no substance in the case as appeared from the letter of December 1, 1911. That meant that even after he had been advised that there was no claim he held on. He briefed counsel and allowed him to see Mr. Duke with a view to a settlement. The Respondent wanted to see if the Defendants would give something in preference to fighting, of which something he would get his share.

He the (learned Judge) himself knew that many actions were brought on the assumption that, rather than fight, the Defendant would settle. Was champerty of this kind illegal? In *In re Attorneys and Solicitor Act* (*supra*), Sir George Jessel said:—"I may, however, say, for the guidance of the parties, that the agreement is in my opinion, pure champerty, as it gives to the solicitor, in the event of success, what is equivalent to a tenth part of the property to be recovered." That was the case here, except that the Respondent was to have a fourth part. The agreement was champertous, illegal, and entered upon with knowledge of the law and of the Act of 1870. In his opinion, therefore, the Respondent had been guilty of misconduct as a solicitor.

Messrs. Duke, K. C., and Cohen for the Applicants.

Messrs. Hume-Williams, K. C., and Dunn for the Opposite Party.

B. D.

ABDUL KADER *v.* ALI MIA.

had every right to say that the title upon which the Plaintiff relied was in fraud of his claim and therefore ineffectual as against him.

The fifth and last ground is also good. The only interest which the creditor has in the property of his debtor is his right to satisfy himself out of that property. If the property is larger than what would satisfy his demand he cannot complain if his right to avoid the transfer is confined to that part of the property which is taken out of his reach by the transfer or if the transferee be made to satisfy his demand. In the case of *Ideal Bedding Co.* v. *Holland* (11), the transferee was directed to join and concur in all acts and things necessary for making the property comprised in the transfer available for satisfying the claims of the creditor. In the case of *Cornish* v. *Clark* (12), Lord Romilly said in respect of a settlement in fraud of creditors, "I think the whole bad as against creditors, but merely as against them, and that the donees must rateably contribute to pay the debt and the costs of the suit."

We therefore set aside the decree of the lower Appellate Court and order and decree that the title of the Plaintiff be declared subject to the satisfaction of the decree of Defendant No. 1. If the amount of the decree with interest as decreed be not paid within one month from the arrival of the record in the Court below, of which arrival due notice will be given, the property in suit will be sold and any surplus remaining after the satisfaction of the decree will be received by the Plaintiff. Each party will bear its own costs in all Courts.

Appeal allowed.

(11) L. R. [1907] 2 Ch. 157.
(12) L. R. 14 Eq. C. 184 (1872).

[CIVIL APPELLATE JURISDICTION.]

L. P. APPEAL No. 42 OF 1910.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
18, March.

AHAD BAKSH MOLLA, Defendant, Appellant,
v.
SHEIKH BAHAR ALI and anr., Plaintiffs, Respondents.

Registration Act (III of 1877), sec. 77—Suit for registration of document—Limitation—Last day a holiday—Suit filed on re-opening of Court— Stare decisis—*General Clauses Act (X of 1887), sec. 7—General Clauses Act (I of 1897), sec. 10—Limitation Act (XV of 1877), sec. 5.*

Where a Registrar having refused to order the registration of a document on the 29th November, the Plaintiff instituted a suit for the registration of the document under sec. 77, Registration Act of 1877, on the 2nd January following, the Court being closed on the 29th of December and the following days until it re-opened on the 2nd January:

Held—*That in view of previous decisions of the Court and of the legislative sanction impliedly accorded to the rule there laid down by the General Clauses Acts of 1887 and 1897, the suit should be held to have been properly instituted.*

MAYER *v.* HARDING (1) *referred to.*

HOSSEIN ALLY *v.* DOUZELLE (2), SHOSEE BHUSAN *v.* GOBINDA CHANDRA (3), PEARY MOHUN *v.* ANANDA CHARAN (4), *commented on.*

Per D. CHATTERJEE, J.—*Sec. 5 of the Limitation Act has no application to suits under sec. 77 of the Registration Act.*

This was an Appeal under sec. 15 of the Letters Patent preferred on the 24th of

(1) L. R. 2 Q. B. 410 (1867).
(2) I. L. R. 5 Cal. 906 (1880).
(3) I. L. R. 18 Cal. 231 (1891).
(4) I. L. R. 18 Cal. 631 (1891).

April 1910 against a decree of Mr. Justice D. Chatterjee, dated the 10th of January 1910, passed in Second Appeal No. 1418 of 1908, which had been preferred against the decree of Babu Pran Krishna Biswas, Subordinate Judge of Zillah Dacca, dated the 20th of May 1908, reversing that of Babu Ramesh Chandra Sen, Munsif of Naraingunge, dated the 30th of May 1907.

The Plaintiffs-Respondents presented a *kobala* for registration, but the Defendant having denied execution, the Sub-Registrar refused to register it. This order was affirmed on appeal by the District Registrar on the 29th November 1906.

The Civil Court being closed on the 29th December 1906, (the thirteeth day) and the following days, the Plaintiffs instituted a suit under sec. 77 of the Registration Act on the 2nd January 1907, the day on which the Courts re-opened. In defence it was urged that the suit was instituted out of time and should be dismissed.

The suit had been dismissed by the Munsif but the Subordinate Judge on appeal reversed his decision and decreed the suit and on second appeal the decision of the Subordinate Judge was affirmed by D. Chatterjee, J.

The JUDGMENT OF HIS LORDSHIP was as follows :—

D. CHATTERJEE, J.—The Plaintiffs presented a *kobala* for registration, the Defendant denied execution and the Sub-Registrar refused registration. On appeal the Registrar confirmed the order of the Sub-Registrar on the 29th November 1906. The Civil Courts being closed on the 29th December on account of the Christmas holidays the Plaintiffs presented their plaint on the 2nd of January 1907, the next open day. The Defendant pleads that the suit is barred by limitation. The Court of first instance gave effect to this plea and dismissed the suit. The Appellate Court has decreed the suit. The Defendant appeals and on his behalf it is contended that the Appellate Court was wrong in law.

It is contended that sec. 77 of the Registration Act provides 30 days as the period within which such a suit must be brought and sec. 5 of the Limitation Act has no application. In the case of *Nijabutoolla* v. *Wazir Ali* (5), it was held that sec. 5 does apply to such suits. In the case of *Khettra Mohan* v. *Dinabashy* (6), it was held that sec. 14 of the Limitation Act was applicable to similar suit. In the case of *Nogendra Nath* v. *Mathura Mohan* (7), it was held that sec. 14 of the Limitation Act was not applicable to a suit for arrears of rent under Act X of 1859. The case of *Khettra Mohan* v. *Dinabashy* (6) was referred to in the referring order as supporting the applicability of sec. 14 of the Limitation Act to control limitation rules under special Acts but the Full Bench held that the decision of the Privy Council in the case of *Unnoda Pershad* v. *Kristo Coomar* (8) disposed of the case as arising under Act X of 1859 which is a complete Code in itself. No reference was made to the case of *Nijabutoolla* v. *Wazir Ali* (5). In the case of *Abdul Hakin* v. *Latifunessa* (9), the question of the applicability of sec. 14 of the Limitation Act to a suit under sec. 77 of the Registration Act was considered to have been settled by the decision of the full Bench in the case of *Nogendra Nath* v. *Mathura Mohan* (7) and the case of *Khettra Mohan* v. *Dinabashy* (6) was considered as overruled by

(5) I. L. R. 8 Cal. 910 (1882).
(6) I. L. R. 10 Cal. 265 (1883).
(7) I. L. R. 18 Cal. 368 F. B. (1891).
(8) 19 W. R. Civ. Rulings 5 (1872).
(9) I. L. R. 30 Cal. 532 (1903).

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the Full Bench. These are all the cases referred to on behalf of the Appellant who contends that it must now be taken as settled law that the provisions of the Limitation Act do not control the special rule of limitation in sec. 77 of the Registration Act. Although the case of *Nijabutoolla* v. *Wazir Ali* (5) stands singly in favour of the Respondent and has not been expressly overruled or dissented from in any case, the *ratio decidendi* of some at least of the above cases must be taken as barring the application of sec. 5 of the Limitation Act to the present suit. It is contended on behalf of the Respondent however that on general principles this case must be held to be within time. He contends that the Respondent had up to the 29th December to file his plaint but the Courts were then closed and it was not through his default that the plaint was not filed on the 29th December ; there being no body to receive the same from the 29th December to the 2nd of January these days must be considered as *dies non* and in filing his plaint on the 2nd of January next he was within time. This principle the Respondent contends has been followed in a number of cases both in this Court and in some of the other High Courts. In the case of *Shosee Bhusan* v. *Gobinda Chandra* (3), it was held that the deposit under sec. 174 of the Bengal Tenancy Act for setting aside a sale could be made on the re-opening day if the 30th day fell on a close holiday. Referring to the case of *Waterton* v. *Baker* (10), the Court said "The broad principle there laid down is that although the parties themselves cannot extend the time for doing an act in Court, yet if the delay is caused not by any act of their own but by some act of the Court itself—such as the fact of the Court being closed—they are entitled to do the act on the first opening day. The same principle was followed in the case of *Peary Mohun* v. *Ananda Charan* (4), Sir Comer Petheram, C. J., who was a party to the Full Bench case of *Nogendra Nath* v. *Mathura Mohan* (7) being one of the Judges. In the case of *Surendra Narayan* v. *Sauravini* (11), the same principle was followed in respect of a deposit under a compromise within a certain date when that date happened to be a close holiday. In the cases of *Aravamadu* v. *Samiyappa* (12), *Sambasiva* v. *Ramasami* (13), *Haji Ismail* v. *The Trustees of the Harbour, Madras* (14), a similar view was taken in respect of other matters although it has been laid down by the Madras High Court that neither sec. 7 nor sec. 5 of the Limitation Act controlled proceedings under sec. 77 of the Registration Act. See *Veeramma* v. *Abbiah* (15), *Nallappa* v. *Ramalinga* (16). The Legislature has adopted this general principle in sec. 7 of Act I of 1887 and sec. 10 of Act X of 1897 as applying to all Acts passed after 1887 to which the Limitation Act does not apply. This I think is a legislative recognition of the broad equitable principle acted upon by the Courts in certain cases while ignoring it in others. Although the Registration Act was passed 10 years before the Act of 1887, I do not feel at all embarrassed in following this principle and I hold that the suit was

(3) I. L. R. 18 Cal. 231 (1891).
(5) I. L. R 8 Cal. 910 (1882).
(10) L. R. 3 Q. B. 173 (1868).

(4) I. L. R. 18 Cal. 631 (1891).
(7) I. L. R. 18 Cal. 368 F. B. (1891).
(11) 3 C. L. J. 339 : s. c. 10 C. W. N. 535 (1906).
(12) I. L. R 21 Mad. 385 (1898).
(13) I. L. R. 22 Mad. 179 (1898).
(14) I. R. 23 Mad. 389 (1900).
(15) I. L. R. 18 Mad. 99 (1894).
(16) I. L. R 20 Mad. 50 (1896).

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within time. The appeal is accordingly dismissed with costs.

[The Defendant thereupon preferred the present Appeal under sec. 15 of the Letters Patent].

Babu Rajendra Chander Guha for the Appellant.

Babu Brojo Lal Chuckerbutty for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This appeal arises out of a suit brought under the provisions of sec. 77 of the Indian Registration Act of 1877. The cause of action is the refusal by the Registrar to order a document to be registered. This refusal was on the 29th of November 1906. The present suit was instituted on the 2nd of January 1907. Now sec. 77 in authorising a suit as the result of such a refusal imposes as a condition that it should be instituted within thirty days after the making of the order of refusal. The institution here was after more than thirty days. Therefore it is urged on the part of the Defendant that the suit is barred. This view found favour with the Munsif. But the learned Subordinate Judge considered that the suit was brought within time, inasmuch as the 29th of December, the thirtieth day, was a holiday, and it was not until the 2nd of January that the Court was reopened. The decree of the Subordinate Judge was affirmed on appeal by Mr. Justice Digamber Chatterjee, and from his judgment the present appeal is preferred under cl. 15 of the Letters Patent. When the Legislature imposes a condition the only escape from its operation, if escape there can be, is by an appeal to the maxim *lex non cogit ad impossibilia*. It is on this ground that in *Mayer* v. *Harding* (1) an Appellant was permitted to transmit his appeal after the precribed period, where during the whole of that period, the transmission of his appeal was impossible, because the Courts were closed. Mr. Justice Mellor in that case says "where a statute requires a thing to be done within three days, or six months, or within any particular period, the time may no doubt be circumscribed by the fact of its being impossible to comply with the Statute on the last day of the period so fixed. But this is not the present case. Here it was impossible for the Appellant to lodge his case within three days after he received it." Had the case been uncovered by authority, I should therefore have come to the conclusion that the plea of the Defendant in this case was sound. There are, however, three cases in this Court by which we are bound. The first of them to which I need refer is *Hossein Ally* v. *Douzelle* (2), which professes to be in conformity with the decision in *Mayer* v. *Harding* (1), although it would appear that on all the days of the prescribed period the Court was not closed : it was open on two of those days. In may be that the Court considered that those two days were, in the circumstances of the case, not practically possible days for the doing of that which was prescribed. But the judgment is not clear as to that, nor does it discuss the case from that point of view. Then there are two decisions in *Shosee Bhusan* v. *Gobinda Chandra* (3) and *Peary Mohun* v. *Ananda Charan* (4).

(1) L. R. 2 Q. B. 410 (1867).
(2) I. L. R. 5 Cal. 906 (1880).
(3) I. L. R. 18 Cal. 231 (1891).
(4) I. L. R. 18 Cal. 631 (1891).

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The earlier professes to follow and is based upon *Mayer* v. *Harding* (1), although the circumstances were not similar to those in the English case, inasmuch as the period indicated was not wholly incapable of being utilised by the Appellant. The case of *Peary Mohun* v. *Ananda Charan* (4) does not expressly mention *Mayer* v. *Harding* (1), but it purports to follow, amongst other cases, those two which I have just mentioned. These cases appear to me to go further than is sanctioned either by *Mayer* v. *Harding* (1) or by the maxim on which the whole doctrine rests but they are decisions which are binding on us and from which we cannot, in conformity with the established practice of the Courts, dissent, without referring the matter to a Full Bench. Now should we refer this matter to a Full Bench? In the circumstances, I think not. It is of paramount importance that the law should not be unsettled, especially in a matter of this kind. The rule adopted by these decisions is one to which legislative sanction has been given ever since 1887 by the General Clauses Act of that year and by that which took its place in 1897; and, although the words of the Acts may furnish a somewhat potent argument for attacking the conclusion in the cases of *Hossein Ally* v. *Douzelle* (2), *Shosee Bhusan* v. *Gobinda Chandra* (3) and *Peary Mohun* v. *Ananda Charan* (4), I think there is no reason why we should not be content to be bound by those decisions. For these reasons and out of deference to the decisions that I have cited in *Hossein Ally* v. *Douzelle* (2), *Shosee Bhusan* v. *Gobinda Chandra* (3) and *Peary Mohun* v. *Ananda Charan* (4). I think we must support the judgment of Mr. Justice Chatterjee and dismiss this appeal with costs.

(1) L. R. 2 Q. B. 410 (1867).
(2) I. L. R. 5 Cal. 906 (1880).
(3) I. L. R. 18 Cal. 231 (1891).
(4) I. L. R. 18 Cal. 631 (1891).

N. R. CHATTERJEA, J.—I agree.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

L. P. APPEALS NOS. 63 AND 64 OF 1911.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
12, April.

RAMANUJ DAS MOHANTA and anr., Opposite Party, Appellants,
v.
THE MIDNAPUR ZEMINDARY CO., LD., Petitioners, Respondents.

Permanent tenure held at fixed rent—Enhancement of rent by compromise, if makes rent enhancible under the Bengal Tenancy Act (VIII of 1885), secs. 6 and 7.

A permanent tenure, the origin of which could be traced back to 1818 was held under a lease in which it was stipulated that "there shall be no increase or diminution of the rent of Rs. 17 sicca." In 1863, there being litigation, the tenant for the time being entered into a compromise with the zemindar by which he agreed to pay an enhanced rent of Rs. 108-13-12 gds.:

Held—*That from the mere fact that the rent had been once enhanced it did not follow that it could be enhanced again.*

That although by mutual agreement the rent was enhanced from Rs. 17 to Rs. 108-13-12 the tenancy which was identical with that which had been traced to 1818, continued to be subject to the provision against increase in the original lease.

Where the lower Appellate Court held that the presumption under sec. 5, cl. (5) of the Bengal Tenancy Act that a holding comprising an area of more than 100 bighas of land was a tenure and not a raiyati

holding, had not been displaced by the contrary being shown ;

Held—*That it was not open to the High Court in second appeal to interfere with the finding of the lower Appellate Court that the holding was a tenure.*

SULATU DASS *v.* JADUNATH DASS (4) *referred to.*

This was an Appeal under sec. 15 of the Letters Patent preferred on the 6th of April 1911 against the decrees of Mr. Justice Coxe, dated the 20th of March 1911, passed in Second Appeals Nos. 418 and 585 of 1908, preferred against the decree of E. E. Forrester, Esq., District Judge of Midnapur, dated the 27th of November 1907, which modified on appeal the decree of Babu Jogendra Nath Mitter, Subordinate Judge, 2nd Court of that district, dated the 10th of June 1907.

The material facts will appear from the judgment of COXE, J., which was as follows :—

COXE, J.—These appeals arise out of two applications by the Midnapur Zemindary Company for determination of the incidents of the Defendants' tenancies. The Court was invited to determine whether the tenants were tenure-holders or raiyats and, secondly, whether their rents were liable to enhancement. The Court below has held that the Defendants are tenure-holders and that their rents are liable to enhancement.

The tenants Defendants appeal. It appears that certain lands were leased as long ago as 1818 to one Hara Santal. Hara Santal subsequently transferred these lands to one Nitai Singh and Nitai transferred them in his turn to the present Appellants. After the transfer to the present Defendants the predecessor in interest of the Midnapur Zemindary Company leased the land to one Behary Singh who is said to have been the illegitimate son of Nitai Singh. This appears to have led to suits by the tenants Defendants for the establishment of their rights. These suits terminated in compromises in the year 1863.

The question whether or not the rents of the Defendants are liable to enhancement turns almost entirely on the proper interpretation of the terms of these compromises. They recite that the Defendants shall continue to hold possession of the lands and shall pay rent for the previous years, thereby implying the continuity of the tenancy. It was agreed that the rent of the whole land should be assessed at the rate of as. 4 a bigha, the total being Rs. 108 odd. This the Defendants agreed to pay ; and a stipulation followed that the parties should not conduct themselves contrary to this *solenamah.* It is argued by the learned Counsel for the Appellant that the effect of this compromise was to engraft on the former existing tenancy a further stipulation that the rent in future should be Rs. 108 odd and that otherwise the terms of the original tenancy continued in force. These terms may be ascertained by a reference to the *sanad* which was granted in 1848 to the Defendants. According to that *sanad* the rent was about Rs. 18. But there was an express stipulation that there should be no increase or decrease in the said rent. I do not think that this condition continued to attach to the tenancy. The mere fact that the rent was altered from about Rs. 18 to Rs. 108 odd shows that the express stipulation that there should be no increase or decrease in the said *jama* was deliberately and purposely set

(4) 8 C. W. N. 774 (1904).

aside, and if it was intended that this sum of Rs. 108 odd should be fixed in perpetuity, it is strange that the stipulation which appears in the former *sanad* was not repeated in the subsequent compromise. Nor do I think the stipulation that the parties should conduct themselves in accordance with the compromise justifies the conclusion that they intended to fix the rent in perpetuity. When land is leased to a tenant at a certain rate of rent there is no breach of the contract if the landlord subsequently sues to have the rent enhanced according to law. In my opinion the decision of the learned District Judge that the rent was not fixed in perpetuity is correct. Reliance has been placed on the two cases of *Robert Watson & Co., Ld.* v. *Radha Nath Singh* (2), *Ramdayal Giri* v. *Midnapore Zemindary Co,. Ld.* (3). But these cases seem to me quite distinguishable. In the first there was the important fact, that the rent fixed for the land had never been altered. This makes the case entirely different from the one now before me. In the second case also the same rate of rent had prevailed for over 60 years and there had been several assessments on additional areas at the rate that had been fixed originally. But here there was a second assessment and in that the original rate of rent was not adhered to.

As regards the second question whether the Defendants are tenure-holders or raiyats, that depends principally on the question for what purpose the tenancy was created. I have been much impressed by the argument of the learned Counsel for the Appellants, drawn from various documents showing how the parties concerned have dealt with these lands, that it was created for the purpose of cultivation. The *sanad* of 1848 to which I have already referred recites, that Hara Santal reclaimed the land. The lease granted to Behari Singh by the Plaintiffs' predecessor also stipulates that he should cultivate the land as jote. There are also road-cess returns filed by the Plaintiffs' predecessors in interest which describe the Defendants as raiyats, although it was against his pecuniary interest so to describe them. If I were sitting here to dispose of this case as a Court of first instance I think I should find considerable difficulty in holding, as the learned District Judge has held, that the Defendants are tenure-holders. But it is not open to me to interfere in second appeal with the decision of the learned District Judge on this point. He refers to the presumption arising from the extent of the land and says that in his opinion the Respondents have entirely failed to rebut that presumption. This is a conclusion, based on the evidence before him, which does not depend on the proper interpretation of any document or on anything of that kind. It is an inference of fact drawn from facts proved before him.

It has been stated in the case of *Ramdayal Giri* v. *Midnapore Zemindary Co., Ld.* (3) to which I have already referred that it was laid down by the Full Bench in the case of *Sulatu Dass* v. *Jadunath Dass* (4) that a question as to the nature of a tenancy is a question of law. But I do not think that it was the intention of the Full Bench in that case to lay down that when a question arises as to the nature of a tenancy all questions of fact which are necessary for the decision of

(2) 1 C. L. J. 572 (1905).
(3) 15 C. W. N. 263 (1910).

(3) 15 C. W. N. 263 (1910).
(4) 8 C. W. N. 774 (1904).

that point can be dealt with in second appeal. In that case the parties apparently went to trial on the footing that the Defendants were tenants-at-will and the case was referred to the Full Bench on that assumption.

But on looking at the pleadings of the Plaintiff it was found that the Plaintiff's case was that the Defendants were not tenants-at-will but yearly tenants. No doubt this Court in second appeal can go into a question of that kind when the findings of fact in favour of the Plaintiff are entirely opposed to his own allegations in the Plaint. But I do not think that that case is an authority for holding that sec. 100 of the Civil Procepure Code has no application where the question for decision is the nature of the tenancy.

I do not think that I can interfere with the learned District Judge's finding that the Defendants have failed to show that the tenancy in its origin had been for the purpose of cultivation and have also failed to rebut the presumption arising from the extent of the land.

The appeals are dismissed with costs.

[The Defendants preferred this Appeal under sec. 15 of the Letters Patent.]

Mr. S. P. Sinha, *Babus Biraj Mohun Majumdar* and *Mohini Mohun Chatterjea* for the Appellants.

Dr. Rash Behari Ghose and *Babu Jogesh Chandra Ray* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—These appeals arise out of a proceeding under sec. 158 of the Bengal Tenancy Act, and the only point, as the appeals have been presented to us by the learned advocates on both sides, is whether the Appellant before us is a tenure-holder or a raiyat holding at fixed rates, and if a tenure-holder whether he is a permanent tenure-holder or not, and whether his rent is liable to enhancement during the continuance of his tenure. The case came in the first instance before a Subordinate Judge who decided that the present Appellant was a raiyat holding at fixed rates. On appeal to the District Judge it was held that he was a tenure-holder and his rent was liable to enhancement. On Second Appeal it was held by Mr. Justice Coxe that he was not in a position to interfere with the decision of the lower Appellate Court, though the inclination of his mind obviously was in favour of holding that the present Appellant was not a tenure-holder but a raiyat. From his judgment the present appeals have been preferred.

We agree with Mr. Justice Coxe that the Appellant before us must be taken to be a tenure-holder. He is one to whom the presumption for which provision is made in sub-sec. (5) of sec. 5 of the Bengal Tenancy Act applies, and we think there is no sufficient ground for us in Second Appeal to interfere with the conclusion of the lower Appellate Court that the presumption in favour of the present Appellant being a tenure-holder has not been displaced by the contrary being shown. The only question then that remains is whether he is a permanent tenure-holder or not and whether his rent is liable to enhancement. It has not been suggested before us that he is not a permanent tenure-holder, and it is therefore unnecessary to discuss that point any further. The only contest is whether his rent is liable to enhancement. Now, the tenure is traced back at least to 1818 and it is possible that the benefit of sec. 6 of

the Bengal Tenancy Act might have been claimed in view of the decision in *Ananda Chandra* v. *Kunjo Behari* (1). But that point has not been made before us, so all we have to consider is whether the original tenure was not one in which the rent was not enhanceable. Our attention has been drawn to Ex. D which is admitted to embody the terms under which the tenure was held from 1848 and possibly before, and there is here a distinct provision, though it is omitted from the translation to the effect that "there shall be no increase or diminution of the above rent," that is the rent of Rs. 17 *sicca*. Though that was the rent then fixed, and there was that provision in it, still as a result of litigation, and possibly to buy peace, the Mohant entered into an arrangement with the zemindars that if they restored him to the right to which he was entitled, he was quite willing to pay the rent of Rs. 108-13-12. Apparently that was the arrangement, and the question is whether this increased rent disturbed the provision against increase, to which I have referred—whether the tenancy was thenceforth a new one. Dr. Rash Behary Ghosh felt, and I think rightly felt, that he must contend that the holding was not on the old terms, that after that *solenamah* decree there was a fresh start in all respects, and it is on that basis that he has addressed us. But there is a finding of the District Judge that the tenancy is identical with that granted to Hara Santal. But he thought it a sufficient answer to the contention that there should be no enhancement, to say that Hara Santal's rent was Rs. 18, and that by compromise of 1863 the rent was raised to Rs. 108; and that a rental which had been once enhanced could be enhanced again. Dr. Ghosh candidly told us that he could not present to Court that line of argument, and obviously he was well advised in that. If it be that the present tenancy is identical with that granted to Hara Santal, it was subject to that provision against increase, to which I have referred: and, the effect of the whole arrangement merely is that in place of Rs. 17 *sicca* Rs. 108 is the rental, but subject to the same provisions as were contained in the original tenancy. This seems to have been recognised by the parties themselves, because there has been a long tenure from 1818 down to 1907 with this one single enhancement by mutual agreement and as the price of peace.

In our opinion, therefore, the judgments of Mr. Justice Coxe must be modified, and we determine that the Appellant before us is a permanent tenure-holder of the 435 bighas odd and that his rent of Rs. 108-13-12 gds. payable in respect thereof is not liable to enhancement during the continuance of his tenure. In respect of the other lands we don't interfere with the judgments under appeal.

Each party will bear his own costs in the first Court and in the lower Appellate Court. The Appellant is entitled to his costs in the High Court (one set of costs).

Decree modified.

(1) 8 C. L. J. 177 (1908).

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE
No. 2112 OF 1909.

CARNDUFF, J.
N. R. CHATTERJEA, J.
1912,
24, April.

PYARI LAL HALDAR, Defendant, Appellant,
v.
HEM CHANDRA SARKAR, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885)—Landlord and tenant, relationship of, denial of—Suit for rent, dismissal of—Appeal by the landlord, withdrawal—Suit for ejectment, if maintainable.

Mere denial of the relationship of landlord and tenant does not, in cases to which the Bengal Tenancy Act applies, work any forfeiture unless the denial has been given effect to by a decree of the Court.

Where the landlord, after the dismissal of his suit for rent upon the tenant's denial of the relationship of landlord and tenant, appealed, and pending the appeal withdrew the suit with liberty to bring a fresh suit and then brought an action to eject the tenant on the ground of such denial by the tenant,

Held—***That the only decree that could be relied on here was a decree which ceased to exist owing to the withdrawal of the suit by the landlord and so the denial of the relationship of landlord and tenant by the tenant would not work any forfeiture as it was not given effect to by a decree of the Court.***

This was an Appeal preferred on the 11th of October 1909 against a decree of Babu Bidhu Bhusan Banerjee, Subordinate Judge of Hughly, dated the 17th of August 1909, affirming that of Babu Hemendra Lal Sinha, Munsif of Hughly, dated the 14th of December 1908.

The facts of this case material to this report are as follows :—

Plaintiff alleged that he had let out certain lands to Defendant at a yearly rent of Rs. 7-12; as Defendant failed to pay rent to Plaintiff, he brought a rent suit against Defendant for the arrears due from 1310 to Pous kist of 1313, B. S.; Defendant denied relationship of landlord and tenant with Plaintiff and Plaintiff's rent suit was dismissed. Plaintiff preferred an appeal, but on the 17th March 1908 withdrew the suit with permission to bring a fresh suit. Then Plaintiff brought the present suit on the 15th April 1908 for declaration of title and *khas* possession. Defendant by his written statement denied that Plaintiff ever had *jamai* right in the lands in suit or that Plaintiff had any possession in them or that Defendant took settlement of these lands from Plaintiff. The first Court found that Plaintiff had *jamai* right in the lands in suit and the suit was not barred by limitation and that Plaintiff was entitled to get *khas* possession of these lands as Defendant had denied relationship of landlord and tenant with Plaintiff in the rent suit which had been dismissed in consequence of that denial. Defendant preferred an appeal which was dismissed by the lower Appellate Court.

Against this decision, Defendant preferred this second appeal.

Babu Surendra Chandra Sen for the Appellant.

Babu Dwarka Nath Mitter for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal raises a very short, and, we think, a very simple question.

The Plaintiff sued the Defendant for the rent of a holding. The Defendant denied that the relationship of landlord and tenant existed. This defence prevailed, and the suit was dismissed. The Plaintiff then appealed and in the appellate stage was allowed to withdraw his

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suit with liberty to bring a fresh suit. He then brought the present action to eject the Defendant on the ground that in the former suit he had denied the relationship of landlord and tenant.

We think it may be said to be settled by the current of decisions in this Court that the mere denial of the relationship of landlord and tenant does not, in cases to which the Bengal Tenancy Act of 1885 applies, work any forfeiture unless the denial was given effect to by a decree of the Court. The only decree that here can be relied on is a decree which has ceased to exist owing to the withdrawal to which we have referred above. The result seems to us to be that there is no decree whatever, and that all that we have is the mere denial to which effect has not been given by any decree of Court.

The question whether the Defendant can be evicted is one which depends upon his status, and the Plaintiff must be left to take such further steps as he may be advised to take in the matter.

The appeal must, we think, succeed and it is allowed with costs throughout.

H. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 247 OF 1911.

JENKINS, C. J.
CHAPMAN, J.
1912,
23, April.

MOHANYA OJHA and others, Appellants,
v.
RAM BAHADUR SINGH, Respondent.

Transfer of Property Act (IV of 1882), sec. 90—Mortgage decree—Decree for costs, if a personal decree.

A decree had been passed on appeal in a mortgage suit upholding the mortgage and ordering that the appellant who was a transferee of a portion of the mortgaged property from the mortgagor do pay costs to the respondents, the mortgagee. The mortgaged property having been sold in execution of the decree, the decree-holder applied for execution of the decree for costs against the transferee personally :

Held—*On a construction of the decree, that there was a personal liability imposed by the decree.*

In such cases regard should be had to what decree was passed rather than to what decree ought to have been passed.

This was an Appeal preferred on the 26th of May 1911 against an order of W. H. Vincent, Esq., District Judge of Mozufferpore, dated the 19th of December 1910, reversing an order of Babu Lal Behari Bhaduri, 1st Munsif of Mozufferpore, dated the 15th of August 1910.

The facts of the case were briefly as follows :—

The appeal arose out of an application for execution of a decree for costs in a mortgage suit. The decree was passed on appeal upholding the mortgage and ordering that "the Respondent do pay the costs of this appeal to the Appellants." The mortgage decree was executed and the mortgaged property sold. The decree-holder now sought to execute the decree for costs against the other property of the judgment-debtor who was a transferee from the original mortgagor. The judgment-debtor objected to the execution on the grounds that the decree being a mortgage decree, the unsatisfied portion of it could not be executed without a previous order under sec. 90 of the Transfer of Property Act.

The first Court gave effect to the objection of the judgment-debtor and dismissed

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the application for execution. In dealing with the suggestion on behalf of the decree-holder that the portion of the decree awarding costs was a personal decree the learned Munsif observed as follows :—

I think this contention is futile and groundless. The decree is one passed in appeal in a case instituted on a mortgage The decree is one and indivisible, and should not be considered to be a decree made in sections, *viz*, two sections, one relating to the mortgage and the other to the costs of the litigation Learned pleader for the decree-holder contends that the decree should be considered as made in the two sections aforesaid. If his method of interpretation of the decree is accepted as correct, in that case there should be two proceedings to be followed in execution, one according to the procedure applicable to sales in mortgage cases, and the other according to the procedure applicable to the case of an ordinary money decree. From the above views, however, I dissent. The decree is one and indivisible, and should be executed as a whole and not piecemeal. The mortgaged lands having already been sold out in execution, it now behoves the decree-holder to arm himself with an order under sec. 90 of Act IV of 1882 before coming to apply for execution of the unsatisfied balance of the decretal dues. Judgment-debtor relies on a ruling *Raj Kumar Singh* v. *Sheo Narain Sahu* (1) in support of his contention that decree-holder should not be permitted to take out execution of the unsatisfied balance by bringing to sale other than the mortgaged properties. The decree does not direct that a separate procedure should be resorted to for recovery of the costs. The costs are a part and parcel of the mortgage money, which includes the principal and interest as well as costs of the suit and appeal.

On appeal the District Judge set aside the Munsif's order holding that the decree so far as it related to costs was a personal decree and restored the execution case. The material portion of the judgment of the learned Judge was as follows :—

He relies on the case of *Raj Kumar Singh* v. *Sheo Narain Sahu* (1) in support of his decision but that case follows *Magbul Fatima* v. *Lalta Prosad* (2) in which case it was not apparently disputed but that costs of an appeal could be recovered without an order under sec. 90. The order of the appellate decree is that the Respondent do pay the costs of the appeal to the Appellants and in my opinion this indicates not merely that the money is to be recovered from the mortgaged property but is a personal decree.

. . . .

It might in many cases be very hard to make the mortgagee recover in the first instance only from the mortgaged property. If the case of a transferee of a portion of the property be taken the transferee might go on fighting the case up to the Privy Council in spite of the desire of the mortgagor to allow the decree to stand and this would mean that all dues would, whether the mortgagor or the successful mortgagee liked it or not, be recovered from the mortgaged property.

Following the words used in the appellate decree that the Respondents were to pay the costs of the appeal, I think that this was a personal liability under the decree.

Against this decision the judgment-debtor appealed to the High Court.

Babu Atul Krishna Ray for the Appellants.

Babus Dwarka Nath Mitter, *Baikanta Nath Mitter* and *Manindra Nath Banerjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The only point on this appeal is whether the decree-holder can realise his decree for costs otherwise than by proceeding under sec. 90 of the Transfer of Property Act. In cases of this kind what we have to see is not what decree the Court ought to have passed but what decree the Court has passed. If the Court passed a personal decree for costs, then there is no necessity of having recourse to the procedure indicated in sec. 90. The learned District

(1) 12 C. W. N. 864 (1908).

(2) I. L. R. 20 All. 523 (1898).

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Judge has held that there was a personal liability for these costs imposed by the decree. I see no reason to differ from this, more particularly when it is borne in mind that these were costs not of the suit but of the appeal. Therefore I think the decree of the District Judge must be confirmed and this appeal dismissed with costs, hearing-fee one gold mohur.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 3 OF 1912.

JENKINS, C. J. WOODROFFE, J. 1912, 7, March.	HARISH CHANDRA MUKHERJEE, Debtor-Appellant, *v.* THE EAST INDIA COAL Co., LD, Creditors-Respondents.

Presidency Towns Insolvency Act (III of 1909), secs. 9 (e), 10—Partnership debt—Attachment of property in execution of a joint decree against partners—Property claimed on behalf of an endowment—Enquiry as to whether property attached was really judgment-debtor's if essential—General Clauses Act (X of 1897), sec. 13—Act or default, if to be personal of person sought to be adjudicated—Delay in applying for annulment.

Sec. 9 (e) of the Presidency Towns Insolvency Act requires that the act or default which amounts to an act of insolvency must be a personal act or default of the particular individual or in certain circumstances of his agent.

Where properties alleged to belong to three judgment-debtors remained under attachment in execution of a joint decree against them for more than 21 days:

Held—*That this alone could not be relied on as an act of insolvency on the part of H., one of the co-judgment-debtors when, in the execution proceeding, claim was laid to what was alleged to be his share of the property on behalf of an endowment, and that claim was pending when the adjudicating order was made against him and the other co-judgment-debtors.*

On an application by H. for annulment of the adjudication,

Held—*That the above act of insolvency on the part of his co-judgment-debtors could not be regarded as an act of insolvency on the part of H.*

Held—*That it was necessary to inquire whether the property attached was in fact the applicant's.*

An objection that the application for annulment was not made till after the lapse of a considerable time, having been raised for the first time on appeal:

Held—*That there being no bar of limitation in the matter, this objection taken at this late stage should not be entertained.*

This was an application by Harish Chandra Mukherjee to set aside an adjudication order in insolvency made against him along with two other persons on the 14th of June 1911. Harish Chandra Mukherjee, Krishna Kishore Adhikary and Sasti Kinkar Bannerjee were three partners of the firm of Laik and Bannerjee and the petition to adjudicate was presented against those persons by the East India Coal Co., Ld., and the act of insolvency alleged against them in the petition was that the property of all the three insolvents was under attachment in execution of a decree passed by this Court in its appellate jurisdiction for a period of more than 21 days, which would be an act of insolvency under sec. 9 (*e*) of the Presidency Towns Insolvency Act. Harish Chandra applied

to set aside the adjudication order so far as it related to himself on the ground that at the date of the adjudication order and for a considerable time previous to that, namely, since the 24th of July 1909, he had no interest in the property which the East India Coal Co., Ld., had attached and his petition set out a deed of the 29th of July 1909 more fully described below. The facts in connection with this attachment were as follows:—The adjudicating creditor in execution of a decree which they obtained against the partnership attached a valuable colliery belonging to the insolvents called Bhulanbarari. Within two years previous to the attachment Harish Chandra's share and interest in Bhulanbarari was made the subject of a trust under the deed of the 29th of July. Thereupon the *shebait* or the trustee under the deed filed in the local Court at Purulia a claim and prayed for the removal of the attachment, alleging that Harish Chandra had no interest in the property and that it was trust property. During the pendency of the claim proceedings, the adjudicating creditors the East India Coal Co., Ld., obtained an order of adjudication against all the three judgment-debtors. Having got the adjudication order they made an application to the Purulia Court for leave to withdraw the attachment. Leave was granted and the attachment was withdrawn. On the application the following order was passed, "as the attachment has been withdrawn there is no need of enquiry into the merits of the claim case. Case disposed of without enquiry."

Mr. Justice Fletcher in rejecting the application observed that "whether the deed is real or colourable is not material to the enquiry, for if the order of adjudication stands then that deed under the provision of sec. 55, Presidency Towns Insolvency Act III of 1909, is void as coming within 2 years of the date of the adjudication order and that deed will therefore be void as against the Official Assignee." His Lordship further observed that sec. 9 (*e*) of the Presidency Towns Insolvency Act "has got to be read along with sec. 13 of the General Clauses Act which says that in all Acts of the Governor-General and Regulations, unless there is anything repugnant in the subject or context, the words in singular shall include the plural and *vice versa*, so reading sec. 9 (*e*) along with that section of the General Clauses Act, it seems to me that you have a joint debt in this case. It is not necessary to attach or sell in execution of the joint debt property that belongs to the debtors jointly. It is sufficient, if in regard to that joint debt property bolonging to one of the joint-debtors be sold or attached." In his Lordship's opinion Harish Chandra committed an act of insolvency. The application therefore failed and was dismissed with costs.

Against this order the Petitioner appealed.

Mr. Garth (with him *Mr. A. K. Ghose*) for the Appellant.

Mr. S. P. Sinha (with him *Mr. Avetoom*) for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This is an appeal from an order of Mr. Justice Fletcher, who dismissed an application made to him by one Harish Chandra Mukherjee for the purpose of obtaining an annulment of an adjudication against him under sec. 10 of the Presidency Towns Insolvency Act of 1909. This adjudication order was made by Mr. Justice Harington on the

15th June 1911, and the act of insolvency on which it was made is set out in the order:—It is that "the properties of the said Krishna Kishore Adhikary, Sasti Kinkar Banerjee and Harish Chandra Mukherjee have been attached in execution of a decree of this Court in its ordinary appellate jurisdiction for a period of more than 21 days." The Petitioner sought for an adjudication against these three debtors and the order was in accordance with the terms of the petition. The present Appellant, one of these adjudged insolvents, that is to say, Harish Chandra Mukherjee, seeks to have the adjudication annulled on the ground that his property had not been attached in execution of a decree of this Court. His reason for so contending is that although property had been attached as his, it was in fact not his and was claimed in the execution proceedings on behalf of an endowment as not being the property of Harish Chandra Mukherjee. When the petition for adjudication was presented, that claim was still pending and had not been decided. In the circumstances it is urged that there has been no act of insolvency within the meaning of sec. 9 (*e*) of the Insolvency Act. Mr. Justice Fletcher did not deal with this point, as it appeared to him that inasmuch as there had been an attachment of the property of the other judgment-debtors and that attachment had continued for a period of not less than 21 days in execution of the decree of the Court for the payment of money, that operated as an act of insolvency not only by these judgment-debtors, but by Harish Chandra Mukherjee. That view the learned Judge sought to base on a joint reading of sec. 9 (*e*) of the Presidency Towns Insolvency Act and sec. 13 of the General Clauses Act. Though this view was presented to us by Mr. Sinha, he did not seriously press it, and in that I think he exercised a wise discretion. It appears to me not to be in accordance with the true construction of sec. 9 (*e*) alone or in conjunction with sec. 13 of the General Clauses Act to give the sec. 9 (*e*) the operation attributed to it by Mr. Justice Fletcher.

Mr. Sinha suggests that his case is strengthened by the fact that the debt was a joint judgment-debt, that the judgment-debtors were three of the members of a partnership and that the debt was in respect of partnership matters. But I do not think those considerations are sufficient to displace what appears to me to be the fair meaning of sec. 9 (e) of the Presidency Towns Insolvency Act, and of the underlying principle which requires that the act or default which amounts to an act of insolvency, must be the personal act or default of the particular individual or in certain circumstances of his agent. In my opinion the mere fact that there may have been an act or default on the part of the co-judgment-debtors, which might be regarded as against them as an act of insolvency does not amount to an act of insolvency by Harish Chandra Mukherjee. But we cannot dispose of the case on that ground alone, for there still remains the question whether or not the property which is alleged to be that of Harish Chandra was in fact his, and so came within the description of his property attached for a period of not less than 21 days in execution of the decree of a Court for the payment of money. That is a point into which, as I have already indicated, Mr. Justice Fletcher did not go. In the view we take, that point is one that he should have determined, and we must therefore send back the case for the Com-

missioner in Insolvency to determine, whether or not there has been an act of insolvency by Harish Chandra Mukherjee. It is true that the petition on which the original adjudication was made may have referred to other possible acts of insolvency, but Mr. Sinha who appeared before us on behalf of the petitioning creditor has abandoned any desire to support the adjudication on any other ground than that on which it purports to have been made by Mr. Justice Harington, that is to say, the ground coming within the description of sec. 9 (e) of the Presidency Towns Insolvency Act and, therefore, it will be for the learned Commissioner, when the case comes before him, to determine not in reference to other possible acts of insolvency but on this and on this alone. I pause here for a moment to say that this election was made by Mr. Sinha deliberately and for a particular and, in his point of view, very good reason.

The only question then that remains is how the Commissioner should dispose of the question that will come before him. It will be open to him either to determine it himself if he thinks fit, or should he think it necessary to direct that it should be determined in some other proceeding appropriate for that purpose. On that I think it would not be right for us to express any definite opinion. It must be a matter to be determined by him when the matter comes before him. All we say is that we do not think that it is a question that can properly be determined merely on affidavit evidence.

The only other matter to which I need allude is the point made by Mr. Sinha that the application for annulment was made after lapse of what he describes as a considerable time. But why there was that delay we do not know, nor is counsel in a position to clear up the matter in any way, inasmuch as the point is taken before us for the first time. It is not suggested that there is any bar of limitation, and we cannot, therefore, on that ground at this stage say that the application for annulment should fail by reason of the date on which it was presented to the Court.

The result of the appeal, therefore, is that we set aside the order of Mr. Justice Fletcher and send back the case for further determination by the Commissioner in the light of the observations we have made.

The costs of the application before Mr. Justice Fletcher and of this appeal will follow the result.

WOODROFFE, J.—I agree.

Messrs. Ghose & Bose, Attorneys for the Debtor-Appellant.

Messrs. Orr, Dignam & Co., Attorneys for the Creditors-Respondents.

A. K. G. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 548 OF 1910.

MOOKERJEE, J.
CARNDUFF, J.
1911,
28, June.

RAGHUBAR DOYAL SUKUL and others, Appellants,
v.
JADUNANDAN MISSER and another, Respondents.

Bengal Tenancy Act (VIII of 1882), sec. 174—Time for depositing money, if may be extended by Court—Order under, if appealable—Inconsistent positions, bar against taking up—Party if may treat the same order as a decree and as not a decree at different stages—Civil Procedure Code (Act V of 1908), sec. 47, Or. 43, r. 1, cl. (j)—Amount payable, if includes costs—Decree-holder purchaser, if entitled to 5 p. c. on purchase-

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money—Execution petition, copy of decree and vakalatnama if necessary for—Poundage-fee, if must be deposited with purchase-money.

An order under sec. 174 of the Bengal Tenancy Act is an order within sec. 47 of the Civil Procedure Code and a second appeal lies against such order.

The Court has no authority to extend the time within which deposit of purchase-money has to be made under sec. 174 of the Bengal Tenancy Act.

AMIR HOSSAIN *v.* NANAK CHAND (1), GULAB CHAND *v.* BAHURIA (8) *distinguished.*

BIBI SHARIFAN *v.* MD. HABIBUDDIN (2), KABILASO *v.* RAGHUNATH (9), AKBAR *v.* SUKHDEO (10), MOTHURA *v.* BANGSIDHARI (11) *referred to.*

If therefore an amount shorter than the amount payable was deposited within the prescribed period and the balance paid out of time under an order of the Court the sale could not be set aside.

In calculating the amount which the judgment-debtor must deposit, 5 per cent. on the purchase-money (even where the purchaser is the decree-holder himself) and costs must be included, but the judgment-debtor is not liable to deposit the costs of taking a copy of the decree or of the stamp on the vakalatnama or the poundage-fee.

The amount deposited within the prescribed time in this case being sufficient to cover the amount payable after excluding the cost of taking a copy of the decree, of the stamp on the vakalatnama and the poundage-fee, the order of the first Court rejecting an application to have the sale set aside was reversed.

A copy of the decree of which execution is sought is not necessary for an application for execution.

The authority of a pleader in a case does not terminate with the decree but extends to execution proceedings. A fresh vakalatnama is not therefore necessary for the purposes of execution proceedings.

Where the judgment-debtors appealed against an order in execution, treating it as one under sec. 174 of the Bengal Tenancy Act, read with sec. 47, C. P. C., it was not open to them on second appeal by the decree-holders to urge that such appeal did not lie.

BINDESWARI CHARAN SINGH *v.* LAKPAT NATH SINGH (3) *referred to.*

This was an Appeal preferred on the 21st of November 1910 against an order of Mr. A. Mellor, District Judge of Zillah Darbhanga, dated the 28th of July 1910, reversing that of Moulvi S. M. Zarif, Munsif at Samastipur, dated the 15th of January 1910.

The facts of the case appear fully from the judgment.

Babu Kshetra Mohun Sen for the Appellants.

Babu Joy Gopal Ghosh for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This Appeal is directed against an order by which the Court of Appeal below in reversal of the order of the Court of first instance has set aside an execution sale. It appears that the Appellants obtained a decree for rent on the 12th August 1909. They applied for execution on the 14th September following and themselves purchased the properties at the execution sale on the 13th December 1909 for

(1) 14 C. W. N. 882 (1910).
(2) 13 C. L. J. 535 : s. c. 15 C. W. N. 685 (1911).
(8) 13 C. L. J. 432 (1911).
(9) I. L. R. 18 Cal. 481 (1891).
(10) 13 C. L. J. 467 (1911).
(11) 10 I. C. 880 (1911).
(3) 15 C. W. N. 725 (1910).

Rs. 99-11 as. The purchase-money was not brought into Court but was set off against the judgment-debt. On the 10th January 1910, the judgment-debtor applied to have the sale set aside under sec. 174 of the Bengal Tenancy Act and on the next day deposited Rs. 100-3 as. On the day following, the Court directed the judgment-debtors to deposit an additional sum of Rs. 4-8 as, inasmuch as the office had reported that the amount deposited was insufficient. Thereupon the judgment-debtor paid into Court Rs. 5 on the 13th January 1910. Two days later, upon the objection of the decree-holders auction-purchasers the Court dismissed the application as the judgment-debtors had failed to deposit the decretal amount with compensation in full within 30 days of the sale as required by sec. 174 of the Bengal Tenancy Act. The judgment-debtors appealed against this order. The District Judge, upon this appeal, has held, on the authority of the decision in *Amir Hossain Khan* v. *Nanak Chand* (1), that the Court had authority to extend the time within which the deposit was to be made and that it was consequently unfair to refuse to set aside the sale after the judg-debtors had carried out the order of the Court for payment of the balance of the sum due. In this view the District Judge has allowed the appeal and reversed the sale.

The decree-holders purchasers have now appealed to this Court and on their behalf the decision of the District Judge has been assailed on the ground that it was not competent either to the original Court or to the Court of Appeal below to extend the time within which the judgment-debtors were required by law to make the necessary deposit. In support of this proposition reliance has been placed upon the case of *Bibi Sharifan* v. *Md. Habibuddin* (2). On behalf of the judgment-debtors it has been suggested that the appeal is incompetent because the order of the original Court could not rightly be treated as an order under sec. 47 of the Code of 1908. It has also been argued that the judgment-debtors had deposited within the time allowed by law whatever sum was justly payable by them and the decree-holders were consequently not entitled to resist the application for reversal of the sale. Before we deal with the case on the merits, it is necessary to examine briefly the objection to the competency of the appeal taken on behalf of the Respondent.

The preliminary objection ought to be overruled, in our opinion, on two grounds. In the first place, the judgment-debtors appealed to the District Judge on the assumption that the adverse order of the Court of first instance had been made under sec. 174 of the Bengal Tenancy Act, read with sec. 47 of the Code of Civil Procedure of 1908. It is therefore not competent to them to urge before this Court that the order in their favour by the District Judge was as a matter of fact made without jurisdiction, and that although the appeal preferred by them was incompetent, it is not open to the decree-holders to assail that order by way of appeal. It was pointed out by this Court in the case of *Bindeswari Charan Singh* v. *Lakpat Nath Singh* (3), that it is not open to a party litigant to assume inconsistent positions of this character. As we have just explained the Respondents have succeeded in the Court of the

(1) 14 C. W. N. 882 (1910).

(2) 13 C. L. J. 535 : s. c. 15 C. W. N. 685 (1911).

(3) 15 C. W. N. 725 (1910).

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District Judge on the assumption that the order of the original Court was of a particular description : they cannot now be permitted to turn round and assume an entirely different and inconsistent position. In the second place, we are of opinion that the order of the original Court must be treated as one within the scope of sec. 47 of the Code of 1908, and in the nature of a decree against which a first appeal and a second appeal lie under the law. It was pointed out by this Court in the case of *Joytara* v. *Prankrishen* (4), that the answer to the question, whether an order in execution proceedings is within the scope of sec. 47 of the Code of 1908, must depend upon its nature and contents. If it decides a question relating to the execution, satisfaction or discharge of the decree and if the decision has been given between parties to the suit or their representatives in interest, the order of the Court falls within the scope of sec. 47 and is a decree within the meaning of sec. 2. Tested in the light of this principle, there can be no room for serious controversy that the order of the original Court in the case before us was a decree, and in support of this position it is sufficient to refer to the cases of *Chandi Churn* v. *Banku Behari* (5) and *Sital Ray* v. *Nanda Lal* (6). In both these cases the decree-holder was the auction-purchaser. The sale had been held in execution of a decree for arrears of rent and the order of which the propriety was called in question had been made under sec. 174 of the Bengal Tenancy Act. In both instances, it was held that the order was appealable as a decree. The recent decision of this Court in *Asimuddi* v. *Sundari* (7) does not militate against that view. That decision merely points out that in cases under r. 89 of Or. 21 of the Code of 1908 which corresponds to sec. 310A of the Code of 1882, only a first appeal is allowed under the new Code. That is so, because the order is made appealable under r. 1, cl. (*j*) of Or. 43 of the Code, and consequently a second appeal is barred under the provisions of sub-sec. 2 of sec. 104. But an order under sec. 174 of the Bengal Tenancy Act is not appealable under Or. 43 of the Code of 1908 and sub-sec. 2 of sec. 104 does not therefore bar a second appeal. The result is that the preliminary objection must be overruled and the propriety of the order of the District Judge examined on the merits.

It cannot be seriously disputed that the view adopted by the District Judge is erroneous. He has held upon the authority of the decision in *Amir Hossain* v. *Nanak Chand* (1), that it is open to the Court to extend the time within which the judgment-debtor is required to make a deposit under sec. 174 of the Bengal Tenancy Act. The case mentioned, however, is clearly distinguishable. It was ruled in that case as also in the case of *Gulab Chand* v. *Bahuria* (8) that when full Court-fees have not been paid upon a plaint or memorandum of appeal, it is competent to the Court to extend the time for payment. That principle has plainly no application to cases under sec. 174 of the Bengal Tenancy Act. As was explained in *Bibi Sharifan* v. *Md. Habibuddin* (2), the Court has no authority to

(4) 13 C. L. J. 257 : s. c. 15 C. W. N. 512 (1910).

(5) 3 C. W. N. 283 : s. c. I. L. R 26 Cal. 449 (1899).

(6) 13 C. W. N. 591 (1909).

(1) 14 C. W. N. 882 (1910).

(2) 13 C. L. J. 535 : s. c. 15 C. W. N. 685 (1911).

(7) I. L. R. 38 Cal. 339 (1911).

(8) 13 C. L. J. 432 (1911).

extend the time within which the deposit has to be made under sec. 174 of the Bengal Tenancy Act, or r. 89 of Or. 21 of the Code of 1908. A similar view has in substance been taken in *Kabilaso* v. *Raghunath* (9) and *Akbar Zaman* v. *Sukhdeo* (10). No doubt the position may be different if the party has been prevented from making the deposit by reason of the action of the Court, because, as observed in *Akbar Zaman* v. *Sukhdeo* (10) and *Mothura Koer* v. *Bangsidhari Singh* (11) in such a contingency the Court is guided by the principle that an act of the Court prejudices no man. The case before us, however, does not fall within the scope of this doctrine. It has not been suggested that if there has been any default on the part of the judgment-debtors that it can be rightly attributed to any act of the Court. We must consequently hold that the ground upon which the order of the District Judge is based cannot be supported.

The learned Vakil for the Repondents judgment-debtors has however strenuously endeavoured to support the order of the District Judge on other grounds, and has contended that the amount deposited by the judgment-debtors was amply sufficient under sec. 174 of the Bengal Tenancy Act: it has been urged in substance that the amount claimed by the decree-holders was excessive and could not be legally claimed from the judgment-debtors.

It has been argued in the first place, that as the decree-holders themselves were purchasers at the execution sale, they were not entitled to receive 5 per cent. of the purchase-money under sec. 174 of the Bengal Tenancy Act. The learned Vakil for the Respondents has sought to support this position by a reference to sub-sec. 2 which provides that in the case of a reversal of the sale, the provisions of r. 93 of Or. 21 of the Code of Civil Procedure shall apply. That Rule provides that when a sale is so set aside, the purchaser shall be entitled to an order for repayment of his purchase-money. The learned Vakil for the Respondents has contended that as in this case the purchase-money was less than the decretal amount and as no part of it was brought into Court by the decree-holders, the provisions of r. 93 cannot apply and consequently the decree-holders were not entitled to receive 5 per cent. of the purchase-money. In our opinion, this contention is not well-founded. It is sufficient to point out that sec. 174 is so framed as to apply to all purchasers, whether they are decree-holders or strangers to the execution proceedings. The question now argued before us was raised with reference to sec. 310A of the Code of 1882 and it was held by this Court as also by the High Courts of Bombay and Allahabad that the decree-holder auction-purchaser was entitled to get 5 per cent. upon the purchase-money just like any other auction-purchaser. *Chandi Churn* v. *Banku Behari* (5), *Mendai Lal* v. *Bhujja Singh* (12) and *Tirumal* v. *Dushtaghiri* (13). We are not prepared to question the correctness of these decisions and upon the plain language of sec. 174 of the Bengal Tenancy Act we cannot accept the contention of the Respondent as well-founded.

It has been argued on behalf of the Respondents, in the second place, that the decree-holders are not entitled to

(9) I. L. R. 18 Cal. 481 (1891).
(10) 13 C. L. J. 467 (1911).
(11) 10 I. C. 880 (1911).

(5) 3 C. W. N. 283: s. c. I. L. R. 26 Cal. 449 (1899).
(12) 15 All W. N. 140 (1895).
(13) I. L. R. 22 Mad. 286 (1898).

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several items included by them in the statement of costs. It will be observed that sec. 173 makes it obligatory upon the judgment-debtors to deposit the amount recoverable under the decree with costs. The costs here referred to are obviously costs properly incurred by the decree-holders subsequent to the decree and in the course of execution proceedings.

One of the items claimed by the decree-holders is the costs incurred by them in obtaining a copy of the decree. It has been argued on behalf of the Respondent that a copy of the decree was not necessary for the purpose of the execution proceedings. In support of this position, reliance has been placed upon the cases of *Gunga Gobind* v. *Makhun Lal* (14), *Ramdhun* v. *Punchanun* (15), *Khettur Mohun* v. *Ishur Chunder* (16) and *Modhoo* v. *Nobin* (17). These cases were decided under the Code of 1889 and were repeatedly treated as good law under the Codes of 1877 and 1882 [*Rajgir* v. *Iswardhari* (18)]. Under the Code of 1908 the position is still clearer. R. 11 of Or. 21 specifies the contents of the written application for execution of decrees. Sub-r. (3) of that rule provides expressly that the Court to which an application is made under sub-r. (1) may require the applicant to produce a certified copy of the decree. It has not been suggested in the case before us, that the Court made any such order. In fact such order would be wholly needless, because the Court in which the application for execution was made, was the very Court which had made the decree and if any reference to the decree was needed, the original could easily have been examined. We must consequently hold that the decree-holders are not entitled to charge the amount spent by them in obtaining a copy of the decree as part of the costs mentioned in sec. 174 of the Bengal Tenancy Act.

Another item claimed by the decree-holders is the amount of Court-fees paid by them upon the *vakalatnama* which they attached to their application for execution. It has been contended on behalf of the Respondent that the *vakalatnama* was wholly unnecessary and in support of this view reference has been made to the case of *Sadasib* v. *Vithaldas* (19) and *Gopal* v. *Har Govinda* (20). These cases affirm the doctrine that the authority of a pleader engaged in the suit does not terminate with the decree, but that it is competent to him to appear on behalf of his client in the course of execution proceedings without a fresh authority. This principle is supported by the decision of the Judicial Committee in the case of *Thakur Prosad* v. *Jakirulla* (21), where it was pointed out that an execution proceeding is essentially a continuation of the suit. We may further point out that as observed by this Court in the case of *Mohini* v. *Ramnarain* (22), the proposition cannot be maintained that the authority of a pleader necessarily terminates with the decree in the suit in which he has been engaged. This principle is also supported by the cases of *Lady De La Pole* v. *Dick* (23) and *Bagley* v. *Maple* (24). The contention of the

(14) 9 W. R. 362 (1868).
(15) 10 W. R. 144 (1868).
(16) 11 W. R. 271 (1869).
(17) 16 W. R. 25 (1871).
(18) 11 C. L. J. 243 (1907)

(19) I. L. R. 20 Bom. 198 (1895).
(20) 5 Bom. H. C. R. A. O. J. 83 (1868).
(21) I. L. R. 17 All. 106 : s. c. L. R. 22 I. A. 44 (1894).
(22) 14 C. L. J. 445 (1911).
(23) 29 Ch. D. 351 (1885).
(24) 27 T. L. R. 284 (1911)

RAGHUBAR DOYAL SUKUL *v.* JADUNANDAN MISSER.

Respondent that the *vakalatnama* was unnecessary must, therefore, prevail.

The third item claimed by the decree-holders is the poundage-fee paid by them in respect of the execution-sale at which they purchased. This poundage-fee is a percentage of the gross amount realised by the sale and is calculated at the rate of 2 per cent. upon sums not exceeding Rs. 1,000. The decree-holders urge that they were obliged by the Rules and Circular Orders of this Court to pay the amount at the time when they applied for permission to set off the purchase-money against the decretal amount and as they have actually paid that money, they are legitimately entitled to claim it from the judgment-debtors as part of the costs incurred by them. In our opinion, this contention is not well-founded. The Rules and Circular Orders of this Court (Vol. I, p. 129) provide that when a sale of immoveable property is set aside under Or. 21, rr. 89, 91 or 92, C. P. C., or under sec. 174 of the Bengal Tenancy Act, the decree-holder becomes entitled to a refund of the fee. It is, therefore, not right to contend that the decree-holder is entitled, in spite of the reversal of the sale, to recover from the judgment-debtors the poundage-fee. But it has been urged that as the sale has not been reversed, the decree-holders are entitled to treat the poundage-fee as an integral part of the costs incurred by them. This contention is fallacious. If the contingency mentioned happens, namely, if the sale is reversed, the decree-holders will forthwith become entitled to a refund of this money. If, on the other-hand, the sale is not set aside, he will not be entitled to a refund. In either event, it is clear that he is not entitled to claim the money from the judgment-debtors.

There are other items also claimed by the decree-holders in respect of which objection has been taken by the judgment-debtors; they relate to the fees paid for the service of processes. It is not necessary, however, to examine this part of the case in detail, because it is clear that if the amount claimed for copy of the decree, for *vakalatnama* and for poundage-fee is disallowed, the amount paid by the judgment-debtors is amply sufficient for the reversal of the sale under sec. 174 of the Bengal Tenancy Act. But we may add that we are by no means satisfied that the amount claimed by the decree-holders in the shape of fees for service of processes is not excessive.

The conclusion follows that although the order of the District Judge cannot be supported on the ground assigned by him, the order is substantially right on the merits and must be affirmed. The appeal is therefore dismissed: but under the circumstances of the case, there will be no order for costs in any of the Courts.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE NO. 1316 OF 1909.

BRETT, J. CARNDUFF, J. 1912, Heard, 25, March. Judgment, 10, April.	BAKAULLA MOLLAH and others, Defendants Nos. 3, 4, 5 and 6, Appellants, *v.* DEBIRUDDI MOLLAH, Plaintiff, Respondent.

Evidence Act (I of 1872), sec. 126—Professional confidence, statement made by client to pleader in—Disclosure without client consent—Impropriety—Inadmissibility in evidence.

Plaintiff sought to prove that Defendant who had recovered a decree for possession of property against certain third

BAKAULLA MOLLAH *v.* DEBIRUDDI MOLLAH.

parties was Plaintiff's benamdar *and for that purpose examined Defendant's pleader in that suit, who deposed that Defendant had informed him that he was Plaintiff's* benamdar *:*

Held—*That the statement of the pleader, having been made without his client's consent, was inadmissible in evidence under sec. 126, Evidence Act.*

The pleader acted improperly in disclosing without his client's consent communications made to him in confidence as pleader.

This was an Appeal preferred on the 24th of June 1909 against an order of E. Panton, Esq., District Judge of 24-Pergunnahs, dated the 23rd of April 1909, affirming that of Babu Ashutosh Ghosh, Munsif of Baruipur, dated the 23rd of December 1908.

The material facts will appear from the judgment.

Messrs. Morton, A. Sen and *Babu Probodh Chandra Roy* for the Appellants.

Moulvi Nuruddin Ahmed for *Moulvi Syed Shamsul Huda* and *Babu Kumar Sankar Roy* for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

The case for the Plaintiff-Respondent was that he had previously purchased some land from one Jadu Nath Pramanik and that, hearing that Jadu Nath was inclined to sell the 17 bighas 9 cottahs of land which form the subject of the present suit and fearing that Jadu Nath would not consent to sell the land to him because, after the purchase of the other land, there had been a quarrel between them, he instructed one Umar Ali to purchase the 17 bighas 9 cottahs of land for him from Jadu Nath. The purchase was made in the name of Umar Ali by a conveyance, dated the 17th Jayt 1311, B. S., and the price paid is stated to have been Rs. 250. After the conveyance had been executed, it is stated that Jadu Nath discovered that the Plaintiff was the real purchaser and refused to have the document registered. It was, however, eventually registered at the instance of Umar Ali; but Jadu Nath had in the meantime conveyed the land to the Defendants, Bakaullah and others, who were put in possession and refused to relinquish it. In consequence, a suit to establish his title and recover possession was brought by Umar Ali against the Defendants, and it was decreed. The Plaintiff's case is that Umar Ali was his *benamdar* throughout. It was he the Plaintiff who took the necessary steps through Umar Ali to have the *kobala* registered. And although, it may here be observed, it is extremely doubtful whether a *benamdar* can maintain a suit for the recovery of possession of land, Umar Ali merely lent his name for the purposes of the suit referred to and all the expenses connected with it were borne by the present Plaintiff. Afterwards, it is said, Umar Ali was won over by the Defendants, Bakaullah and others, who are his relations, and he sold the property in suit to them. When the Plaintiff went to take possession on the strength of the decree obtained by him in the name of Umar Ali, he was again resisted by the Defendants and the present suit was instituted by the Plaintiff against Umar Ali and the other Defendants for a declaration of his title and for recovery of possession of the land.

Umar Ali died after the institution of the suit, and his wives were substituted in his place. The Judge of the Court of first instance found that Umar Ali was

the *benamdar* of the Plaintiff in the purchase of the land from Jadu Nath, that the Plaintiff was the real purchaser and that, therefore, he was entitled to the reliefs claimed in the suit. He accordingly granted a decree in the Plaintiff's favour. There was an appeal to the lower Appellate Court, but the judgment and decree of the Court of first instance were affirmed and the appeal was dismissed.

This appeal is preferred on behalf of Bakaullah and others, Defendants Nos. 3, 4, 5 and 6 in the lower Courts, who claim to have purchased the land from Umar Ali after the decision of the title suit in which Umar Ali was the Plaintiff.

In support of this appeal, several points have been argued; but the one which appears to us at present to be of importance is that the learned Judge of the Court of Appeal below appears to have been influenced in arriving at his decision by the evidence of one Haran Chandra Chatterjee who was a pleader for Umar Ali in the title suit brought against Jadu Nath, such evidence being inadmissible under the provisions of sec. 126 of the Indian Evidence Act. The main point on which the Plaintiff-Respondent relied in support of his case, was that Umar Ali in purchasing the land from Jadu Nath was merely the *benamdar* of the Plaintiff. Umar Ali was a Defendant in the present suit up to the time of his death while Haran Chandra Chatterjee was a pleader engaged on behalf of the Plaintiff. This pleader was examined as a witness on behalf of the Plaintiff and he made statements in the witness-box disclosing communications made to him in the course and for the purpose of his employment as pleader in the case brought by Umar Ali. This was done without the consent of his client in that case, and it is contended that under the provisions of sec. 126 of the Evidence Act his evidence was inadmissible. In his evidence, the pleader said "Umar Ali told me he was a *benamdar*;" and this evidence is relied on by the Court of first instance as well as by the lower Appellate Court. In our opinion, the contention advanced on behalf of the Appellant is correct, and the evidence of the pleader, Haran Chandra Chatterjee, as to communications made to him in the course and for the purpose of his employment as pleader was inadmissible under sec. 126 of the Evidence Act. From the judgment of the lower Appellate Court it would appear that the learned Judge has to a considerable extent been influenced in arriving at his decision by that evidence and it is impossible for us to say how far that evidence may have affected the conclusion at which he has arrived in the appeal. We think, therefore, that the only course which we should adopt in the present case as to set aside the judgment and decree of the lower Appellate Court and direct that the appeal be sent back to that Court for rehearing after discarding from consideration all statements made by the pleader, Haran Chandra Chatterjee, as to communications made to him in the course and for the purpose of his employment as pleader in the case brought by Umar Ali against Jadu Nath. At the same time, we desire to express our astonishment at, and disapproval of, the conduct of the pleader who, while he was a pleader for the Plaintiff in the present case, consented to go into the witness-box to give evidence as to facts which had been communicated to him in confidence as pleader for one of the Defendants in another case. Costs will abide the result.

Case remanded.

THE

Calcutta Weekly Notes.

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Contents.

NOTES.

THE ELEVATION OF LORD HALDANE TO THE Woolsack which is now an accomplished fact has for a long time past been anticipated. In fact the matter was freely talked about at the time of his elevation to the Peerage. The announcement now made will therefore cause no surprise and will surely be welcome to the people not only in England but also in this country and elsewhere. Lord Haldane has long been one of those few lawyers of eminence whose reputation was not confined to the Bench and the Bar or to the volumes of the Law Reports. Before he joined the Cabinet he was known as one of the foremost of lawyers, an erudite scholar, a philosopher of acknowledged merit and a prominent figure in Parliament. He was one of the small band of Englishmen who have contributed very much to the proper understanding of the most difficult systems of modern German Philosophy and his contributions to the study of some of the vexed questions of philosophy in his Gifford Lectures are of considerable merit and originality. On being called upon to assist in the government of the Empire as a Cabinet minister he has had to perform important and some of the most difficult functions. It is no small merit in him that he has succeeded remarkably well in whatever function he was called upon to discharge. His appointment to the charge of the Army was looked upon with considerable diffidence and, judged in the abstract, it was undoubtedly a far cry from philosophy and law to war. But after his years of stewardship of the, War Office there can no longer be any doubt that it has been a success which has not only silenced clamour at home but evoked admiration from foreigners qualified to express an opinion.

WE ENTERTAIN NO DOUBT THAT A MAN OF SUCH versatile talents and breadth of view would surely justify his appointment to the highest and historic legal office in England. If he has done so well even in the Army one may naturally expect that he will do even better in law in the practice of which he spent the best part of his life and showed an amount of ability that distinguished him even amongst the high legal luminaries among whom he had taken his rank.

ONE REMARKABLE TRAIT OF LORD HALDANE'S character is his capacity for broad views and freedom from narrowness and hide-bound orthodoxy and aversion to change which is said to mark a lawyer. His conception of an Imperial Court of Appeal which is now going to be established and the spirit behind it showed that he had a grand imagination worthy of a true Imperialist. The Empire was in his view to be tied together by the strong bond of a common justice, and a common Court of final appeal was an indispensable requisite for realising the conception. The man who has made such a tremendous change in the legal system of England may surely be expected from his new position to initiate reforms in the law in England which are bound to have an indirect influence all over the Empire, India not excepted.

THE JUDICIAL COMMITTEE HAS LATELY DECIDED a question of considerable importance not only to Canada but, in a certain sense, to all Colonies, on an appeal from a proceeding of a very extraordinary character instituted in Canada. It appears that under an Act of the Dominion Parliament the Govenor in Council is authorised to put questions either of law or of fact to the Supreme Court and to require the Court to answer them. This Statute appears to have been acted upon for the last 35 years without question as also similar enactments made by Provincial legislatures imposing similar duties on the Provincial Courts. Recently however some questions arose relating to the respective legislative powers under the British North America Act of the Dominion and the Provinces of Canada on which there was some difference between the Dominion Government and the Provincial Governments. These questions the Governer-General in Council referred to the supreme Court before which the Attorney-General for the Dominion was arrayed against

the Attorneys-General of Ontario, Quebec, Nova-Scotia, New Brunswick, Manitoba, Prince Edward Island and Alberta.

AGAINST THE DECISION OF THE SUPREME COURT on this reference the Provincial Attorneys-Generals appealed to His Majes y in Council, and before their Lordships of the Judicial Committee as well as before the Supreme Court their objections were aimed at the very root of the reference. They contended that the Canadian Act conferring the power on the Government and the duty on the Supreme Court was *ultra vires*. It could not be denied that the British North America Act had conferred the fullest measure of self-Government on Canada, the sovereign power being distributed between the Dominion Government and the Provinces. Nor was it contended that the power of making the reference lay constitutionally in the Provinces and not in the Dominion Government. The contention on behalf of the Provinces was that no Legislature in Canada had the power to authorise the asking of such questions at all; that under the British North America Act the Dominion Government was authorised to establish a Supreme Court for hearing appeals from the Provincial Courts; that such Court must be a judicial body "according to the conception of judicial character obtaining in civilised countries and specially obtaining in England" and that the duty of answering such questions was incompatible with such character of the Courts and therefore outside the scope of the power conferred by the British North America Act to establish a Supreme Court.

THEIR LORDSHIPS OF THE JUDICIAL COMMITTEE held that there was no such incompatibility as was contended. The mere fact that a judicial body is called upon to give opinion at the request of the Government was not, in the opinion of their Lordships, "incompatible with the maintenance of such judicial character or public confidence in it or with the free access to an unbiassed tribunal of appeal to which litigant in the Provincial Courts are of right entitled." It could not therefore be said, as was contended, that a Court by having such duty imposed on it ceases to be such a Judiciary as the constitution in the British North America Act provided for. The Act of the Canadian Legislature could not therefore be regarded as *ultra vires* and no question of public policy or prejudice to the Provinces could be permitted to interfere with the validity of an Act of a Legislature strictly within its powers.

THE DECISION SETTLES A CONSTITUTIONAL QUESTION of considerable importance touching the mutual relations of the Executive and Judiciary. The decision has been regarded by some as running "counter to the established British usage." There is no doubt that the usual course is for Courts to decide the law on particular facts and the Courts have often discountenanced academic discussions on points not based on the facts of the concrete case before them. The principle underlying this practice is that when the question arises on the facts of a particular case the parties may not find themselves tied down by the previous decision in which the parties interested were not heard. But it would be hard to say that the practice here in question is either wholly without support or entirely against public policy. Their Lordships themselves point out that the Judicial Committee which is a judicial body is undoubtedly under a duty to answer similar questions put to it by the Crown. The question of prejudice may be looked upon as not very well arising, for, as their Lordships point out, these opinions on academic questions even when given by the Supreme Court are not binding decisions on the law. That being so, one may well ask why the Government should not have power to take the opinion of the Judges on matters of general importance to guide their action from beforehand.

THERE IS ANOTHER ASPECT OF THE QUESTION AND that was urged with considerable weight on their Lordships. It may be said that if the judges of the highest Court were once constituted the legal advisers of the Executive they would lose their judicial character and people would cease to have that amount of faith in their independence which is deemed essential for the proper administration of justice. The consideration of this question tempts a discussion on the history of the relations of the Judiciary and the Executive and as to how from being the advisers of the Crown in matters of administration of justice the judiciary gradually attained to its present position of independence of the Executive, while in America the Judges are placed, in a sense, above the Executive. But without considering these questions it may be safely observed that the experience of ages has shown that the independence of the Judiciary is the best possible security for the proper administration of justice. Anything which tends to take away from that independence and make the Judiciary to any extent a hand-maiden of the Executive must be looked upon as contrary to public policy. Though in theory the opinions of the Judges may not be binding as law, if in practice the opinion to which they are thus committed in any way handicaps their free judgment on the particular facts of any case to the prejudice of the public, such laws are to be deprecated.

SIR ROBERT FULTON, WHO WILL BE REMEMBERED in India as Mr. Justice Rampini of the Calcutta High Court, is evidently a man who is very hard

to please. Some time ago, he gave expression to opinions concerning Civilian Judges which were the very reverse of complimentary to that body. But Barrister Judges appear, from the speech which he delivered last week in London, to be his pet aversion at present. "Barrister Judges recruited in England are," says the ex-Judge, "usually unsuccessful men with whose selection interest and political services have a great deal to do." He is constrained to admit that Indian barristers and pleaders raised to the Bench are invariably men of great ability, industry and learning," but even they are not "expeditious." From the summary of the speech as transmitted by Reuter, the great defect of both Barrister and Pleader Judges, according to Sir Robert, is that they cannot control the Bar. His complaint against them is that they cannot stem or check the "prodigious prolixity of speech" of Indian lawyers with their "national aptitude for dialectics." But "prodigious prolixity of speech" on the part of Indian lawyers appears to us who also know something of the condition of things out here to be an absolute myth.

NOR CAN WE ACCEPT THE IMPLICATION CONVEYED in Sir Robert's speech that Civilian Judges whose want of training in Civil law he himself has on a a previous occasion deplored (13 C. W. N. ccxiii) have made it their exclusive business, on taking their seats on the High Court Bench, to curb and control the forensic eccentricities of Indian pleaders and barristers. It is strange that Sir Robert should have failed to gather from his long experience as a Judge that judicial business can never go on smoothly and satisfactorily or even with a reasonable degree of expedition if the Judge habitually places himself in opposition to the members of the Bar and assumes towards them the attitude of a schoolmaster towards his pupils. No pleader or barrister, whether English or Indian really finds it worth his while to address lengthy arguments before a Judge who is himself a trained lawyer, and can appreciate a legal argument and value it at its proper worth. A legal argument on the part of a pleader or barrister if irrelevant or fallacious can only be met by counter-argument of the same kind from the Bench pointing out its fallacy or irrelevancy. Any mere heroic remedy habitually applied by a Judge would not only lead to loss of dignity on the part of the Court but would seriously affect public confidence in its judgments. If over and above this the Judge is not a sound lawyer, such action must often lead to positive failure of justice.

HOWEVER THAT MAY BE, WE WOULD CONSIDER IT highly invidious on the part of any one to suggest that Civilian Judges as such are prepared to accord a less patient hearing in determining cases before them than Judges drawn from the legal profession. Such a defect when it does occur is surely temperamental, and may quite as well be found in a Barrister or a Vakil Judge as in a Civilian.

WE HAVE NO DESIRE TO SPEAK UNKINDLY OF SIR Robert in his retirement. Possessed of great natural ability, he served on the bench with some distinction, though his success as a Judge was marred by his impatience of other people's opinion and excessive faith in his own. But Sir Robert is impulsive and notwithstanding his long judicial experience he would give expression to opinions without duly weighing them. In his last speech he has done justice neither to the Bar nor to his former colleagues whether of the Indian Civil Service or outside it. His remarks are specially unfortunate as they seem to be coloured by prejudice and personal dislike.

BABU SATYA KANTA BANDOPADHYAY, PLEADER, Faridpur, made a reference to the High Court, through the District Judge of Faridpur, enquiring "whether it is permissible for two or more pleaders of the mofussil Courts to start a joint office for the conduct of their professional business on the lines adopted by the Attorneys and Solicitors of the High Court in strict compliance with the provisions of the Legal Practitioners Act and the Rules made thereunder." We have received from Babu Satya Kanta Bandopadhayay a copy of the reply sent by the Registrar of the High Court, Appellate Side, and publish it below for general information. As might have been expected, the reply states, "the High Court have no objection to two or more pleaders of the mofussil Courts starting a joint office for the conduct of their professional business on the lines adopted by the Attorneys and Solicitors of the High Court."

PLEADERS IN PARTNERSHIP

No 2191.

FROM

H. T. CULLIS, ESQR, I. C. S.,

Registrar of the High Court, Appellate side, Calcutta.

To

THE DISTRICT JUDGE OF FARIDPUR,

Dated, Calcutta, the 6th June 1912.

SIR—With reference to your letter No. 1013, dated the 22nd May 1912, and its enclosure, I am directed to request that you will be good enough to inform Babu Satya Kanta Bandyapadhyay, Pleader, that the High Court have no objection to two or more pleaders of the Mufusil Courts starting a joint office for the conduct of their professional business on the lines adopted by the Attorneys and Solicitors of this Court.

I have &c.

(Sd.) H. T. CULLIS,

Registrar.

Review.

A DIGEST OF THE LAW OF AGENCY. *By William Bowstead, Bar-at-Law. Fifth Edition. Price 18s. Sweet & Maxwell Ld., London.*

The plan of this work resembles to a certain extent that of the Indian enactments. For instance under the heading of Liabilities of Agents to their Principal, the law is stated in the form of general propositions and the cases bearing on the question are given by way of illustration. In the present edition all the recent cases bearing on the subject have been inserted under appropriate headings. This has enhanced the usefulness of this already well-known work. But we think that there is yet a scope for adding a few notes dealing especially with unauthorised acts of agents and the circumstances under which a principal may repudiate agent's acts done in excess of his authority. It is necessary in this connection to set out the limitations of any implied authority. It is not unoften that implied authority is contended for by third parties in the face of the agent's power being well defined in writing by the principal. The question of onus or presumption in such cases is of considerable importance. We also think that questions relating especially to Limited Liability Companies and the unauthorised acts of their secretaries, managers and other agents deserve special treatment.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM SHANGHAI.]

LORD MACNAGHTEN. LORD ATKINSON. LORD SHAW. LORD MERSEY. 1912, 17, May.	E. D. SASSOON & CO. *v.* THE WESTERN ASSURANCE CO.

"Perils of the sea," meaning of, explained—Difference when the words are used in a policy on goods from that in a policy on ship.

This was an appeal from a judgment of His Majesty's Supreme Court for Shanghai, dismissing the Plaintiffs' claim.

The facts of the case are as follows:—The Plaintiffs were the owners of a wooden hulk moored in the river Whangpoo, which they used as a store. In this hulk they placed some opium on which they effected an insurance with the Defendants against marine risks. The policy was a time policy running from the 6th July to the 6th August 1908. On the 20th July the hulk sprang a leak and the opium was damaged by the percolating water. The leak was wholly due to the rotten condition of the hulk. The condition of the hulk was unknown to the Plaintiffs, the weak place being covered up by some copper sheathing. In these circumstances the Plaintiffs brought their action. The Defendants denied that the damage to the opium was by the perils insured against.

The risks covered by the policy were "perils of the sea and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods." It was contended on the Plaintiffs' behalf that the loss was due to a "peril of the sea." The learned Judge held that the damage was not due to a sea peril at all, but was solely due to the weakness of the hulk and he thereupon dismissed the action. On the present appeal their Lordships were of opinion that the learned Judge was right. In the course of their judgment which was delivered by LORD MERSEY they said:—"There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea. Although sea water damaged the goods, no *peril* of the sea contributed either proximately or remotely to the loss. There is ample authority for so holding, but it is sufficient to cite the judgment of Lord Herschell, in *The Xanthe* reported in 12 App. cases where he says (at p. 509):—"I think it is clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear."

An attempt was made during the argument to attribute a different meaning to the expression "perils of the sea" when used in a policy on goods from that which it bears when used in a policy on ship: but no authority was cited for the distinction nor would it be right in principle to make any such distinction. In the case above cited an attempt was made to draw a distinction between the meaning to be given to the words when used in a bill of lading and in a policy of insurance, but Lord Herschell said "It would in my opinion be very objectionable unless well settled authority compelled me to give a different meaning to the same words occurring in two maritime instruments."

"In this case the damage though doubtless proximately due to sea water was not in any sense due to sea peril. It does not therefore fall within the policy."

B. D. *Appeal dismissed with costs.*

[PRIVY COUNCIL.]

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.

1912,
2, May.

BRIJ LAL, since deceased (now represented by RAM BHAROSE) and ors., Appellants,
v.
SURAJ BIKRAM SINGH, Respondent.

Will—Construction—Hindu Law—Bequest of estate to daughter-in-law—Legatee to remain in occupation of the property "just like myself," and appoint an "heir"—Estate given if life estate or absolute interest.

A testator executed a Will which provided that after his death his widow, legatee No. 1, would remain in possession of his properties with all sorts of powers "just like myself," and on her death, his widowed daughter-in-law, R., legatee No. 2, would remain in possession and occupation of the entire property "just like myself and legatee No. 1," and the latter was invested with the power of appointing an "heir" either in her lifetime or by Will:

Held—***That on the death of the testator's widow, the daughter-in-law did not take an absolute estate in the properties left by the testator.***

The word "heir" meant "heir to the testator."

These were two Consolidated Appeals from two judgments and decrees of the Court of the Judicial Commissioner of Oudh, which set aside two decrees of the Subordinate Judge of Tahsil Biswan, in the District of Sitapur in Oudh, passed in favour of the Appellants.

The question for decision in the appeal depended upon the construction of the last Will of one Narpat Singh, dated the 11th July 1893.

The appeal had arisen out of the following circumstances :—

The village in dispute, named Ingaon, belonged to Narpat Singh who died on the 2nd February 1894.

On the 11th July 1893, he had made a Will under which one Rani Brij Nath Kuar, the widow of a nephew of his, obtained possession of the village, and on her death the Respondent was placed in possession of it. The material provisions of the Will were the following :—

"After my demise my wife Musammat Sheolagan Kuar, the legatee No. 1, will remain in possession of the above-mentioned property with all sorts of powers like myself, that after the death of my wife, my daughter-in-law, Musammat Rani Brij Nath Kuar, wife of Rana Raghuraj Singh, deceased, the legatee No. 2, will remain in possession and occupation of the entire property mentioned above—just like myself and the legatee No. 1. . . . . I do hereby execute . . . . an instrument of Will in her favour which I am going to have also registered, so that after my demise and that of my wife the estate and the names and vestiges of my ancestors may continue to endure, even as they have existed in times past and do exist at present, and so that she may perform my funeral ceremonies as well as those of my wife according to the Hindu religion and custom of the caste in the same way as Rana Raghuraj Singh, deceased, himself would have done; that thereafter she will have power to nominate any one whom she thinks fit as an heir, so that the (good) name of the family may continue to flourish with fame, in the same way as in times past and up to the present day."

After the death of Rani Brij Nath Kuar, the Appellants obtained two simple money decrees against her assets and, on the 25th

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July 1906, they instituted the present proceedings by filing two applications for execution of the two decrees in the Court of the Subordinate Judge.

In these applications the decree-holders prayed that the amounts of the two decrees with future interest and costs might be realized with costs of execution by attachment and sale of the village in dispute.

In reply to the applications, the judgment-debtor, the present Respondent, objected to the attachment on the ground that the possession of Rani Brij Nath Kuar was that of a Hindu widow only and that the property attached could not be sold to satisfy decrees for sums of money personally due from her.

The decree-holders filed a reply to the objections of the judgment-debtor, and with reference to the allegations of the parties, the Subordinate Judge framed the following issue for trial in both cases which were heard together: "Whether Rani Brij Nath had a full and absolute interest in the property in dispute?"

On the 12th February 1907, the Subordinate Judge delivered his judgment. He held, in effect, that the Will of Narpat Singh conferred an absolute estate in favour of Rani Brij Nath Kuar, and as such, the property in suit was liable to be seized in execution of the decrees of the decree-holders. The Subordinate Judge, therefore, recommended the sale of the property and on the 3rd April 1907 sanction for such sale was given by the Commissioner.

The judgment-debtors appealed, and the Judicial Commissioner allowed the appeals holding that she had only a life-estate. Mr. Chamier in the course of his judgment said :—

"The testator confers upon Brij Nath Kuar a power to nominate an heir (*waris*). The passage cannot possibly mean that she should nominate an heir to herself, the word *waris* obviously means an heir to the testator. This power could not have been required if Brij Nath Kuar was to take a heritable estate and to have power to nominate an heir to herself.

"The words used with reference to both the women (*qabiz-o-mutsarrif*) (one who possesses and one who spends or enjoys) do not by any means indicate an intention to confer a transferable estate. The notion that a woman should have a transferable estate and be able to divert the estate to her own family is positively repugnant to the Hindu mind and the soundness of the decisions which lay stress upon this is to my mind beyond question.

"It is unnecessary to observe that the word *dakhil* used with reference to Brij Nath Kuar means no more than *qabiz*. It denotes possession only.

"Counsel for the Respondents laid stress upon the words *mai jami ikhtiarat* (with all power or authority). In the first place they are used with reference to Sheolagan Kuar so that if they denote a transferable estate there was nothing left for Brij Nath Kuar. Next full effect can be given to these words without construing them as importing a transferable estate, and lastly this must be read with the context.

"It is noticeable that the testator does not say that either of the ladies is the *malik* (proprietor). The whole Will seems to work up to the nomination of an *heir* obviously a male heir by Brij Nath Kuar who, he assumed, would survive both Sheolagan Kuar and himself.

"In my opinion there can be very little doubt that the testator did not intend to confer a heritable estate upon either of the ladies."

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Hence this appeal.

Mr. K. Brown for the Appellant submitted that the lady had an absolute estate under the Will. She had power to appoint any person as her heir. He relied on *Shumsool Hooda* v. *Sheuwuk Ram* (1) and *Hoy* v. *Master* (2).

Messrs. L. DeGruyther, K. C., and Ross for the Respondent were not called upon to reply.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—This is a simple case. The only question is whether the daughter (?) took an absolute estate or an estate for life?

In the first place, there is no estate at all given to the lady, in terms. The only direction is that she is to remain in possession and occupation of the property, and then she is invested with the power of appointing an heir either in her lifetime or by Will. It seems to their Lordships that the word "heir" in that clause means heir to the testator and that the judgment of the Judicial Commissioners is perfectly right.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed, and with costs.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Respondent.

B. D. *Appeal dismissed with costs.*

(1) L. R. 2 I. A. 7 (1874).
(2) 6 Simon. 568 (1834).

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 118 OF 1911.

CHAUDHURI, J.
1912,
2, April.

B. E. M. RODRICKS
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

State Railway, suit for damages against, by servant, if may be brought against the Secretary of State for India in Council—Jurisdiction, High Court, Calcutta—Cl. 12, Letters Patent, Calcutta High Court (1865), leave to file plaint under, if Defendant may question propriety when once granted—Secretary of State for India in Council, if a Body Corporate and if represents Government of India in all suits maintainable against Government—Sec. 65 of 21 & 22 Vict., c. 106—Government carrying on business for State purposes, where may be sued—Railway Company, if a a person carrying on business and where suit may be brought against it—Decision of a Bench of two Judges sitting on Original Side, if binding on a single Judge.

A servant of the Eastern Bengal State Railway was prosecuted at Rungpur on a charge of criminal breach of trust which resulted in his acquittal. He thereupon filed a plaint claiming damages for false and malicious prosecution against the Secretary of State for India in Council in the Calcutta High Court in which he craved leave under cl. 12 of the Letters Patent of the High Court (1865) for the institution of the suit in the said Court and the Court granted such leave:

Held—*That as the cause of action had arisen wholly outside the jurisdiction of the Calcutta High Court the leave was not properly granted and that the fact of the leave having been granted did not preclude the Defendant from questioning the jurisdiction of the Court at the trial.*

Under sec. 65 of 21 & 22 Vict., c. 106, the Secretary of State in Council is a Body

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Corporate for purposes of a suit and as such represents the Government of India in such suits as may be maintained against the Government. By 21 & 22 Vict., c. 106, such right of suit as individuals had against the East India Company were continued as against the Secretary of State.

A Railway Company is a "person" "carrying on business" within the meaning of sec. 12 of the Letters Patent and it may be sued at the place of its principal office where the directors meet and the general business of the company is transacted or the brain power of the business is.

A Government may be presumed to dwell in its own capital and a Government engaged in trades, though it may be for purpose of the State, carry on business there.

DOYA NARAIN TEWARY *v.* SECRETARY OF STATE FOR INDIA (1) *dissented from. The judgment of Pigot, J., in* BIPRO DAS DEY *v.* THE SECRETARY OF STATE FOR INDIA (2) *approved,*

Held—*That the former being the decision of two Judges sitting on the Original Side presumably upon a reference by one of the Judges sitting singly on the Original Side the decision is binding on a single Judge so sitting.*

The facts of the case stated in the judgment are sufficient for the purposes of this report and the argument of counsel is also sufficiently noticed therein.

Mr. N. Sirkar for the Plaintiff.

Mr. Kenrick, K. C, Advocate-General, for the Secretary of State.

The JUDGMENT OF THE COURT was as follows:—

CHAUDHURI, J.—The Plaintiff in this suit seeks to recover the sum of Rs. 10,000 by way of damages for a false and malicious prosecution, said to have been conducted against him in the District of Rungpur, in which he says he was falsely accused of criminal breach of trust in respect of certain articles belonging to the Eastern Bengal State Railway when he was employed as a servant of the Railway. He states that the criminal proceedings terminated in his acquittal, that such proceedings were taken maliciously and without reasonable or probable cause, and claims to be entitled to judgment against the Secretary of State for India in Council, for damages. It has not been argued before me, whether or not such a suit is maintainable against the Secretary of State for India in Council, the only point urged being that this Court has no jurisdiction under the Charter to entertain it. The argument on both sides has also proceeded upon the basis, that the whole of the cause of action in this suit arose outside the local jurisdiction of this Court. I find, however, from the 9th paragraph of the plaint that the Plaintiff asked for leave under cl. 12 of the Letters Patent "to safeguard himself against any contention" that part of the cause of action arose outside Calcutta. I find also from an endorsement on the plaint that such leave was granted by a learned Judge of this Court then sitting on the Original Side. I do not, however, find anything in the plaint upon which such leave could have been granted. It may be there are facts which have not been fully set out in the plaint upon which the Plaintiff could have legitimately asked for such leave, but as the matter now stands, I must hold that leave under cl. (12) was not rightly granted and the Secretary of State for India in Council cannot be bound by the leave so given. The order

(1) I. L. R. 14 Cal. 256 (1886).
(2) I. L. R. 14 Cal. 262n (1885).

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was made in his absence, and he can, undoubtedly, question it. As I have said before, the argument has proceeded on the basis that no part of the cause of action in this suit arose within the local limits of our jurisdiction. The learned Advocate-General contends that this Court has no jurisdiction to try an action of this character against the Secretary of State for India in Council, the cause of action having arisen wholly outside our local jurisdiction. He says that unless it can be shown in cases like this, that the Secretary of State for India in Council is a person who dwells, or carries on business, or personally works for gain within the local limits of Calcutta, this Court cannot try a suit instituted against him, and relies upon *Doya Narain Tewary* v. *The Secretary of State for India in Council* (1). That case was decided by two Judges sitting on the Original Side of this Court composing a Bench constituted by the then Chief Justice on the 10th August 1886. There were three other similar cases which were referred to the same Bench for disposal, in all of which the Secretary of State for India in Council was Defendant. The Bench was so constituted, I take it, upon a reference by one of the Judges who was then sitting on the Original Side of this Court under r. 54 (Original Side), although I have not been able to find the order of reference. There is no doubt that the case of *Doya Narain Tewary* (1) is direct authority for the proposition that no such suit is maintainable. The learned Judges there hold that the Secretary of State for India in Council does not dwell within the local jurisdiction of this Court, or carry on business, or personally work for gain. In so deciding the learned Judges discussed the decision of Mr. Justice Pigot in *Bipro Das Dey* v. *The Secretary of State for India in Council* (2). Pigot, J., had taken a directly opposite view. He held that such a suit was maintainable. He held further that if the Secretary of State for India in Council in this country was a legal person in any sense, he could not possibly hold that he did not carry on business in Calcutta. So far as I am concerned, I am bound by the decision of the two learned Judges, Mitter and Trevelyan, JJ., who constituted the Bench to whom the matter was referred, but as I am not convinced in my mind that the decision is correct, I state my reasons. However differently the word "business" may have been construed at different times, I do not think there is any question whatever that a carrier's business is "business" within the meaning of sec. 12 of the Letters Patent, nor is there any doubt that a Railway Company, or other Corporate Body, or even a body of individuals, whether incorporated or not, is a "person" within the meaning of that section. See the definition of the word "person" in the General Clauses Act, 1897. It cannot also be doubted that a Railroad Company, apart from the fact of having a Registered Office, "carries on business" at its principal office where the directors meet and the general business of the Company is transacted. Jessel M. R. in *Erichsen* v. *Last* (3) said that where the "Brain Power" is, there a trade or business is carried on. The question therefore is as to whether the Secretary of State for India in Council, is a "person" within the meaning of sec. 12 of the Letters Patent, and if so, does that

(1) I. L. R 14 Cal. 256 (1886).

(2) I. L. R. 14 Cal. 262n (1885).

(3) 51 L. J. Q. B. 86; 8 Q. B. D. 414 (1881).

"person" carry on business in Calcutta, which at the time of the institution of this suit was the capital of the Government of India.

I shall therefore first consider the position of the Secretary of State for India in Council as a Defendant in suits. In order to understand the position of the Government in this country, it is necessary to refer to certain old Acts. At the time that 21 Geo. iii, C. 70, and 37 Geo. iii, C. 142 were enacted the Governor-General, the Governors of Bombay and Madras and their Councillors were servants of the East India Company, and it was necessary to protect them by special enactments from suits on account of things done by them in the exercise of their *quasi*-political functions. By Statute 3 and 4 Wm. iv, C. 85, the trading capacity of the Company was abolished except as to such trade as was necessary for purposes of the State. By 21 and 22 Vic., c. 106, the Government was transferred from the East India Company to the Crown. Sec. 65 of that Statute provides as follows:—"The Secretary of State in Council shall and may sue, and be sued as well in India, as in England by the name of the Secretary of State in Council as a Body Corporate; and all persons and Body Politic shall and may have and take the same suits, remedies and proceedings, legal and equitable against the Secretary of State in Council of India as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company." By the words of the Statute a clear right of suit is given against the Secretary of State for India in Council as a Body Corporate. Mitter and Trevelyan, JJ., however, hold that this section does not constitute the Secretary of State for India in Council a Body Corporate. Perhaps not so for all purposes, but it is quite clear that they were constituted a Body Corporate for purposes of suits, and as such represents the Government of India in such suits as may be maintained against the Government. Sir Richard Garth in *Judah* v. *The Secretary of State for India in Council* (4) says "it seems to me that since the Statute 21 and 22 Vic, c. 106, the Secretary of State for India in Council represents the Government here to all intents and purposes. He is the officer of the Crown authorized to sue and be sued in respect of all Crown debts and contracts." On p. 452, he says "sec. 1 of that Act deals only with the manner in which suits are to be brought and has nothing to do with substantive rights. The latter part of the section says nothing as to what rights may be acquired either by the Secretary of State or by the Crown through the Secretary of State, nor as to the nature or character of rights so acquired. It leaves that to be governed by the ordinary principles of law. But with regard to liabilities which may be enforced against the Secretary of State there are express words."

The East India Company was in its origin a Trading Company, which became vested with sovereign powers. There is no question that the Company was liable to suits in respect of acts done in their trading capacity.

(4) I. L. R. 12 Cal. 445 at p. 450 (1886).

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In *Gibson* v. *The East India Company* (5), Chief Justice Tindal distinctly points out that the powers of the East India Company was of a two-fold nature—one political and the other commercial. By 21 and 22 Vict., c. 106 such right of suits, as individuals had against the East India Company, was continued as against the Secretary of State. This was an exceptional enactment. Colonial Governments have been held not to be liable to such suits. They are not subject to any similar provision. See *Sloman* v. *The Government of New Zealand* (6).

The East India Company at the time that the Government was transferred from them, had power to carry on trade for purposes of the State. After the transfer such trade has been carried on by the Government of India in this country, and as pointed out by Pigot, J., in the case of *Bipro Das Dey* v. *The Secretary of State for India in Council* (2), the Government is a frequent litigant in the Indian Courts, in respect of matters arising out of such trade.

The Secretary of State for India in Council cannot in this country claim on behalf of the Crown the prerogative of immunity from suits. As is pointed out in the *Secretary of State for India in Council* v. *Hari Bhanji* (7) that two principles regulate the maintenance of proceedings at law by a subject against the Sovereign—the one, having a relation to the personal status of the Defendant—the other, to the character of that in respect of which relief is sought. In England the form of procedure permitted to a subject who considers himself aggrieved by an act of the Crown, is by petition of rights. In this country the Crown has consented to submit some of its acts to the jurisdiction of the Municipal Courts. It is not necessary in this case to discuss the nature of the acts for which Government can be sued in our Courts. The Defendant concedes for the present, that such a suit as this is maintainable against the Government. I am, therefore, of opinion that for purposes of such a suit the Secretary of State for India in Council is a *Body Corporate* and a person within the meaning of cl. 12 of the Letters Patent.

Just before the Letters Patent of 1862, the first Civil Procedure Code (Act VIII of 1859) had come into operation so far as the Mofussil Courts were concerned. Sec. 5 of that Act dealt with the jurisdiction of those Courts. In that Act there was no provision as to how the Government might sue or be sued The Civil Procedure Act of 1877, Chap. 27, sec. 416, introduced the provision which we now find in sec. 79 of our present Code. It laid down that suits against the Government were to be instituted in the name of the Secretary of State for India in Council. The Secretary of State for India in Council, therefore, is more than a "mere name." He is for purposes of suits to be treated as a "person," and represents the Government. The learned Advocate-General referred me to Ilbert's Government of India (2nd edition), pages 176-177, which does not help to decide the point. I notice that on page 146 the learned author says this; "the office of the Secretary of State is constitutionally a unit, though there are five officers." Reference was made by the learned Judges in *Doya Narain Tewary's* case (1) to

(2) I. L. R. 14 Cal. 262n (1885).
(5) 5 Bingh. N. C. 273 (1839).
(6) L. R. 1 C. P. D. 563 (1876).
(7) I. L. R. 5 Mad. 273 (1882).

(1) I. L. R. 14 Cal. 256 (1886).

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Kinlock v. *The Secretary of State for India in Council* (8) in which the Plaintiff sued for an account and distribution of "booty of war" come to the hands of the Secretary of State under a Royal Warrant. It was argued that the Defendant thus became "trustee" and the "booty" was "trust fund." James, L. J., held it was not a trust, and that the Secretary of State for India in Council (the name by which the Government can be sued) was not a person capable of being *trustee*, because according to that learned Judge the Government of India was not capable of being the trustee of such a fund. The property in that case had vested in the Crown, and was to be distributed by the servants of the Crown according to the Crown's directions, and that therefore no Municipal Court had jurisdiction to entertain the suit. The observations made in the course of the judgment refer to the matter which was before the Court of Appeal and cannot be considered of general application. To hold that where suits are actually maintainable against the Secretary of State for India in Council that he is a "mere name," I consider erroneous. He is a "Body Corporate" in such a suit according to the express words of the Statute. If, however, the Secretary of State for India in Council is a "mere name" it is quite clear that a name can never be said to "dwell" anywhere or "carry on business." It is also clear that a "mere name" can do nothing. The name cannot sue or be sued, nor can there ever be a cause of action against a mere name, but as I hold it is not, I shall consider whether the Secretary of State for India in Council who is "legal person" in such suits, can be said to dwell in Calcutta, or carry on business there. It seems to me difficult to say that the Government does not dwell in its own capital, and that a Government engaged in trades, though it may be for purpose of the State, does not "carry on business," if Sir George Jessel is right that where the "Brain Power" is, where a trade or business is carried on. That the Brain Power of the Government of India is at its seat of Government, is not an unjustifiable assumption. I would have had, therefore, no hesitation in holding that the Secretary of State for India in Council, namely, the Government, dwells at its capital and carries on business there, and is thus amenable to the jurisdiction of this Court, in cases where a suit can be maintained against the Government.

I have gone through the cases referred to by Mr. Justice Pigot in his judgment, and I may say I generally agree with the view expressed by him. In the case of the *Peninsular & Oriental Steam Navigation Co.* v. *The Secretary of State for India in Council* (9), the question has been elaborately discussed. The learned Judge points out that there are several cases decided in our Courts against the Secretary of State in spite of the ruling in *Rundle* v. *The Secretary of State for India in Council* (10). The observations in that case were made for the guidance of the profession and are *obiter*. About the same time the Madras Court in the case of *Subbaraya Mudali* v. *The Government* (11) took a different view, after which came the cases of *Brito* v. *The Secretary of State for India* (12), in which the question of jurisdiction does not appear to have been raised, *Hari Bhanji* v. *The*

(8) L. R. 15 Ch. D. 1, 6 (1880).

(9) Bourke Rep. Pt. VII, 166 : S. C. 5 Bom. H. C. R. App. 1 (1861).

(10) 1 Hyde. 37 (1862).

(11) 1 M. H. C. R 286 (1862).

(12) I. L. R. 6 Bom. 251 (1881).

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Secretary of State (13) and *Secretary of State for India* v. *Hari Bhanji* (7). *Rundle* v. *The Secretary of State for India in Council* (10) was cited during argument but was not commented upon in the judgment. It appears that in spite of the decision in *Rundle* v. *The Secretary of State for India in Council* (10) the other High Courts continued to exercise jurisdiction over the Secretary of State. This Court also did the same in the case of *Ross Johnson* v. *The Secretary of State* (14), although how it came to do so in direct conflict of the decision in *Rundle* v. *The Secretary of State for India in Council* (10) is not clear. See also Hukumchand's Civil Procedure Code, page 319, where the references are collected. I may also refer to *Doss* v. *The Secretary of State for India in Council* (15), see page 535, in which Sir R. Malins V. C. allowed the demurrer, one of the grounds being that the Plaintiff was a resident of India and the Secretary of State "was also in India." Reference was made, during the argument in that case, to *Re Holmes* (16) in which a demurrer was allowed on the ground that the Queen was as much "resident" in Canada as in England.

Having regard to what I have said before and with great respect to the learned Judges who decided the case of *Doya Narain Tewary* v. *The Secretary of State for India in Council* (1) I venture to dissent from the views therein expressed, but as I hold that I am bound by the decision of a Bench so constituted I must hold that this Court has no jurisdiction. The suit will accordingly be dismissed with costs, unless the Defendant will consent to waive costs.

Advocate-General.—I am not in a position to consent.

THE COURT.—Then the costs must be paid by the Plaintiff.

Messrs. B. N. Bose & Co., Attorneys for the Plaintiff.

Honble C. H. Kesteven, Attorney for the Defendant.

Suit dismissed.

(1) I. L. R. 14 Cal. 256 (1896).
(7) I. L. R. 5 Mad. 273 (1882).
(10) 1 Hyde 37 (1862).
(13) I. L. R. 4 Mad. 344 (1879).
(14) 2 Hyde 153 (1864).
(15) L. R. 19 Eq. 509, see p. 535 (1875).
(16) 2 J. & H. 527 (1861).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 232 OF 1909.

MOOKERJEE, J. CARNDUFF, J. 1911, Heard, 26 and 27, July. Judgment, 1, August.

KISHAN PROSAD SINGHA and others, Defendants, Appellants, *v.* PURNENDU NARAIN SINGHA and others, Plaintiffs, Respondents.

Broker's commission—Authority "to raise loan" on security of immoveable property—Broker, if entitled to commission on finding capitalist, when latter insists on a margin of security not proposed or agreed to by borrower—Construction of contract—Broker if must find funds or only capitalist—English rules of construction, artificial, if to be applied here—Time, when essence of contract —Quantum meruit *for services, if may be claimed when no case established under contract as expressed.*

The Defendants being urgently in need of money to save their property from sale executed the following letter of authority in favour of the Plaintiffs :

" We authorise you to raise a loan of 11 lakhs (or less, if so required) to clear all our present debts on mortgage of our entire estate at an interest of 7 per cent. per annum within the period of one month. We agree to pay you a commission of 5

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per cent. on such amount as may be advanced by the capitalist to us . . . ."

The Defendants did not state what the value of the security was, but the Plaintiffs on their own responsibility represented to the capitalist whom they found that the value of the property would be not less than 20 lakhs, and the capitalist insisted upon satisfactory proof that there was that margin of security before he would agree to make the advance. The negotiation with the capitalist having for this reason fallen through, the Plaintiffs sued for recovery of the stipulated commission :

Held—*That upon a construction of the contract that the stipulation was not merely to find a capitalist ready and willing to advance the money but also to procure funds for the satisfaction of the debts of the Defendants.*

That even assuming that the Plaintiffs undertook only to find a person ready and willing to advance the money, they had not done so, as the capitalist whom they found imposed a condition as to the margin of security never proposed or accepted by the borrowers, and at no stage of the negotiations was he ready to accept the estate as it stood as security for the loan, i.e., *to advance the funds on the terms prescribed by the principal.*

Held also—*That time was, in the circumstances, of the essence of the contract, and no case had been made out of an extension of time by continuation of* bonâ fide *negotiations for completion.*

Quære—*Whether an implied contract, to pay the agent a* quantum meruit *for his services could be presumed when there was an express contract upon which the Plaintiff's case failed.*

Held, *that no such case having been made by the Plaintiffs, and no evidence given to show upon what scale remuneration could be calculated* quantum meruit *no relief could be granted on that basis.*

Quære—*Whether the technical meaning ascribed to the expression "to raise a loan" in English cases, implying that the agent who is engaged "to raise a loan" discharges his duty as soon as he finds a creditor who is able and willing to advance money, should be imported in the interpretation of contracts in this country.*

Held—*That where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquires no benefit from his services, and, except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed falls through, provided it does not fall through in consequence of any act or default of the agent.*

This was an appeal preferred on the 28th of May 1909 against the decree of Babu Umesh Chandra Sen, Subordinate Judge, 1st Court of Zillah Patna, dated the 21st of January 1909.

The material facts will appear from the judgment.

Babus Umakali Mukherjee and *Chandra Sekhar Prosad Singh* for the Appellants.

Babu Nares Chandra Sinha for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal is directed against a decree in a suit for recovery of money due on a brokerage contract. On the 17th April 1904, three persons, by name Kashi Prosad, Krishna Prosad and Ram Chandra

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Prosad, executed a letter of authority in favour of two persons, Harendra Narain and Purnendu Narain, in the following terms :—

"We authorise you to raise a loan of eleven lakhs (or less, if so required) to clear all our present debts on mortgage of our entire estate at an interest of 7 per cent. per annum within the period of one month. We agree to pay you a commission of 5 per cent. on such amount as may be advanced by the capitalist to us. In case the loan succeeds we further agree to appoint Babu Harendra Narain Singh our Manager, on an initial pay of Rs. 200 a month rising to Rs. 400 as funds permit."

On the day following the agents authorised one Troilokhya Nath Chatterjee as their sub-agent to act for them in this transaction :—"We are authorised by the agreement of Rai Kashi Prosad Singh, Rai Krishna Prosad Singh and Rai Ram Chandra Prosad Singh, dated the 17th April 1904, in our favour to appoint you as a broker to raise a loan of eleven lakhs or less for the said Rai Shaheb, at an interest of 7 per cent. per annum. You are to raise the loan within one month, you will get a commission of 2 per cent. for yourself, and the balance you (we ?) may divide just as you (we ?) like. The Rais will soon hand you a statement showing that the annual income of the properties to be mortgaged is not less than a lakh of rupees. The valuation of the properties is not less than twenty lakhs."

Before we proceed further, it is desirable to observe that there is no evidence to shew that the terms of this agreement between the agents and their sub-agent were ever brought to the notice of the borrowers. On the other hand there is good reason to believe that although the borrowers were awere that a sub-agent had been employed they were not apprised of the terms on which his services had been engaged. It will further be noticed that, although the letter of authority to the sub-agent states that the writers were authorised to appoint a broker the original contract was silent upon this point. It may further be remarked that there is an assertion by the agents that the value of the properties to be given by way of security was not less than twenty lakhs of rupees and that the borrowers would soon furnish a statement of the income which was alleged to be not less than one lakh of rupees a year. There was, however, no statement upon these points in the original contract, and there is no evidence to shew that the borrowers had ever represented that their estate was worth twenty lakhs. The sub-agent, furnished with this authority, entered into n gotiations with a firm of bankers of this City, and one of the officers of the borrowers as also Harendra Narain came down to Calcutta to assist in the completion of the transaction. The capitalists, as might have been anticipated, insisted upon satisfactory proof of the value of the security, and Harendra, as also the officer of the borrowers was for a considerable time engaged in the preperation of a statement of the assets of the estate. Meanwhile the period of one month specified in the letter of authority of the agents and of their letter to the sub-agent expired. The borrowers, however, were in a situation of considerable embarrassment as a portion of their estate was about to be sold in execution of a decree held by one of their creditors in the Monghyr Court to the extent of two and a half lakhs of rupees. To save the properties from the impending sale,

was a matter of pressing and paramount necessity. This was fully realised by the agents, and they endeavoured to obtain from the capitalists the sum needed even before the negotiations with them had been brought to a completion. But the capitalists were inexorable and would not part with their money unless Purnendu Narain and Gajadhar Prosad, both leading members of the Patna Bar, consented to stand as surety. This they declined to do. Purnendu Narain about this time on the 19th May 1904 sent a letter to one of the borrowers in which it was stated that the capitalists were willing to deposit the whole of the decretal money in Court, and to take two months' time to complete the enquiry and the transaction. Purnendu Narain, however, realised that this could not be done, unless the Subordinate Judge in whose Court the execution proceedings were pending would agree to give time on such deposit. It is not clear, upon the evidence, whether any reply was sent to this letter, there is none in the record; but Ram Chandra Prosad who has been examined in this case states that he replied to the letter to the effect that the loan was not required. The transaction with the capitalists was not completed and on the 27th May 1904 Gajadhar Prosad, on behalf of the intending borrowers, telegraphed to Purnendu Narain who was apparently then in Calcutta that he had accepted the terms of the Maharaja of Darbhanga. It has been stated to us that, as a matter of fact, the transaction with the Maharaja of Darbhanga also fell through and that the borrowers were ultimately obliged to place their creditor in possession of their estate for a term of years, so as to enable him to satisfy his dues from the usufruct. The substance of the matter therefore was that nothing came of the negotiations with the Calcutta capitalist and they must be taken to have been discontinued after the 27th May 1904. On the 27th May 1907, that is on the last day for the institution of a suit for recovery of money due on the contract of agency, Purnendu Narain and the infant sons of Harendra Narain who had meanwhile died commenced the present action for recovery of Rs. 28,000 from Kishen Prosad, Ram Chandra Prosad and the infant son of Kashi Prosad who had also died in the interval. The infant sons of the second Defendant, Ram Chandra Prosad, were also joined as parties Defendants, but it is difficult to appreciate how any claim could be put forward against them even with the least show of plausibility. The plaint recites that the Plaintiffs were entitled to receive Rs. 55,000 as brokerage on the contract of the 17th April 1904, but that as the Defendants were in straitened circumstances the claim was limited to Rs. 28,000. The Defendants resisted the claim substantially on the ground that the Plaintiffs had not earned the remuneration and that they had not performed their part of the agreement within the time specifically prescribed. The Subordinate Judge laid down four issues of which the first and the fourth were of a fundamental character, namely, *first*, whether the agreement between the parties was that the Plaintiff should merely find out a capitalist within one month or raise the amount wanted, and, *fourth*, whether time was of the essence of the contract, and whether the Plaintiffs performed their part of the contract within the time fixed. The Subordinate Judge answered those questions in favour of the Plaintiffs and as Purnendu Narain stated that he did not want any money out of

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the amount claimed for his own sake, the Subordinate Judge made a decree for Rs. 14,000 in favour of the other two Plaintiffs, the sons of Harendra Narain. The Defendants have now appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed on two grounds, namely, *first*, that upon a true construction of the agreement of the 17th April 1904 the agents undertook not merely to find a capitalist but the money itself, and, *secondly*, that time was of the essence of the contract. These positions have been strenuously controverted on behalf of the Plaintiffs-Respondents and the learned Vakil who has appeared for them has further argued in the alternative that if the Respondents cannot succeed in their contention, a decree should be made in their favour for compensation for the labour and expense they had undergone in the course of their negotiations with the capitalists.

In support of the first contention of the Appellants it has been argued that the plain meaning of the contract is that the agents should find the money and not merely a capitalist. It has been pointed out that the borrowers were deeply embarrassed, their creditors were pressing hard in all direction, and what was urgently needed, as was well-known to Purnendu Narain himself, was not merely a capitalist but actual money to save the Defendants from the peril of an execution sale which had been already proclaimed. In answer to this argument, it has been contended by the learned Vakil for the Respondents that the expression "to raise a loan" has a well-known technical meaning and that the agent who is engaged to raise a loan discharges his duty as soon as he finds a creditor who is able and willing to advance money. In support of this proposition reliance has been placed upon the cases of *Green* v. *Lucas* (1), *Prickett* v. *Badger* (2) and *Fisher* v. *Drewett* (3). These cases are authorities for the proposition that if the person proposing to negotiate a loan brings the principals together and if nothing remains for him to do, he is entitled to his commission. It must be remembered however that at least on one occasion dissatisfaction was expressed by a learned English Judge with this rule of construction. In *Fuller* v. *Eames* (4), Mr. Justice Smith observed that if he had construed the agreement without the authorities of the cases cited [*Roberts* v. *Bernard* (5), *Green* v. *Read* (6), *Green* v. *Lucas* (1) and *Fisher* v. *Drewett* (3)] he might have held that the commission was only to be recovered if the money was actually paid. It is undesirable that a rule of construction should be imported in the interpretation of contracts in this country which is obviously artificial and may very often defeat the true intention of the parties [See *Stokes* v. *Soondernath* (7)]. In the case before us there is the additional weighty circumstance that the agreement which the principals were made to sign was written in English, a language of which they had a very imperfect knowledge. In fact, the agreement had to be explained to them in their vernacular Hindi and Ram Chandra who has been examined, states definitely that he certainly understood that they should pay the commission if the money was actually advanced. He adds that he took the con-

(1) 31 L. T. 731 ; 33 L. T. N. S. 584 (1875).
(2) 1 C. B. N. S. 296 ; 107 R. R. 668 (1856).
(3) 48 L. J. Ex. 32 (1878).
(4) 8 T L. R. 278 (1892).
(5) 1 Cab. and El. 336 (1884).
(6) 8 L. T. 83 (1863).
(7) I. L. R. 22 Bom. 540 at p. 547 (1898).

tract to be that the money should be advanced to them within one month and not merely that a capitalist should be found willing to advance the money. We must express our surprise, in view of the position of one of the agents, that he should have made the principals execute such a contract in a language of which they had a very imperfect knowledge. We are therefore not prepared to accept the interpretation put by the Plaintiffs upon this agreement. But it is not necessary to rest our decision upon this view of the matter, because even if it be conceded that the agents undertook to find a creditor able and willing to advance the money, they did not perform that agreement. It need not be disputed that where the remuneration of an agent is payable upon the performance by him of a definite undertaking he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquires no benefit from his services, and except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed falls through, provided that it does not fall through in consequence of any act or default of the agent. Illustrations of this principle are furnished by the cases of *Green* v. *Lucas* (1) and *Fisher* v. *Drewett* (3). But it is essential, as was pointed out by Mr. Justice Chitty in *In re Salter's claim* (8), that the agent procures a person ready and willing to make the loan on the terms proposed; it is obviously not sufficient that he procures a person willing to negotiate about the matter. Now, in the case before us, the Defendants had granted a letter of authority to the Plaintiffs to raise a loan of eleven lakhs on a mortgage of their entire estate; they did not undertake to find security for twenty lakhs for a loan of eleven lakhs; they were prepared to give their estate as security for whatever it might be worth. But the Calcutta capitalists, with whom the agents and the sub-agent entered into negotiations, were not ready and willing to advance eleven lakhs upon the security of the whole estate, unless its value was established to be twenty lakhs; in other words, the capitalists were not prepared to advance the money on the terms offered by the borrowers; they imposed a condition which was never accepted by the borrowers and which in fact, was introduced by the agents in their letter of authority to the sub-agent entirely on their own responsibility. The position is completely covered by one of the illustrations given by Mr. Justice Chitty in *In re Salter's Claim* (8). The learned Judge observed: "if A. employs B. to procure a loan of £1,000 on his bond, and B. finds C. who says that he is willing to make the advance if A. will pay C.'s solicitor a fee for negotiating the loan to which A. does not agree, the commission is not earned." The same view was affirmed by the Court of Appeal in *Cassingham* v. *King* (9) [See also *Peacock* v. *Freeman* (10)]. The view we take is not inconsistent with the decision in *Elias* v. *Govind Chunder Khatick* (11), which was accepted as good law in *Annaswami* v. *Zemindar of Ayakudi* (12).

(1) 33 L. T. 731; 33 L. T. N. S. 584 (1875).
(3) 48 L. J. Ex. 32 (1878).
(8) 7 T. L. R. 602 (1891).

(8) 7 T. L. R. 602 (1891).
(9) 14 T. L. R. 390 (1898).
(10) 4 T. L. R. 541 (1888).
(11) I. L. R. 30 Cal. 202 (1902).
(12) 1 Mad. W. N. 199; 8 Mad. L. T. 40 (1910).

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There the broker employed to negotiate for a loan of money brought a creditor who was willing to advance the amount and actually placed money in the hands of the Attorney: the transaction, however, fell through by reason of the inability of the borrower to make out his title to the property offered as security. The case of *Mattyrose* v. *Courjon* (13), which followed the decisions in *Prickett* v. *Badger* (2) and *Grogan* v. *Smith* (14), also supports the view we take. In the case last mentioned, Lord Esher made the following observations :—"The agent, in order to earn a commission, was to get a purchaser, an actual purchaser, not, merely a person who might become a purchaser but one who would enter into a binding contract, binding him to purchase the house. It was true that the Plaintiff had an alternative right of action if he could shew that he did obtain a person who was ready and willing to enter into a binding contract, if he could shew that the two parties, vendor and purchaser, were really agreed as to all the terms of the contract, that it was prevented from becoming a binding contract only by reason of the fault or default of the Defendant in refusing to make the agreement valid and binding. This view also receives support from the judgment of their Lordships of the Judicial Committee in *Burchell* v. *Gowrie* (15), where Lord Atkinson stated the rule in the following terms :—"In the words of Erle, C. J., in *Green* v. *Bartlett* (16), if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him, or, in the words of later authorities, the Plaintiff must show that some act of his was the *cause causans* of the sale, *Tribe* v. *Taylor* (17), or was an efficient cause of the sale" [*Millar* v. *Radford* (18). In the same case the learned Judge added an observation from the judgment of Willes, J., in *Inchbald* v. *Western Nilgiri Coffee Co.* (19) :—"I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay, is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it." In the case before us, it is indisputable upon the evidence that the agent never found a capitalist willing to advance eleven lakhs upon the security of the estate. The capitalists brought forward imposed a condition as to the margin of security never proposed or accepted by the borrowers. Under these circumstances, it is impossible to hold that the Plaintiffs ever earned the remuneration claimed by them. The Defendants were, therefore, entitled to repudiate the offer made in the letter of the 19th May 1904. There are two other circumstances in connexion with this branch of the case which deserve special mention. The sub-agent, Troilakhya Nath, in his evidence seeks to make out that another contract by which the estate was to be leased to the capitalists rather than given by way of mortgage was accepted by the borrowers. The plaint, however, is not based on the allegation that the claim was laid for the recovery of compensation for

(2) 1 C. B. N. S. 296; 107 R. R. 668 (1856).
(13) 3 C. W. N clxxviii (1889)
(14) 7 T. L. R. 132 (1890).
(15) [1910] A. C. 614.
(16) 14 C. B. N. S. 681 (1863).
(17) 1 C. P. D. 505 (1876).
(18) 19 T. L. R. 575 (1903).
(19) 17 C. B. N. S. 733 (1864).

services in connexion with the alleged substituted contract. Troilakhya Nath also makes assertions as to the progress of the negotiations with the capitalists for the advance of the money. It is a matter for legitimate comment, however, that no one has been examined amongst the capitalists themselves to corroborate this part of the story, and we are not prepared to place implicit reliance upon the assertions of Troilakhya Nath who is admittedly at the root of this litigation and whose evidence as that of a person deeply interested does not always shew a scrupulous regard for truth. Our conclusion, therefore, upon this branch of the case may be summarised in the manner following. In our opinion, the agents undertook not merely to find a capitalist able ready and willing to advance the money but also to procure funds for the satisfaction of the debts of the borrowers ; but even if this interpretation of the agreement be discarded, and if it be assumed that they undertook only to find a person able, ready and willing to advance the money, they have not done so. The capitalists whom they found insisted upon a margin of security which the borrowers had not covenanted to offer, and at no stage of the negotiations were the capitalists ready to accept the entire estate as security for the loan ; in other words no capitalist was found able ready and willing to advance the funds on the terms prescribed by the principals. The transaction was never completed, and the failure could not be attributed to any default on the part of the principals. In fact, Purnendu Narain who had previously employed his son-in-law to survey the properties and ascertain their value, assumed that they were worth twenty lakhs of rupees, but the capitalists were not to be satisfied without full scrutiny and Purnendu Narain found them more exacting than he had anticipated. Consequently, the Plaintiffs cannot be held to have earned the remuneration claimed on account of their unsuccessful effort to negotiate the transaction which they had been employed to negotiate. The first contention of the Appellants must therefore prevail.

In support of the second contention of the Appellants, it has been argued that time was of the essence of the contract, and that whatever interpretation might be put upon the agreement, as it was not carried out within the prescribed time, the Plaintiffs did not earn the remuneration claimed. In our opinion, time was of the essence of the contract in the case before us. The rule of equity, which now is the general rule of English jurisprudence, is to look at the whole scope of the transaction to see whether the parties really meant the time named to be of the essence of the contract, *Lennon* v. *Napper* (20), *Roberts* v. *Berry* (21), *Tilley* v. *Thomas* (22). The same principle is formulated in sec. 55 of the Indian Contract Act. In the case before us, the agents knew, quite as well as the principals, the purpose for which the loan was required ; the creditors of the principals were insistent for payment, and one of them had already obtained the sale proclamation issued for the sale of properties valued at several lakhs of rupees. The sale was to take place early in May, and although the Court might possibly show some indulgence, the matter was of the gravest urgency and importance to the principals. Even if, therefore, no time had been

(20) 2 Sch. and Lef. 684 (1802).
(21) 3 DeG. M. and G. 289 ; 98 R. R. 146 (1853).
(22) L. R. 3 Ch. App. 61 (1867).

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specified for the performance of the contract, the Court would have inferred from its nature and from the surrounding circumstances that time was intended to be of its essence to this extent at any rate that the agents were bound to use the utmost diligence to perform their part of the contract [*Macbryde* v. *Weekes* (23)]. We do not feel any doubt whatever that time was of the essence of the contract, and that the agents were bound to find, not merely a capitalist, but also the money within the time prescribed. This, indeed, is shewn by the letter of Purnendu written on the 19th May 1904 But even if it be assumed that time was not intended to be of the essence of the contract, it had to be performed in a reasonable time, *Houghton* v. *Orgar* (24) and *Nosotti* v. *Auerbach* (25). In the circumstances of the present case, the agreement was not performed even within a reasonable time; of what use would the money be to the borrowers if it was provided after their creditors had sold their estate, which they were so anxious to save? The second contention of the Appellants must consequently prevail.

We may add that the learned Vakil for the Respondents suggested that the time prescribed was extended by the continuance of the negotiation, and he relied upon the cases of *Wood* v. *Bernal* (26), *Webb* v. *Hughes* (27) and *Bruner* v. *Moore* (28). The principle deducible from these cases, namely, that the time originally fixed may be extended by the continuation of *bonâ fide* negotiations for completion has, however, no application to the case before us. There is no reliable evidence to shew that negotiations were continued for the purpose of completion after the expiry of the prescribed date; the presence of the officer of the Defendants at Calcutta did not amount to a continuance of the negotiation. In fact, the letter of Purnendu written on the 19th May 1904 shews that there was no prospect of completion of the agreement within any reasonable time, and all that he was able to offer at that stage was a quarter of the sum required, and even that on condition that the Subordinate Judge agreed to a postponement for another two months. This clearly can be of no assistance to the Plaintiffs.

The learned Vakil for the Respondents finally contended that the Plaintiffs were entitled to receive some remuneration for the trouble they have taken and referred to the decisions in *Companon* v. *Woodburn* (29) and *Simpson* v. *Lamb* (30). The answer to this argument is that no such claim was put forward in the plaint. The Plaintiffs claimed remuneration according to the contract; that case has completely failed. As Lord Justice Lindley observed in *Lott* v. *Outhwaite* (31) in answer to a contention that there was an implied contract to pay the agents a *quantum meruit* for his services, there could be no implied contract where there was an express contract [*Battams* v. *Tompkins* (32), *Barnett* v. *Isaacson* (33), *Martin* v. *Tucker* (34)]. It is not necessary for us, however, to hold that if a special contract is not executed, it can never give rise to a claim for *quantum meruit*. Assume that remuneration for services rendered may be

(23) 22 Beav. 533; 111 R. R. 471 (1856).
(24) 1 T. L R. 653 (1884).
(25) 15 T L. R. 41; 15 T L R. 140 (1899).
(26) 19 Ves 220 (18 2).
(27) L. R. 10 Eq. 281 (1870).
(28) [1904] 1 Ch 805.
(29) 15 C. B 400; 100 R. R. 406 (1854).
(30) 17 C. B. 603; 104 R. R 806.
(31) 10 T. L. R. 76 (1893).
(32) 8 T. L R. 707 (1892).
(33) 4 T. L R. 645 (1888).
(34) 1 T. L R. 655 (1884).

claimed ; but the evidence shews that so far as Purnendu is concerned, he was paid in advance for his visits to Calcutta in connexion with this matter, and it is probable that Harendra also was similarly paid. At any rate, as no evidence has been given to shew upon what scale remuneration could be calculated *quantum meruit*, we cannot make a decree in favour of the Plaintiff on that basis. It follows, consequently, that the claim cannot be supported from any point of view.

The result, therefore, is that this appeal is allowed, and the decree of the Subordinate Judge discharged. The suit will stand dismissed ; the Plaintiffs-Respondents will pay the Defendants-Appellants their costs in this Court, but there will be no order as to the costs in the Court below.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2678 OF 1910.

STEPHEN, J.
D. CHATTERJEE, J.
1912,
18, March.

TARINI KANTA BHATTACHARJEE and anr., Defendants, Appellants,
v.
BHABANI NATH DEY SARKAR, Plaintiff, Respondent.

Lunacy Act (XXXV of 1858), sec. 14—Guardian of lunatic, powers of—Lease, unauthorised, for more than five years if void or voidable—Avoiding a lease, suit if must be brought for.

A lease for more than five years granted by the guardian of a lunatic without the authority of the Court as required by sec. 14 of the Lunacy Act is voidable and not void.

It is not necessary that a suit should be brought to avoid the lease and when the Plaintiff on becoming sui juris *brought a suit for damages in respect of occupation of the land leased, electing to treat the lease as a nullity :*

Held, *that there was sufficient avoidance of the lease.*

This was an appeal from a decision of Babu S. C. Ganguly, Subordinate Judge of Mymensingh, dated the 9th of May 1910, affirming a decision of Babu Jotindra Nath Mookerjee, Munsif of Tangail, dated the 6th of October 1909.

The material facts will appear from the judgment.

Babus Sarat Chandra Roy Chaudhuri and *Ambica Pada Chowdhury* for the Appellants.

Babu Mohini Mohan Chakraverty for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This case comes before us on second appeal. The suit was brought by the Plaintiff on his becoming *sui juris* for damages in respect of occupation of lands by the Defendants.

The Defendants set up an *ijara patta* granted by the mother of the Plaintiff. She purported to grant it as the guardian of the father of the Plaintiff who was a lunatic. It was a lease for more than 5 years and it was not granted under the authority of the Court in conformity with the provisions of sec. 14 of the Lunacy Act (Act 35 of 1858).

The first question that is raised before us is whether this lease was absolutely void as it has been held to be by the lower Appellate Court or whether it was only voidable. We are of opinion that it was only voidable. There is no direct authority on the construction of sec. 14 of the Lunacy Act ; but there are authorities from which the above conclusion may

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be reached with some certainty. Sec. 14 of the Lunacy Act gives certain powers over the lunatic's property to his manager; it then provides that he shall not have power to sell or mortgage the lunatic's property, or to lease it for more than five years without an order of the Court. Sec. 18 of the repealed Guardian, and Wards Act, Act XL of 1858, contained very similar provisions and in *Til Koer* v. *Roy Anund Kishore* (1) and *Sreemati Ahfutunissa* v. *Goluck Chunder Sen* (2), it was held that an alienation wrongly made, without the leave of the Court, was voidable but not void. The new Guardian and Wards Act, VIII of 1890, provides in sec. 29, that a person appointed guardian shall not, without leave, make certain alienations, but provides in sec. 30 that if he does his alienation is voidable. We may thus suppose that the Legislature recognised the principle acted on in the two decided cases as applicable to the repealed Guardian and Wards Act, and did not in the new Guardians and Wards Act supply a defect existing in the old one, as one might suppose to be the case if one looked at the two Acts only. We may therefore safely apply the same principle to the Lunacy Act. In *Umar Churn Mahaldar* v. *Norendra Nath Basu* (3), Mookerjee J., recognised the existence of the principle and applied it to the construction of secs. 14 and 39 of the Court of Wards Act, IX of 1879, B. C., which in view of the difference of the terms of those sections from those of the section under consideration may not be of much consequence but is at least in favour of the view we have expressed. Consequently we differ from the lower Appellate Court which held that the lease was void, but in this case the lease being voidable has in fact been avoided by the Plaintiff, who on becoming *sui juris*, and within the period of limitation which applied to him, brought this suit electing to treat the lease as a nullity.

(1) 10 C. L. R 547 (1882).
(2) 22 W. R. 77 (1864).
(3) 10 C. W. N. 126: s. c. I. L. R. 33 Cal. 278 (1905)

The second objection made on behalf of the Appellants is that proceedings ought to have been taken to set aside this ijara before the suit for damages had been brought. In the view of the case we have first expressed it was not necessary so to do.

We were also desired to remand this case for clear findings upon the questions before it, but having had the facts clearly before us we consider this unnecessary, as a remand would of necessity require the Court below to consider the same matters over again.

The result therefore is that this appeal is dismissed, but as the lower Appellate Court made an error in law which has invited this appeal we make no order as to the costs in this Court.

Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION]

RULE NO. 5454 OF 1911.

BRETT, J.
CURNDUFF, J.
1912,
18, March.

ANANDAMOI CHOWDHURANI,
Plaintiff, Petitioner,
v.
GOKUL CHANDRA ROY,
and others, Defendants,
Opposite Party.

Civil Procedure Code (Act V of 1908), Or. XXV, r. 1, cl. (3)—Female Plaintiff, security for costs from—Suit to recover ornaments or their value if suit for payment of money.

A suit by a lady against the adopted son of her deceased husband and others for a declaration of her title to certain ornaments

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and other moveable properties alleged to have been wrongfully removed from her custody by the Defendants and for recovery of possession of the same and in the alternative for the value of the properties, was a suit for payment of money within the meaning of Or. XXV, r. 1, cl. (3) of the Civil Procedure Code.

DEGUMBARI DEBI *v.* ASHUTOSH BANERJEE (1), SONABAI *v.* TRIBHOWANDAS NAROTAMDAS MALVI (2) *followed.*

This was a Rule granted on the 15th of November 1911 against the order of Babu Sarat Chandra Sen, Subordinate Judge of Dacca, dated the 10th of November 1911.

The facts of the case will appear from the judgment.

Babus Basanta Kumar Bose and *Bepin Chandra Bose* for the Petitioner.

Dr. Rash Behari Ghosh, Babus Harendra Narain Mitter and *Upendra Lall Roy* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The present Petitioner is the Plaintiff in a suit which she has brought against the Defendant No. 1, who is the adopted son of her deceased husband, and certain other persons. The Petitioner sued to have her title declared to, and to recover possession of, certain ornaments and other moveable properties which, she alleged, had been wrongfully removed from her custody by the Defendants and belonged to her and did not belong to the Defendant No. 1. She sought to recover possession of those properties or to obtain a decree for their value which she assessed at about Rs. 98,000. An application was made by the Defendants in the suit under Order XXV, r. 1, cl. (3), C. C. P., for an order from the Court directing the Plaintiff to furnish security for the Defendants' costs in the suit. The Plaintiff in the suit is a woman, and it was alleged that she did not possess any sufficient immoveable property within British India to cover the costs which might be incurred by the Defendants in the suit. It seems that the Plaintiff alleged that she was the owner of certain garden property in Dacca. A suit on a mortgage-bond had been brought against her by her daughter to recover the sum of Rs. 10,000 and, in that suit, on a mortgage of the garden property now claimed by the Petitioner, during the trial of that suit, the Defendant No. 1 intervened and claimed that the garden property was, in fact, his property and that it did not belong to the present Petitioner. The matter was gone into and it was, in the end, determined that the property did not belong to the Petitioner, but that it did belong to the Defendant No. 1. In disposing of the application of the Defendants in the suit brought by the Plaintiff, which application was made under Order XXV, r. 1, C. C. P., the learned Judge of the Court below had to determine whether or not the present Petitioner, the Plaintiff, was possessed of sufficient immoveable property within British India to cover the probable costs of the Defendants in the litigation. The only immoveable property of which she alleged she was in possession was this garden property and the learned Judge, in determining the question whether or not that property belonged to the Petitioner, took into consideration the decision in the suit just referred to which had been brought by the Petitioner's daughter against her. It is true that in dealing with that matter the learned Judge re-

(1) I. L. R. 17 Cal. 610 (1890).
(2) I. L. R. 32 Bom. 602 (1908).

marked that the decision in that case might be treated as having decided the question of the right to the property between the Defendant No. 1 and the Petitioner, and that, therefore, the matter was *res judicata*; but the learned Judge also, in disposing of the matter, said that, on all the evidence adduced as well as on a consideration of the result of that case, he was not satisfied that the garden property belonged to the Plaintiff. As the Plaintiff did not allege that she had any other immoveable property, the learned Judge granted the application and directed that the Plaintiff should furnish security to the amount of Rs. 6,000. Against that order of the lower Court the present Rule was obtained against the Opposite Party to show cause why that order should not be set aside on the ground that it was made without jurisdiction and that the question whether the Plaintiff was possessed of sufficient immoveable property within British India had not been properly tried.

In support of the Rule, the learned pleader who has appeared on behalf of the Petitioner has, first, argued that the learned Judge has no jurisdiction to pass the order directing the Petitioner to furnish security for costs as the suit was not a suit for the payment of money. We are unable to hold that there is any real substance in this contention. In several cases, the facts of which are very similar to the present case, it has been held that a suit like the present, which, though it may not be exclusively for money, will ordinarily result in a decree for money, and the relief sought comes within the purview of sec. 380 of the old Code of Civil Procedure corresponding with cl. (3) of r. 1 of Order XXV of the mended Code. These cases are *Degumbari Debi* v. *Ashutosh Banerjee* (1) and *Sonabai* v. *Tribhowandas Narotamdas Malvi* (2). In our opinion these two cases are sufficient authority for the view which we take that the suit brought by the Petitioner is a suit for the payment of money within the terms of cl. 3 of r. 1 of Order XXV, C. C. P. The learned Judge of the Bombay High Court in the case referred to noticed that attempts were often made in that Court to avoid the applicability of the provisions of sec. 380 of the old Code by introducing into the plaint either a quite unnecessary prayer for some unimportant or useless declaration or a prayer for administration of an estate. The learned pleader who has appeared to oppose the Rule has argued that, in the present case, no declaration of the title of the Plaintiff is really necessary. What she seeks in the suit is to recover the value of certain ornaments and other moveable property on the allegation that they are her property and do not belong to the Defendant No. 1, and that they have been wrongfully removed from her possession by the Defendant No. 1. We are unable to hold that, because a prayer for declaration of her title has been introduced into the plaint the suit is one which does not fall within the provisions of Order XXV, r. 1, cl. (3), C. C. P.

The second point taken by the learned pleader for the Petitioner is that the lower Court erred in law in holding that the decision regarding the title to the garden property in the mortgage suit must be regarded as determining the question raised in the application made by the Opposite Party and that the matter was *res judicata*. Reading the judgment of

(1) I. L. R 17 Cal. 610 (1890).
(2) I. L. R. 32 Bom. 602 (1908).

the lower Court as a whole, we do not think that this point is of much consequence. Under the provisions of Order XXV, r. 1, cl. (3), C. C. P., all that the lower Court had to do was to satisfy itself that the Plaintiff did not possess any sufficient immoveable property within British India and the judgment of that Court shows that, on the evidence, the Judge was satisfied that the Plaintiff was not in possession of the garden property which was the only property which she alleged belonged to her. In these circumstances and having regard to the relationship between the parties and the facts connected with the institution of the suit and the other proceedings during the trial, we are of opinion that the lower Court was fully justified in the order which it passed requiring security from the Plaintiff. The amount required is not also, in our opinion, excessive. It has been argued in opposition to the Rule that the order of the lower Court being an interlocutory order is not one with which this Court should interfere under sec. 115 of the Code. We think that, so far as the present case is concerned, this is certainly not a case in which we should interfere under the provisions of that section; and we also think that having regard to the facts stated and the conclusion at which we have arrived it is not a case in which we should interfere under the power of this Court under the powers of this Court under the Charter.

The result, therefore, is that the Rule is discharged with costs, five gold mohurs.

Let the record be sent down at once.

Rule discharged.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 5688 OF 1911.

HARINGTON, J.
CASPERSZ, J.
1912,
12, April.

SHEOBARUT RAM and others, Plaintiffs, Petitioners,
v.
THE BENGAL NORTH-WESTERN RY. CO. and another, Defendants, Opposite Party.

Railway Company—Goods consigned for carriage—Risk note, Form B—Company absolved from liability in all cases except negligence or dishonesty of its servants—Onus.

Where goods were consigned to a Railway Company for carriage, the contract being embodied in a risk note, Form B, under which, in consideration of the Railway Company accepting a lower frieght the consignor absolved the Railway Company from all liability for loss or damage to the goods, subject, however, to the proviso that the Company would be liable for loss due to wilful negligence on the part of their servants or due to thefts by its servants or agents:

Held—*That the onus lay on the person seeking to charge the Railway Company with damages for loss of goods to show that the case came within the proviso.*

This was a Rule granted on the 23rd of November 1911 against the judgment of Babu Srihari Lahiri, Subordinate Judge of Saran, passed in the exercise of his powers of a Court of Small Causes, dated the 17th of July 1911.

The facts of the case will appear from the judgment.

Babus Dwarka Nath Mitter and *Bejoy Kumar Bhuttacharya* for the Petitioners.

Mr. B. C. Mitter, *Mr. J. B. MacNair* and *Babu Ambica Pada Chowdhury* for the Opposite Party.

SHEOBARUT RAM *v.* THE BENGAL NORTH-WESTERN RY. CO.

The JUDGMENT OF THE COURT was as follows:—

This is a Rule calling on the Opposite Party to show cause why the judgment and decree of the Court below in so far as it dismisses a portion of the Plaintiffs' claim should not be set aside. The suit was one in which the Plaintiffs recovered a decree for Rs. 30 but they claimed to be entitled to a considerably larger amount representing the value of some bags of black pepper and catechu which were consigned to them by their vendor and which were not delivered by the Railway Company. The suit was brought against the Railway Company. The terms of the contract under which the Railway Company carried the goods are to be found in a document headed 'Risk note, Form B.' In that document a special contract limiting the liability of the Railway Company was made. And it was agreed between the parties that in consideration of the Railway Company accepting a lower freight than that which they were entitled to charge the person who consigned the goods would absolve them from all liability for loss or damage to the goods. But then inasmuch as the Railway Company is not in law entitled to divest itself of all liability there was a proviso that the Company would be liable for the loss due to wilful negligence on the part of the Railway Company's servants or due to theft by the Company's servants or agents. The result is, when the Plaintiffs sued on that contract which made the Railway Company *primâ facie* not liable the onus lay on them to show that they came within the proviso: because the contract which they entered into expressly absolved the Railway Company from the liability which was imposed upon them by the ordinary law except under certain particular circumstances in which their liability was preserved. Therefore, to succeed on that contract they were obliged to show that they came within the particular exceptions which were provided against the freedom of the Railway Company from all liability. But they failed to show this and therefore failed in their action.

I am unable to accede to the argument which has been put before us by the learned Vakil for the Plaintiffs that the onus lay on the Railway Company. That would be treating the contract in a way which in my view would be wrong because it would be treating the contract as though it were the converse of what it is.

Then it is said that there is no evidence to justify the learned Judge in coming to the conclusion to which he came. But there was evidence, as appears from the judgment, that the wagon containing these goods was found sealed at Sitarampur, that some time before it came to the next station the goods disappeared and that the guard saw some bags lying on the line. I think the Judge is quite justified in inferring from the evidence that some person got into the wagon and threw out the bags with the intention of stealing them. That being so, the Plaintiffs, to bring their case within the exception, had to prove that this was done by the servants or agents of the Railway Company. This the Plaintiffs failed to do.

The result therefore is that the Rule must be discharged, because in my opinion the judgment of the Court below is right.

CASPERSZ, J.—I agree.

Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 168 OF 1912.

HOLMWOOD, J.
SHARFUDDIN, J.
1912,
7, March.

SIVA SUNDARI CHAUDHRANI and others,
Petitioners,
v.
THE KING-EMPEROR,
Opposite Party.

Indian Penal Code (Act XLV of 1860), sec. 154, responsibility, under, test of—Sentence under, how the amount is to be determined.

A certain naib of an estate got up a riot in order to dispossess certain persons by force. Three ladies having interest in the estate did not themselves do or omit to do any of the things set out under sec. 154, I. P. C., but they were resbonsible for the appointment of the officers under the estate; their adopted sons although they took some share in the active management of the estate were in no way responsible for the appointment of the naib who brought about the riot. On the conviction of the ladies and the adopted sons under sec. 154, I. P. C.:

Held—*That it was impossible to punish in every case under sec. 154, I. P. C., every person who had any interest in the land. The responsibility must depend upon the fact of the person who caused the riot being himself the person who has an interest in the land or an agent or manager of such person.*

That the adopted sons could not be held guilty under sec. 154, I. P. C.

That the liabilities of the ladies were joint, but the case against them being a criminal one separate sentences should be passed against each of them. But in awarding punishment the extent of the responsibility of the estate should be kept in view rather than the number of individuals who are responsible under sec. 154, I. P. C.

This was a Rule granted on the 5th of February 1912 against an order of the Sub-Divisional Magistrate (Mr. C. W. Jacob) of Patuakhali, dated the 31st of August 1911, convicting the Petitioners under secs. 154 and 155, I. P. C., and sentencing them each under each section to pay a fine of Rs. 500, which order was was on appeal modified by the Sessions Judge (Mr. A. J. Chotzner) of Backergunge on the 21st of November 1911 by setting aside the conviction and sentence passed under sec. 155, I. P. C.

The facts material to the report will appear from the judgment.

Mr. K. N. Chaudhuri and *Babu Gunoda Charan Sen* for the Petitioners.

Babu Monmatha Nath Mukherjee for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This was a Rule calling on the District Magistrate of Backergunge to show cause why the conviction and sentence passed on the Petitioners should not be set aside, or such other order passed as to this Court may seem fit on the ground that it is doubtful which of the Petitioners, if any, is liable under sec. 154, I. P. C.

Now the facts are that a certain naib of the estate got up a riot in order to dispossess certain persons by force. Four rioters were convicted, one of them was sentenced to one month and three others to two months' rigorous imprisonment. The first point, therefore, which we have to notice is that this riot appears not to have been in any sense a serious one. There is no doubt under sec. 174, I. P. C., that the owner or occupier of the land or any person having or claiming an interest in such land is punishable with fine not exceeding Rs. 1,000 if he or his agent or manager do not use all lawful means in their power to prevent it, and in the event of its taking place use all lawful means in

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NOTES.

THE JUDICIAL COMMITTEE HAS DELIVERED JUDGMENT in the case of *Clarke* v. *Brojendra Kishore* which was an appeal against the appellate decision of the Calcut a High Court in the well known case, arising out of the Jamalpore riots. Their Lordships appear from the telegraphic reports to have decreed the appeal in full. The summary of the judgment cabled by the *Pioneer's* London correspondent is not remarkable for its perspecuity. We gather from the summary that their Lordships were of opinion that the action of Mr. Clarke in going upon the Plaintiff's kutcherry and doing what he did was justified by the provisions of the Criminal Procedure Code relating to the issue of search warrants. We do not feel ourselves justified in offering comments on this view of the case without looking into the full judgment. All that we can now say is that the telegraphic summary does not convince us that a correct view of the law and the pleadings in the case has been taken by the Judicial Committee. We find that Lord Macnaghten is reported to have observed in the judgment that the words Court and Magistrate have been used as convertible terms in the Criminal Procedure Code. The proposition is so startling and involves such wide issues that we can scarcely believe that that their Lordships could have meant to lay down such a broad proposition. We must therefore suspend our opinion on the judgment till we have had the full text of the judgment of their Lordships before us.

THE LETTER OF THE GOVERNMENT OF INDIA TO the Government of Orissa and Behar on the question of the establishment of a High Court for the new Province is in many respects a remarkable document. The first thing that strikes us about it is that its language is singularly inelegant. Even the very opening sentences are not only clumsy and entangled but are very faulty in their construction and inaccurate in their expressions. For instance the letter says that "it is necessary to *examine the existing system* under which the High Court of Calcutta is the *highest judicial tribunal in this country in respect of litigation arising from the areas which now constitute the new province*, and to consider whether it is desirable that this arrangement should continue or whether *in these matters* Behar and Orissa should be self-contained, *a new High Court being established at Patna*." The italics are our own. In the observations that follow we do not find any *examination of the system* that now exists. Nor do we find any consideration of the momentous questions whether the establishment of a High Court at *Patna* would not be a source of great hardship to the people of Orissa, Singbhum, Manbhum and other areas to the east and south of Chota Nagpur. The Government of India is surely aware that the grievances of the people of these areas have been publicly and frequently discussed in the newspapers and that memorials have also been submitted to them from Orissa protesting against the establishment of a High Court at Patna at any rate. It is therefore not at all fair to Orissa and the adjoining areas that the Government of India should pass over their protests without taking even the slightest notice of their representations and issue a mandate on the Local Government that the High Court for the new province, if established, shall be at Patna.

WE HOPE THAT IN THIS MATTER THE GOVERNMENT of Behar and Orissa would consult the opinion of the people of Orissa before communicating their mature opinion to the Government of India on the question. It would be highly unfair to

Orissa if in every matter Behar is made to play the part of the dominant partner. If the convenience and interest of Orissa are thus systematically ignored by the Imperial Government, who are responsible for annexing her to Behar, we have no doubt that Orissa would soon demand the dissolution of her partnership with Behar with which the has nothing in common and would long to revert to Bengal with which she is indissolubly bound up by linguistic and religious ties. The Government of India may have committed themselves rashly to the selection of Patna as the capital of the new Province but why should they be so anxious again to repeat the blunder with reference to the location of the High Court to the serious inconvenience and detriment of a very integral and important part of the new Province. We had suggested a scheme which, without breaking up the Calcutta High Court, would have avoided all hardship to the people of Orissa and might have been to the advantage of Behar as well in many respects. But if it be not acceptable to Government and if a separate High Court must be established let it be established in a healthy locality and some central position which would be easily accessible to all.

On other questions as well the letter of Government of India presents various other anomalies. In the ordinary course we should have expected the Local Government to formulate a scheme on a question like this instead of the Government of India taking the initiative and foisting its own suggestions on the Local Government and thus handicapping it to a great extent. Next, it is quite evident from the Government of India's letters that the High Court of Calcutta has not up to now been consulted on the question of the proposed High Court for the new Province although they knew very well that the new High Court, when formed, could only be carved out of the old one. We thought that under such circumstance in ordinary courtesy and common fairness, the High Court of Calcutta should have been first consulted on the question. It was indeed very generous on the part of the Calcutta High Court to have offered to co-operate in the execution of any proposal which may be decided upon by the Government of India. On the face of this it is somewhat painful to us to read the letters of the Government of India to the Behar Government and the High Court of Calcutta side by side. On the question of its jurisdiction and its curtailment territorially as also the "policy," and "the administrative issues involved," the High Court may very well legitimately lay the claim to be first consulted. The Government of India has not certainly acted very wisely or candidly in not communicating their proposals to the High Court and in merely asking them to compile figures and submit them.

The Government of India even before consulting the High Court or the Local Government have already expressed their opinion that seven judges would be required. We defer our criticism on this question till the figures which the High Court has been asked to compile are published. But judging from the figures laid on the table during the last session of the Imperial Legislative Council, it would appear that roughly speaking about a third of the appellate work of the High Court ordinarily came from the new Province. If we leave out three judges who have to devote their time to Original Side and Sessions and other extraordinary work, of the remaining judges who attend to the appellate work, a third would then suffice to deal with the work from the new Province. So we have serious doubts whether more than five judges would be required for the new High Court. Of course, with a High Court at Patna litigation in Behar might increase but on the other hand people of Orissa and adjoining areas will have to ponder whether it would not be preferable to forego the right of appeal rather than incur the expense of a journey to Patna and the very great risks to life there during the plague season.

The Government of Orissa and Behar has been told by the Government of India, that the High Court of Calcutta will hereafter be consulted about the "appropriate accommodation and establishment" and, we presume, about the number of judges as well and we are very thankful to the Government of India for this assurance. But, as we have already remarked, the letter of the Government of India is singularly unhappy in giving expression to its ideas and thoughts on the subject. After struggling hard over almost every sentence of the Government of India's letter to the Local Government to ascertain what they exactly mean, we must sadly confess that we are hopelessly puzzled when we come to the concluding lines. They speak of "provision of buildings in keeping with the dignity of the Court" (whatever that may mean) which the India Government say "would be a *necessary preliminary* to its creation," but in the very preceding sentence they say that "the precise extent of accommodation required by a new Court *can be decided hereafter*." So we take it that as a preliminary the Local Government is to prepare imposing plans and estimates of the new High Court buildings with only the specification of "befitting dignity" before it and that the Calcutta High Court is to advise about the "extent of the accommodation" required after the plans are matured by the Local

Government. The concluding passage of the Government letter is so very luminous that we cannot refrain from quoting it in extenso. "The precise extent of accommodation required *by a* new Court *can* be decided hereafter, but the *provision of buildings* in keeping with the dignity of the Court would be the *necessary preliminary to its creation.*" The italics are our own.

ON TUESDAY LAST, THEIR LORDSHIPS HOLMWOOD and Imam, JJ., delivered their judgment in what is known as the Cotton Gambling Case. It will be remembered that some months ago, the Calcutta Police raided some houses where gambling in cotton figures was carried on and prosecuted some of the persons engaged in this trade which their Lordships very correctly characterise as pernicious. They were convicted by Mr. Keays, 2nd Presidency Magistrate of Calcutta, who held that this form of wagering came within the scope of sec. 44 of the Calcutta Police Act. Against this the accused obtained a rule and their Lordships decided that the houses did not come within the definition of Common Gaming House in the Police Act and acquitted the accused. In a previous issue (16 C. W. N. lxxxii) we discussed the legal aspects of the game and expressed a doubt whether this form of game came within the provisions of the law as laid down in the Calcutta Police Act. In that view it would be difficult to say that the decision of their Lordships is not a correct interpretation of the law. We think that the Bengal Government was not well-advised in starting the prosecutions in question before legislating on the matter. At the time we had drawn prominent attention to this evil, the Local Government could very well have introduced a Bill in the Bengal Council and got it passed.

THEIR LORDSHIPS VERY PROPERLY POINTED OUT in the course of their judgment that their duty on the Bench was confined to giving an interpretation of the law and not expressing any opinion on the policy or morality of allowing these bettings to go on. With that aspect of the question their Lordships had nothing to do and in this matter the learned judges' views will find strong support from a very recent pronouncement of the Judicial Committee in the case of *Attorney-General of Quebec, &c.* v. *Attorney-General of Canada*. There Lord Loreburn very emphatically said that "it cannot be too strongly put that with the wisdom or expediency or policy of an Act lawfully passed, no Court has a word to say." The question before their Lordships of the Judicial Committee in that case was whether an Act passed by the Canadian Parliament was *ultra vires* and considerations of public policy were pressed before their Lordships. "With that," their Lordships observed, "this Board is in no sense concerned. A Court of law has nothing to do with a Canadian Act of Parliament lawfully passed, except to give it effect according to its tenor. No one who has experience of judicial duties can doubt that, if an Act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the Judges themselves. Such considerations are proper, no doubt, to be weighed by those who make and by those who administer the law of Canada. . . . . So far as it is a matter of wisdom or policy it is for the determination of the Parliament."

IT SEEMS TO BE SUGGESTED IN SOME QUARTERS that in interpreting the law in the gambling case, the Court would have been justified in straining its words from consideration of the pernicious character of these transactions and their evil effect on public morality. We have no hesitation in repudiating the suggestion as very objectionable. Public policy, it has been observed, is an unruly horse and it is always risky to allow judges to have recourse to it when they want to override the provisions of a statute. It is clear however that legislation on the subject is imperative. Their Lordships also have expressed an opinion on the character of the transactions which leave no doubt about what they think of it. We should urge therefore, as we have already suggested before, that some law on the lines of the English Betting Act should be passed at once. The fact that there is no Legislative Council in Bengal is no bar, for there is nothing to prevent the Supreme Council from introducting a Bill and passing it as speedily as possible. The evil is a growing one in all the big cities of India and legislation by the Government of India will therefore be quite appropriate.

CURRENT INDIAN CASES.

Consent decree if may be set aside by motion.

A consent decree puts an end to a litigation so far as that Court is concerned unless it is re-opened by way of review, failing which a suit must be brought. Remedy by motion to Court should be available only where no regular remedy is provided. So a consent decree could not be set aside by motion though there may be extreme cases where the impeached decree is so defective that the Court treats it as a nullity in which case possibly it may be got rid of by motion.

Beaman, J.

FATIMABAI v. SONAVAI (Original Civil), I. L. R. 36 Bom. 77.

Hindu Law—Alienation by widow—Legal necessity—Pilgrimage and betrothal of daughter.

A Hindu widow alienated part of the immoveable property inherited by her from her husband partly to repay her husband's debts partly for the expenses of a pilgrimage to Pandharpur and partly for the expenses of a betrothal of her daughter. The betrothal was found to have been in accordance with the custom of the caste to which the parties belonged. *Held*, therefore, that she was justified in incurring the expenditure. With reference to the pilgrimage expenses, they having been incurred for the spiritual benefit of her husband they were allowable so far as they were reasonable having regard to the estate, the status of the family and other considerations which it is customary for Hindus to take into account. The alienations were therefore upheld in part. The question as to what amount was reasonably necessary in the particular case was one of fact which could not be reconsidered in second appeal.

[NOTE.—It does not appear from the report whether the pilgrimage to Pandharpur was for presenting funeral oblations to the husband and thus for the benefit of his soul within the meaning of the decision in 8 M. I. A. 529 referred to by the learned Judges.]

Chandavarkar and *Hayward, JJ.*

GANPAT *v.* TULSIRAM, I. L R. 36 Bom 88.

Hindu Law—Hereditary Priesthood—Nibandha.

Where a caste appoints a person the "hereditary priest" of the caste, his office becomes one in the nature of immoveable property. A suit to establish title to such office is not a mere caste question, but one relating to property.

In order to constitute the office of the hereditary priest of a caste or certain families, a *Nibandha* and as such property, it is not necessary that it should be created by royal grant. The office is a creature of custom and custom annexed to the office certain incidents in the nature of civil rights as against the family which neither the family nor the caste has the right to annul except on the ground of some offence under Hindu law.

A suit by a descendant of a hereditary priest for establishment of his right as such was therefore held maintainable and decreed.

Chandavarkar and *Hayward, JJ.*

CHELABHAI *v.* HAIGOWAN, I. L. R. 36 Bom. 94.

Civil Procedure Code, sec. 115.—Award, decree on, how may be set aside—Excess of jurisdiction and material irregularity.

There being no appeal against a decree passed on the award of an arbitration the appeal was treated as an application in revision.

The High Court of Bombay has jurisdiction to interfere in revision with the orders of his Britannic Majesty's Court at Zanzibar.

A suit for possession of a few pots and pans on the allegation of a title as mutwa'li was instituted by the Plaintiff. In the course of the suit some other persons were added as parties. All the persons concerned including some who were not parties to the suit, asked the Judge to act as arbitrator, but there was no written reference and the reference included questions between the parties which were not in suit and included the framing of a scheme for the administration of a large religious endowment. On these grounds the arbitration was held to be wholly irregular as also because no suit for administration of an endowment could be instituted without the Advocate-General's sanction.

The award was made on 30th June 1904 and the application to have it filed not having been made till 1909 was time-barred,

Further the Plaintiff died during suit and no attempt was made to substitute his heirs, so that the suit had abated before the award.

Held, that a decree passed on such award was liable to be set aside in revision. That the High Court has jurisdiction to set aside decrees passed on awards in such circumstances.

Beaman and *Hayward, JJ.*

MEERALI *v.* SHERIFF DEWJI, I. L. R. 36 Bom. 105.

Limitation Act, Sch. I, Arts. 120, 123—Suit to recover legacy—Wakf, validity of—Mahomedan Endowment—Cypres doctrine.

A suit to recover a legacy is governed by Art. 123, Sch. I of the Limitation Act. Where a legacy has not been assented to by the Executor the prayer in such suit must include a demand for the administration of the whole estate. But where the substantial relief claimed is the recovery of the legacy, this does not convert the suit into an administration suit and take it out of the province of Art. 123.

Giving a *Gadi-ul-khun* feast at Mecca and a *Gadi* feast at Surat are objects for which a valid *wakf* may be created. In the Will in question there was besides these bequests a further direction to give a Fattiah dinner on account of the testator and wife. Whether this last object was a valid one for a *wakf* or not *held* upon a construction of the Will that as the general object of the bequest was charitable it was a valid *wakf* and that even if the third bequest was invalid, the funds would be devoted to some like charitable object on the *cypres* doctrine.

Beaman and *Hayward, JJ.*

SALEBHAI *v.* BAI SAFIATU, I. L. R. 36 Bom. 111.

Review.

THE LAW OF MISREPRESENTATION IN RELATION TO LIMITED LIABILITY COMPANIES. *By A. M. Brice. Price 5s. Sweet & Maxwell, London.*

Both lawyers and laymen will find this book very useful either in avoiding the pitfalls in promoting companies or in safeguarding one's interests either as director or shareholder of companies in the course of formation. The first three chapters explain clearly by reference to the English Statutes and leading cases what would amount to misrepresentation on the part of promoters and directors which would fasten personal liability on them; the next chapter, under what circumstances action for deceit would lie and also cases where unauthorised deceit by companies' servants would not fasten any liability on the company. Chaps. V and VIII deal with circumstances under which rescission of contracts would be denied or specific performance would be refused on account of misrepresentation. The effect of laches and the operation of the doctrine of estoppel in connection with misrepresentations are also treated under separate chapters. The concluding chapter deals with the criminal liability of directors

and agents of a company for fraudulent misrepresentation. All these headings have been very clearly and yet very succinctly explained.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION.—*Galloway* v. *Schill, Seebohm & Co., "Ld."* Before THE LORD CHIEF JUSTICE OF ENGLAND AND PICKFORD AND AVORY, JJ. 26th April 1912.

A Company's balance-sheet, what must it contain?

This was the hearing of a case stated. The Respondents were a public company, and the summary forwarded by them to the Registrar was in the form of a balance-sheet which, under the heading "Assets," contained the entry, "Good-will, trade marks, machinery, furniture, and fixtures, £100,007." Buildings, machinery, and fixtures were stated to be taken at cost less depreciation; and good-will and trade marks at the sum at which they were taken over by the company, but no details were given of these items.

The Magistrate dismissed the summons holding that the balance-sheet was proper. The Appellant contended that it was not a sufficient compliance with sec. 26, sub-sec. 3 of the Company's Act, 1908. The Court allowed the appeal. In the course of his judgment the Lord Chief Justice said:—

The section provided that the statement sent in by the company should contain "a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets have been arrived at." It was not necessary for him to attempt to define the expression "fixed assets"; he was content to take it as meaning probably the same thing as "fixed capital," which, in Lord Justice Buckley's book on Companies (p. 653), was defined as meaning "property acquired and intended for retention and employment with a view to profit as distinguished from 'circulating capital,' meaning property acquired or produced with a view to resale or sale at a profit." The statute said that the shareholders had to know how the values of the fixed assets had been arrived at, and it could not be right to tell shareholders that the company had, as to part of the figure *x*, applied one mode of valuation, and as to another part had applied another mode. To put together machinery, &c., with such items as good-will and trade marks was not right where the value of the good-will and trade marks was taken at their value when taken over by the company, and the value of the machinery, &c., was taken at cost price less depreciation. He did not lay down what the summary must give but this summary was defective. The Solicitor-General had not asked them to say that a distinction must be made between good-will and trade marks; but the balance-sheet should show what was fixed on the one principle and what was fixed on another principle.

The Solicitor-General (Sir J. Simon, K. C.) and *Messrs. Sargant, Raeburn and Thomas* for the Appellant.

Sir R. Finlay, K. C., and *Messrs. Younger, K. C, and Atkinson* for the Respondents.

B. D. *Appeal allowed.*

PRIVY COUNCIL.

[APPEAL FROM QUEBEC.]

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD ROBSON.
1912.
17, May.

THE DOMINION COTTON MILLS COMPANY, LIMITED and others,
v.
GEORGE E. AMYOT and others, Respondents, and ALFRED BRUNET, Intervenant.

Company—Resolution by majority of shareholders—Minority, remedy of.

The action was brought by two shareholders in the Dominion Cotton Mills Company, Limited, hereinafter called the Cotton Company, in their individual capacity against the Cotton Company and the Dominion Textile Company, Limited, hereinafter called the Textile Company, seeking to set aside a lease of the Cotton Company's mills, dated the 10th of November 1905, which was granted by the Cotton Company to the Textile Company for the period of 21 years from the 1st of April 1905, as well as a resolution passed by the Cotton Company in general meeting approving of that lease.

The Trial Judge in the Superior Court gave judgment for the Plaintiffs and set aside both the resolution and the lease with costs against both Companies.

In the Superior Court in review the judgment of the Trial Judge was affirmed by a majority of two judges to one, Charbonneau, J., dissenting. Hence this appeal.

The grounds on which the Plaintiffs claimed relief were (1) that the lease was *ultra vires* of the Cotton Company, and (2) that the transaction was of a fraudulent character and amounted to a confiscation of the interests of the Plaintiffs and other dissentient shareholders. Their Lordships found against the Plaintiffs on both the said points and allowed the appeal. In the course of their judgment which was delivered by LORD MACNAGHTEN they said:—

"The principles applicable to cases where a dissentient minority of shareholders in a company

seek redress against the action of the majority of their associates are well settled. In order to succeed it is incumbent on the minority either to show that the action of the majority is *ultra vires* or to prove that the majority have abused their powers and are depriving the minority of their rights. It would be pedantry to go through the line of decisions by which those principles have been established. But there is a passage in a recent judgment of this Board in the case of *Burland* v. *Earle*, 1902, A. C. 83, which has the high authority of Lord Davey, so apposite to the circumstances of the present case, that it may be useful to cite it at length.

"It is," say their Lordships, "an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their power, and, in fact, has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company the action should be *primâ facie* brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss* v. *Harbottle*, 2 Hare. 461 and *Mozley* v. *Alston*, 1 Ph. 790, and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names This, however, is a mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the Plaintiffs cannot have a larger right to relief than the company itself would have if it were Plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are therefore confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier* v. *Hooper's Telegraph Works*, 9 Ch. 350. It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be the illustrated by the judgment of Mellish, L. J., in *MacDougall* v. *Gardiner*, 1, Ch. D. 13.

"There is yet a third principle which is important for the decision of this case. Unless otherwise provided by the regulations of the company a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject matter of the vote. This is shown by the case before this Board of the *North-West Transportation Company, Limited* v. *Beatty*, 12 A. C. 589. In that case the resolution of a general meeting to purchase a vessel at the vendor's price was held to be valid notwithstanding that the vendor himself held the majority of the shares in the company, and the resolution was carried by his votes against the minority who complained.

B. D. *Appeal allowed with costs.*

PRIVY COUNCIL.

[APPEAL FROM WESTERN AUSTRALIA.]

LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD MERSEY.
1912.
17, May.

FAIRCLOUGH
v.
THE SWAN BREWERY COMPANY, LIMITED.

Equity of redemption, clogging of—Provision allowing redemption merely a pretence.

This was an appeal from the Supreme Court of the State of Western Australia. The Appellant in this case became the registered proprietor of a lease of the Federal Hotel, Katanning, for the residue of a term of twenty years from the 12th of June 1905

By an instrument of mortgage, dated the 27th of December 1907, the Appellant therein called "the mortgagor," in consideration of the sum of 500*l.* lent to him by the Respondent Company, and in consideration of all moneys which might thereafter become owing by the mortgagor to the Company for goods supplied, etc., covenanted with the Company as follows:—

"That the mortgagor will pay to the Company the said principal sum of 500*l*, by 209 successive monthly instalments as follows, that is to say, 208 instalments of 2*l.* 8*s.* each, and one final instalment of 16*s*, the first of such monthly instalments of 2*l.* 8*s.* to be paid on the 1st day of January next, and a subsequent instalment to be paid on the 1st day of every succeeding month thereafter until the whole of the said principal sum of 500*l.* shall be paid off, provided always that the mortgagor shall not be at liberty to pay off the said principal sum, except by the instalments, and at the times aforesaid, without the express consent in writing of the Company on each occasion first had and obtained."

Then followed a covenant for payment of interst on the amount from time to time remaining unpaid, at the rate of 7*l.* per cent. per annum on the first day of every calendar month, and other covenants including a covenant stipulating in effect that during the continuance of the security the Federal Hotel should be a tied house in favour of the Company. For better securing the payment in manner aforesaid of the said principal sum and interest, and all other moneys intended to be thereby secured, the mortgagor thereby mortgaged all his estate and interest in the Federal Hotel to the Company.

It would thus appear that without the consent in writing of the Company, the mortgage debt of 500*l.* was not to be wholly paid off until the 1st of May 1925 that is just six weeks before the actual expiration of the lease.

In December 1909 the Company were prevented by accidental circumstances from supplying the Appellant with beer in accordance with a covenant on their part contained in the mortgage deed. The Appellant thereupon assumed to treat the

tie as at an end, and obtained beer from other quarters. The Company brought an action for damages and for an injunction. The Appellant, who apparently had already offered to redeem, counterclaimed for redemption. McMillan, J., gave judgment for the Company in the action, and assessed the damages at 8*l*. On the counterclaim he gave judgment for the Appellant, holding that by law he was entitled to redeem. On appeal to the Full Court an order was made in the action in favour of the Company with a reference as to damages. The counter-claim was dismissed with costs. Hence the present Appeal which was allowed.

In the course of their Lordships' judgment which was delivered by LORD MACNAGHTEN, they said:—

"There is" as Kindersley, V. C., said in *Gossip* v. *Wright*, 32 L.J., Ch. 653, "no doubt that the broad rule is this: that the Court will not allow the right of redemption in any way to be hampered or crippled in that which the parties intended to be a security either by any contemporaneous instrument with the deed in question, or by anything which this Court would regard as a simultaneous arrangement or part of the same transaction." The rule in comparatively recent times was unsettled by certain decisions in the Court of Chancery in England which seem to have misled the learned Judges in the Full Court. But it is now firmly established by the House of Lords that the old rule still prevails and that equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption. The learned Counsel on behalf of the Respondents admitted as he was bound to admit that a mortgage cannot be made irredeemable. That is plainly forbidden. Is there any difference between forbidding redemption and permitting it, if the permission be a mere pretence? Here the provision for redemption is nugatory. The incumbrance on the lease the subject of the mortgage according to the letter of the bargain falls to be discharged before the lease terminates, but at a time when it is on the very point of expiring when redemption can be of no advantage to the mortgagor even if he should be so fortunate as to get his deeds back before the actual termination of the lease. For all practical purposes this motgage is irredeemable. It was obviously meant to be irredeemable. It was made irredeemable in and by the mortgage itself."

The appeal was allowed and the decision of McMillan, J., was restored.

B. D. *Appeal allowed with costs.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CARNDUFF, AND CHAPMAN, JJ. APPEAL FROM APPELLATE DECREE NO. 1764 OF 1909. BHUPENDRO KUMAR CHUCKERBUTTY, Appellant *v.* PEARY MOHON ROY AND OTHERS, Respondents. Heard, 5th and 7th June. Judgment, 10th June 1912.

Second appeal—Main ground of first Appellate Court's judgment non existent—Evidence, estimate of—Remand.

The appeal was against the decree of the District Judge of 24-Pergunnahs reversing that of the Subordinate Judge and dismissing a suit for the recovery of possession of some 600 bighas of land in the Sunderbans. The Plaintiff's vendor, Shama Charan Das, obtained from the landlord, the third Defendant, on the 22nd June 1909, a permanent lease for the reclamation of a *chak* in the lot known as Jeliakhali, and the first Defendant obtained a similar lease on the 12th August following, of two adjoining *chaks*, one to the north, and the other to the east, of the *chak* of Shama Charan Das. The Plaintiff charged that the Defendant had, by erecting an embankment south of the Bhardubi Khal, which was fixed by the leases as the northern boundary of the former's *chak* and the southern boundary of the first of the latter's *chaks*, encroached upon and wrongfully taken possession of the lands in suit. The first Court gave the Plaintiff a decree subject to the payment to the Defendant of the expenses actually incurred by the latter in reclaiming the lands; but on the Defendant's appeal the suit was dismissed *in toto* and the Plaintiff preferred this second appeal.

The first Appellate Court found that there was in the lease (by which it meant each of the leases) a clause providing that there should be a consultation and arrangement between the parties regarding the precise division of the lands covered by the two, that in pursuance of that understanding, it was agreed between Shama Charan Das and the Defendant that the embankment complained of should be erected on the boundary; and that the embankment was erected accordingly.

Held—That when the main ground which a Judge below took had no existence, the Appellate Court could not be satisfied that his estimate of the evidence was a proper one. The High Court remanded the appeal for a reconsideration of the evidence as it really stood, and not as it had been supposed it to have stood.

Bibee Ameerun v. *Sheikh Cherag Ali* (24 W. R. 343) followed.

Babus Nil Madhab Bose and *Siba Prosonno Bhattacharya* for the Appellant.

Dr. Rash Behary Ghose and *Babus Mahendra Nath Roy* and *Krishna Prosad Sarbadhicary* for the Respondents.

A. T. M. *Case remanded.*

CIVIL APPELLATE JURISDICTION. Before CARNDUFF, AND CHAPMAN, JJ. APPEAL FROM APPELLATE DECREE No. 2306 OF 1909. SHEIKH MAJIBAR RAHAMAN, Defendant, Appellant *v.* SAYED MUKTASHED HOSSAIN AND ANOTHER, Plaintiffs, Respondents. Heard, 10th and 11th June. Judgment, 11th June 1912.

Contract against public policy—Consideration—Compounding non-compoundable offence—Criminal Procedure Code (Act V of 1898), sec. 345.

The Appellant was the *gomasta* of the Respondent. He was prosecuted by the Respondent for criminal breach of trust under sec. 408 of the Indian Penal Code, in respect of certain moneys collected in the course of his duty. The Magistrate before whom the case was being tried suggested, after having drawn up a charge, that the matter was one which might appropriately be settled out of Court. Accordingly the matter was settled out of Court. The Appellant executed a mortgage-bond for the amount embezzled, and though the withdrawal of the criminal prosecution was not mentioned in the instrument as forming part of the consideration, the prosecution was in fact dropped by the Respondent after the execution of the deed, and the Appellant was then acquitted or discharged.

The suit out of which the appeal arose, was afterwards brought upon the mortgage-bond executed in the circumstances just described, and it was decreed by both the Courts below. The Defendant then preferred this second appeal to the High Court.

Held—That the offence being non-compoundable it was against public policy to compound it, any agreement to that end was wholly void in law.

Williams v. *Bayley*, (1866) L. R. 1 H. L. 200 (220) followed; *Sheikh Neebet* v. *Mussamut Bibea* (8 W. R. 412) dissented from.

Babus Dwarka Nath Mitter and *Satindra Nath Mukerjee* for the Appellant.

Moulvi Wahed Hossein for the Respondents.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and BEACHCROFT, JJ. APPEAL FROM ORDER No. 6 OF 1912 AND APPLICATION No. 20 OF 1912. DARSAN LANKA AND OTHERS, Appellants, Petitioners *v.* MOHUNT GADADHOR RAMANUJ DAS, Respondent, Opposite Party. 10th June 1912.

Act X of 1859, sec. 109—Construction of.

The Respondent obtained a money-decree against the Appellants under Act X of 1859 on compromise. The compromise petition stated that the money would be paid in two instalments failing which the Appellants will get interest at 6 per cent. The decree drawn up was to this effect:—"To-day the papers being put up before the Court it is ordered in terms of the *solenamah* filed by the parties that in accordance with the *solenamah* a decree may be passed in favour of the Plaintiff for Rs. 3,500 and cost of suit Rs. 247-9-6. Total Rs. 3,747-9-6." The Respondent executed the decree and attached moveables of the debtors under sec. 109 and realized some money. On the 20th May 1911, he applied for execution of the decree for Rs. 3,500 with interest by attachment of the moveables, then immoveables and then persons of the judgment-debtors excepting two. The judgment-debtors objected that under sec. 109, Act X of 1859, the decree-holder's application was not maintainable for he must exhaust the moveables of all the judgment-debtors first before applying for process against their persons and immoveable properties and that under the terms of the decree he was not entitled to interest. The Court below overruled the objections and against that order the debtors preferred the above appeal and application under sec. 115, C. P. C.

Held—(1) Sec. 109, Act X of 1859, contemplates a single execution creditor and a single debtor, it does not refer to the case of joint and several decrees. The decree-holder in this case is entitled to proceed against as money debtors as he chooses. (2) The proposition that no application for attachment and sale of immoveable property can be entertained so long as there is any moveable is too broadly put. This cannot at least be said of a subsequent application in, which it is not obligatory to proceed against moveables that might have come into existence in the interval; but it is not the duty of the debtor to prove that he has sufficient moveables. 10 W. R. 341 followed. (3) It is not a condition precedent to proceed against the person of the debtor before applying for sale of his immoveable properties. (4) The decree as drawn provides for no interest and the decree-holder is not entitled to interest.

Babus Mohendra Nath Roy and *Kshetra Mohun Sen* for the Appellants' petition.

Babus Provas Chundra Mitra and *Susil Madhub Mullick* for the Respondent, Opposite Party.

A. T. M. *Appeal dismissed as incompetent. Application granted in part.*

SIVA SUNDARI CHAUDHRANI *v.* THE KING-EMPEROR.

their power to disperse or suppress the riot and if they knowing or having reason to believe that such an offence is being or has been committed or is likely to be committed do not give the earliest notice thereof in their power to the nearest police station. In this case it is admitted that the ladies themselves did not do or omit to do any of the things which are set out under sec. 154. It was their agent or naib who got up the riot apparently to promote his own ends and who did not take any steps to prevent it or give notice to the police station. The ladies therefore in this case or their adopted sons would be responsible for having appointed such an agent and for not having removed him.

The question therefore which arises in this case is as to who was responsible for the management of this estate and for the appointment of the officers under the estate. It is clearly proved by the general manager, Mr. Savi, that the three ladies Siva Sundari Chaudhrani and two others were fully responsible for these appointments; and that although their adopted sons took some share in the active management of the estate they are in no way responsible for the appointment of this naib who created this riot. It seems to us impossible to punish in every case every person who has any interest in the land. The responsibility must depend upon the fact of the person who caused the riot being himself the person who has an interest in the land or an agent or manager of such person; and one of the facts to be proved was whose agent or manager the person who fomented the riot is. In this case we cannot trace the appointment of this naib to any one else but the three ladies, and the conviction and sentence therefore against the two adopted sons, Dakhina Ranjan Ray Choudhry and Ramesh Chandra Ray Choudhry, must be set aside and the fine if paid must be refunded.

Then as regards the liabilities of the ladies, we think that in this case they must be considered to be jointly liable, although the case being one under the criminal law separate sentences have to be passed against each of them; and we think that in all these cases what should be considered is the extent of the responsibility entailed upon the estate by the occurrence, for it would be manifestly inequitable that in a riot between two sets of zemindars, where there are 100 co-owners on one side and one only on the other, that the one man should be fined Rs. 100 and the hundred men should be fined Rs. 100 each, which seems to be the principle upon which the present case has been decided. We consider that a fine of Rs. 300 would amply meet the justice of this case.

We reduce the sentence on each of the ladies to a fine of one hundred rupees each and in default one month's simple imprisonment. The Rule is so far made absolute and the balance of the fine if paid will be refunded.

B. C. *Rule made absolute in part.*

[PRIVY COUNCIL.]

[APPEAL FROM BOMBAY.]

LORD MACNAGHTEN. LORD ATKINSON. LORD SHAW. SIR JOHN EDGE. MR. AMEER ALI. 1912, 3, May.	VISSANJI, SONS, AND COMPANY, Appellants, *v.* SHAPURJI BURJORJI BHAROOCHA, Respondent.

Guarantee, letter of, construction of—Conditional or unconditional guarantee—Undertaking by broker to find money on mortgage of debtor's property and pay off sum advanced by creditor—Debtor declining to make the mortgage through broker, if discharges broker's liability to pay off advance.

VISSANJI, SONS, AND COMPANY *v.* SHAPURJI BURJORJI BHAROOCHA.

D. being in financial difficulties approached V. for an advance of 1½ lac of rupees, representing that he was about to raise a loan of 11 lacs on a first mortgage of certain Mills through broker B. and would pay off V.'s advance out of that loan. V. advanced the money to D. upon B. signing a guarantee to this effect: "In consideration of your having at my request acceded to the proposal of D. to advance to him a sum of Rs. 1½ lacs I hereby bind myself to you to procure a loan within two weeks of Rs. 11 lacs as the first mortgage of the Mills, and to pay you thereout the sum of Rs. 1½ lac agreed to be advanced by you to the Mills:"

Held—*That by this document, B. gave a substantial undertaking that a loan should be procured and out of the loan the sum of Rs. 1½ lac was to be paid to V., and not merely a conditional undertaking that B. would procure the lending of 11 lacs if a first mortgage of the Mills was given and pay thereout Rs. 1½ lacs to V.*

This was an appeal from a judgment and decree of the High Court of Bombay, dated the 23rd August 1910, on an appeal from a judgment and decree of the said Court in its original civil jurisdiction, dated the 11th February 1910.

The only question for determination upon this appeal was whether the Respondent personally guaranteed by a letter, dated the 7th August 1909, the payment to the Appellants of a sum of Rs. 1,50,000.

The facts giving rise to this litigation shortly stated were as follows :—

One Dwarkadas Dharamsey was a partner in the firm of Tricumdas Dwarkadas & Co., who acted as the secretaries, treasurers and managers of the Tricumdas Mills Co., Limited.

The business of the mills was in the main carried on and managed by the said Dwarkadas Dharamsey.

In August 1909 he, his firm, and the Tircumdas Mills Company were in financial difficulties and on the 7th August 1909 Dwarkadas Dharmsey applied to the Appellants for a loan of Rs. 1,50,000 to be made to the mills, which was refused.

He explained to the Appellants that he was about to raise a loan of 11 lakhs of rupees on first mortgage of the mills through the Respondent, and that the proposed advance of Rs. 1,50,000 for which he asked would be repaid out of that loan.

The Appellants and the said Dwarkadas Dharmsey thereupon had a draft letter prepared by their solicitors, which was to be put before the Respondent for his signature.

The said Dwarkadas Dharamsey on that same date called on the Respondent and informed him that the Appellants required assurance from him before they would make the said advance and requested him to sign the said letter.

The Respondent had at the time a large sum of money belonging to a principal of his available for the said investment, and he agreed to procure the said loan which was to be secured upon a first mortgage of the said mills.

On the 7th August 1909, the Respondent was requested to and did sign a letter stating his ability to procure the said loan in terms of a draft produced by the said Dwarkadas Dharmsey which is quoted in their Lordships' judgment.

Dwarkadas Dharamsey took the said letter to the Appellants and obtained from them an advance of Rs. 1,50,000 which was secured by a promissory note signed by Tricumdas Mills Company and the

VISSANJI, SONS, AND COMPANY *v.* SHAPURJI BURJORJI BHAROOCHA.

Appellants' firm of Tricumdas Dwarkadas & Co.

The said advance was debited in the books of account of the Appellants to the said mills and the said firm.

On the 9th August 1909, the Respondent heard from the Dwarkadas Dharamsey that he would not require the Respondent to procure him the loan, as the firm of Shivlal Motilal had arranged to lend the sum of 5 lakhs to the mills on a further mortgage.

The Respondent immediately wrote and informed the Appellants of the refusal by Dwarkadas to contract with the Respondent and told him to look to the said Shivlal Motilal and the said Dwarkadas Dharamsey to reserve for him the sum of Rs. 1,50,000 from the amount of the further loan.

The Respondent received no reply to his said letter until the 24th August 1909, when the Appellants wrote and demanded the payment of the said sum of Rs. 1,50,000.

On the 25th August 1909, the Respondent replied to the Appellants' letter of demand and repudiated all liability stating that he had been and was then in a position to procure and advance the said loan on the first mortgage, and to carry through the said transaction, but that Dwarkadas Dharamsey refused to mortgage the mills to him.

On the 28th August 1909, the said Dwarkadas Dharamsey committed suicide.

On the 11th October 1909, the Appellants instituted the present suit in the High Court of Bombay.

They alleged that the Respondent had failed to keep his promise contained in the said letter and had broken his contract and they prayed for a decree for Rs. 1,50,000 with interest at 6 per cent. and costs.

The Respondent filed a written statement in answer. He denied that he in fact requested the Appellants to advance any money to the said mills, or that he promised to repay any such advance, and he stated that he received no consideration for the said letter.

He stated that he was always ready and willing to perform what he had undertaken to do, and he denied that he had failed in his promise or broken any contract of his.

He contended that under the circumstances which had taken place it became impossible for him to pay Rs. 1,50,000 out of the mortgage loan to the Appellants.

He further contended that the Appellants accepted the determination of any contract under the said letter of the 7th August 1909, and agreed with Dwarkadas Dharamsey to get his advance paid out of the loan which would be made by Shivlal Motilal upon the further mortgage.

On these pleadings the following issues were fixed for trial:—

(1) Whether the Plaintiffs advanced Rs. 1,50,000 to the Tricumdas Mills on the faith of the letter A to the plaint.

(2) Whether the promise of the Defendant to pay the Plaintiffs Rs. 1,50,000 was not conditional upon the Tricumdas Mills granting a first mortgage of the mills to the Defendant's client for 11 lakhs.

(3) Whether the Defendant was not always ready and willing to perform the promises made by him in the said letter.

(4) Whether on the 9th August 1909 Dwarkadas Dharamsey as representing the Tricumdas Mills did not refuse to grant a first mortgage of the mills to the Defendant's client.

(5) Whether such refusal did not render it impossible for the Defendant to perform his said promises.

VISSANJI, SONS, AND COMPANY v. SHAPURJI BURJORJI BHAROOCHA.

(6) Whether, if the said promises amounted to a contract, such refusal did not render the contract void.

(7) Whether the Plaintiffs did not treat the Defendant's letter of 9th August 1909 as terminating any contract between them with reference to the sum of Rs. 1,50,000.

After recording evidence both oral and documentary the learned Judge (Beaman, J.) delivered judgment on the 11th February 1910 and made a decree dismissing the suit with costs.

He held that the Respondent believed that the mortgagee Shivlal Motilal was willing to be paid off in full, that the Respondent had the 11 lakhs available for the said loan which he undertook to procure and was ready and willing to advance the said sum on a first mortgage of the said mills, that the undertaking to pay the sum of Rs. 1,50,000 out of the mortgage money contained in the letter of the 7th August 1909 was conditional and contingent on the transaction of mortgage being given effect to and carried out by the loan being taken and was not a promise unfettered by that condition, that the contingency failed in consequence of the act of Dwarkadas Dharamsey, that the fulfilment of the said undertaking thereby became impossible, and that there was no breach on the part of the Respondent of his contract, or any liability on his part in respect of the said sum.

The Appellants appealed from the said judgment and decree to the High Court of Bombay in its appellate jurisdiction.

The appeal came on for hearing before Sir B. Scott, C. J., and Batchelor, J., on the 16th August 1910, and judgment therein was delivered on the 23rd August 1910, and a decree made affirming the decree of the lower Court and dismissing the said appeal with costs. In the course of their judgment they said :—

"The Plaintiff's present case is that he insisted on a request from the Defendant for an advance of Rs. 1½ lakhs to Dwarkadas Dharamsey and the Defendant's promise that he would repay that amount. If this was what he wanted it is strange that he did not ask for a bare and absolute guarantee from the Defendant instead of introducing an unnecessary reference to the first mortgage of the Tricumdas Mills.

"It appears to us that no reasonable business man in the Plaintiff's position can possibly have supposed that a loan broker however wealthy would promise to pay out of his client's money 1½ lakhs of rupees except upon condition of some security being obtained for the lender of the money. As between business men like Plaintiff and Defendant dealing with a tottering financier like Dwarkadas Dharamsey any arrangement for an unconditional guarantee such as the Plaintiff now asserts is incredible. It appears to us that the words 'I bind myself to you to procure a loan within 2 weeks of Rs. 11 lakhs on the first mortgage of the mills and to pay you thereout' are correctly paraphrased in para. 5 of the Defendant's written statement, where he says that all he had undertaken to do was to procure the lending of 11 lakhs if a first mortgage of the mill was given and to pay thereout 1½ lakhs to the Plaintiff.

"It was suggested by the Plaintiff's Counsel that if Defendant had offered a written guarantee in these terms the Plaintiff would never have advanced the money. We do not think that this would have been the result, for the Plaintiff had no doubt of Dwarkadas Dharamsey's ability or willingness to mortgage the

mills. His only doubt was (as he himself says) whether Dwarkadas Dharamsey could induce any one to lend him the 11 lacs he wanted on the mills. On the other hand looking at the case from the point of view of the Defendant, if he had been asked to promise repayment of the Plaintiff's money, mortgage or no mortgage, security or no security, we cannot doubt that he would have refused."

Hence this appeal.

Sir A. Cripps, K. C. (with him *Messrs. Lowndes and Rowlatt*) for the Appellants submitted that upon the true construction of the letter in question the Respondent promised unconditionally to repay the loan out of a loan to be procured by him. It was a promise to procure it effectually for the purpose in contemplation. There was no implied condition that Dwarkadas would take up the loan nor any circumstances justifying it. Before the learned Counsel had concluded his argument,

Sir R. Finlay, K. C. (with him *Mr. L. DeGruyther, K. C.*, and *Mr. Grey*) for the Respondent were called upon.

Sir R. Finlay, K. C., submitted that the contract must be construed with reference to the existing circumstances of the case. All that the Defendant agreed was to find a lender willing to lend the money. He gave no personal guarantee. Here the borrower refused to take the loan. That was beyond the Defendant's control. The completion of the contract became impossible by the unwillingness of the proposed borrower. The Defendant gave no guarantee that Dwarkadas would take the loan. Both parties had no doubt that he would take the loan, and no guarantee on that point was necessary. And if it were the intention of the parties to provide for it they would have done in more explicit terms. The taking of the loan was assumed—it was a condition precedent to the enforcement of the contract. He referred to the following authorities: *Chandler* v. *Webster* (1), *Krell* v. *Henry* (2), *Taylor* v. *Caldwell* (3), *Jackson* v. *Union Marine Insurance Co.* (4).

Mr. L. DeGruyther, K. C., submitted that the Defendant was a broker and by his letter he promised to do nothing more than what he would ordinarily do, that is, to procure a loan. It is incredible that a broker should have guaranteed that Dwarkadas would take the loan. The words of the letter only mean that on completion of the loan for 11 lacs he would pay out of it the amount specified. There was no personal guarantee.

Without calling on Counsel for the Appellants their Lordships delivered judgment.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—The question in this case turns simply upon the construction of a very short document. It is addressed to the Appellants, and is in these words:—"In consideration of your having at my request acceded to the proposal of the Secretaries, Treasurers, and Agents of the Tricumdas Mills Company, Limited, to advance to the Mills a sum of Rupees one lac and fifty thousand, I hereby bind myself to you to procure a loan within two weeks of Rupees eleven lacs as the first mortgage of the mills block property, and to pay to you thereout the said sum of Rupees one lac and fifty thousand agreed to be advanced by you to the mills."

(1) L. R. [1904] 1 K. B. 493, 499.
(2) L. R. [1903] 2 K. B. 740.
(3) 3 Best & Smith 826, 833, 836 (1863).
(4) L. R. 8 Com. Pleas. 572, 581 (1873).

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Everybody is now agreed that what took place after the execution of that document can have no bearing on the construction of it. All that the admitted evidence shows is that the Appellants wanted some real and substantial security for their advance. They advanced the lac and a half, and the only question is, what is the meaning of this guarantee? Does it mean that all that the Respondent undertook was that he would find somebody willing to lend eleven lacs on a first mortgage of the mill and that he was to do nothing further except, if that arrangement was carried through, he would pay to the Appellant out of the loan a lac and a half?

Various constructions have been suggested. The one which Sir Robert Finlay, for the Respondent, finally adopted is the one on which the Judges in the Appeal Court relied. They say they agree with the Respondent when he says "that all he had undertaken to do was to procure the lending of eleven lakhs if a first mortgage of the Mill was given, and to pay thereout Rupees 1½ lacs to the Plaintiff."

Their Lordships read the document not in that sense at all, but as a substantial undertaking that a loan should be procured, and that out of that loan this sum of Rs. 1,50,000 should be repaid.

Their Lordships will therefore humbly advise His Majesty that the Appeal should be allowed, and that a decree should be made in favour of the Appellants. Of course the Respondents will pay the costs of this Appeal, and the costs below.

Solicitors: *Messrs. Lalteys and Hart* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondent.

B. D.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos. 2098 and 2625 OF 1909.

D. CHATTERJEE, J. N. R. CHATTERJEA, J. 1912, Heard, 28 and 29, February, 4 and 5, March. Judgment, 2, April.	SHYAMA CHURN DAS, Defendant, Appellant, *v.* JOGES CHANDRA RAY, Plaintiff, Respondent.

Co-sharer landlord, if may sue for his share of rent when no separate collection—Suit for apportionment, if lies—Prayer for apportionment in rent suit, if entertainable—Parties—Decree for entire rent in favour of all co-sharers when may be made.

A co-sharer landlord can maintain a suit for his share of the rent separately if there is an arrangement for separate collection without a division of the lands amongst the co-sharers. The case of RAJ NARAIN MITTER *v.* EKADASI BAG (1) *does not lay down that there must be a division of the lands before a co-sharer can maintain a separate suit for his share of the rent.*

A sale of a share in an estate which has been let out in its entirety to a tenant does not of itself necessarily effect a severance of the tenure or an apportionment of rent, but if the purchaser desires such severance or apportionment, he must give the tenant due notice to that effect and then if an amicable apportionment cannot be made by arrangement between all the parties concerned, the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned making all the co-sharers parties to the suit.

Such an apportionment can be asked and effected in the rent suit itself. But where in such a suit the Plaintiff did not ask for an apportionment, though he made all his co-sharers parties, the Plaintiff was

(1) I. L. R. 27 Cal. 479 (1879).

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entitled to ask for a decree for the entire rent in favour of all the co-sharers.

This was an Appeal preferred on the 8th of October 1909 against the decree of Babu Nikunja Behary Ray, Subordinate Judge of Zillah Chittagong, dated the 13th of July 1909, reversing that of Babu Nishikant Guha, Munsif at Patiya, dated the 22nd of December 1908.

The facts of the case material to this report will appear from the judgment.

Babu Samatul Chandra Dutt for the Appellant.

Babu Dhirendra Lal Kastgir for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

These two appeals arise out of a suit for rent. It was alleged by the Plaintiff that the lands of sch. 1 appertained exclusively to *hisyas* Nos. 3, 11 and 6 in a revenue-paying estate called Taraf Sambhuram, that *hisyas* Nos. 3 and 11 belonged to one Raj Kumar Ray, whose rights in *hisya* No. 3 was purchased at a revenue sale by the Defendant No. 23 who again sold the same to the Plaintiff. The Plaintiff as purchaser of Raj Kumar Ray's *hisya* No. 3 sued to recover his share of the rent from the Defendant No. 1 making the other co-proprietors of the estate parties to the suit. In the alternative he prayed that a decree for the entire rent might be passed on taking additional court-fee from him. There was a further alternative claim for a certain share of the rent of the lands of schs. 2, 3 and 4 which it is unnecessary to consider in these appeals.

The defence *inter alia* was that the lands do not belong to *hisyas* 3, 11 or 6 but belong to a different *hisya* (No. 2) owned by Defendants Nos. 3-8.

The Court of first instance held that the lands did not appertain to *hisya* No. 3 and there was no relationship of landlord and tenant between the Plaintiff and the Defendant No. 1 with respect to any land mentioned in the plaint and dismissed the suit.

On appeal the lower Appellate Court held that the lands of schedule No. 1 were held under the proprietors of Taraf Sambhuram and that there was relationship of landlord and tenant between the Plaintiff and Defendant No. 1 but gave a decree to the Plaintiff for a share of the rent proportionate to his share in the entire estate. The Defendant No. 1 has appealed to this Court in Second Appeal No. 2098 and the Plaintiff has appealed in No. 2625.

It has been contended on behalf of the Defendant No. 1, *first*, that a co-sharer cannot sue for his share of the rent separately unless the lands are divided among the co-sharers, *second*, that at any rate he cannot do so without apportionment of the rent, and that there being no finding that Plaintiff or his predecessor in title had separate collection of rent in the share purchased by the Plaintiff, he cannot maintain a suit for his share of the rent separately.

The objection as to there having been no separate collection in the share purchased by the Plaintiff does not appear to have been raised in the written statement or in the issues. But the Plaintiff himself states in his plaint that a portion of the rent is payable to him and the remaining portion to his co-sharers who are made *pro formâ* Defendants and there is no allegation that there was separate collection in respect of the share purchased by them. It is stated by the learned Pleader for the Respondent that there is evidence on both sides on the point but there is no finding

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on the point by either of the Courts below.

We are of opinion that the first contention raised on behalf of the Appellant has no force. A co-sharer can certainly maintain a suit for his share of the rent separately if there is such an arrangement (and it is an exceedingly common arrangement) without a division of the lands among the co-sharers. The case of *Raj Narain Mitter* v. *Ekadasi Bag* (1) relied on by the Appellants does not lay down that there must be a division of the lands before a co-sharer can maintain a separate suit for his share of the rent. In that particular case there was a division of the land and the co-sharers ceased to be joint landlords, and it was held that a co-sharer could separately sue for his share when he had asked for apportionment of the rent.

A sale however of a share in an estate which has been let out to a tenant in its entirety, as pointed out in the Full Bench case of *Iswar Chandra Dutt* v. *Ram Krishna Das* (2), does not of itself necessarily effect a severance of the tenure or an apportionment of the rent, but if the purchaser desires to affect a severance of the tenure or an apportionment of the rent he must give the tenant due notice to that effect and then if an amicable apportionment cannot be made by arrangement between all the parties concerned the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned making all the co-sharers parties to the suit; and the authorities show that such an apportionment can be asked for and effected in the rent suit itself. But in the present case the Plaintiff did not pray for any apportionment.

In the absence of separate collection of rent, a co-sharer can of course maintain a suit for the entire rent due to all the co-sharers making them parties to the suit and there is such a prayer in the plaint.

In Appeal No. 2625 the Plaintiff appeals on the ground that his share of the rent ought not to have been determined with reference to his share in the entire estate, but ought to have been determined with reference to his share in the *hisyas* to which the land exclusively belonged.

If the Plaintiff's case, that the lands appertained exclusively to the particular *hisyas* a share of which was purchased by him, is true, we think the rent to which he is entitled should be determined according to his share in such *hisyas*.

We think therefore that the lower Appellate Court should decide, *first*, whether the land of which rent is claimed appertained exclusively to the *hisyas* as alleged by the Plaintiff; and, *second*, whether there was separate collection in Raj Kumar Ray's *hisya* No. 3 purchased by the Plaintiff. If the second question is answered in the negative, the Plaintiff cannot get a decree for rent for his share separately but he may be allowed a decree for the entire rent on payment of the additional court-fee.

The judgment and decrees of the lower Appellate Court are accordingly set aside and the cases remanded to that Court to rehear and dispose of the appeal in accordance with the observations made above. Costs to abide the result.

Case remanded.

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(1) I. L. R. 27 Cal. 479 (1879).
(2) I. L. R. 5 Cal. 902 (1880).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2192 OF 1908.

MOOKERJEE, J. TEUNON, J. 1910, 23, August.	SOMIR JAMA and others, Defendants, Appellants, *v.* MOHABHARAT BAKTU, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 159, 160, 161, 167—Suit to annul incumbrance—Burden of proof—Separated share of tenure dealt with as distinct tenure.

When a share in a tenure has been duly and effectually recognised by both landlords and tenants as a separated share and as constituting a distinct tenure, the purchaser of such a share at a sale for its arrears acquires the rights of a purchaser of an entire tenancy within the meaning of sec. 159 of the Bengal Tenancy Act.

The burden is on the purchaser of a tenure at a sale for its arrears to prove that the interest sought to be annulled was an "incumbrance" within the meaning of cl. (a) *of sec. 161 of the Bengal Tenancy Act, and if he proves this he starts his case sufficiently; and the burden shifts upon the Defendant to prove that he has a "protected interest" within the meaning of sec. 160.*

DURGA PROSANNA GHOSE *v.* KALI DAS DUTT (2), GOBINDA NATH SHAHA CHOWDHURY *v.* REILY (3), NARMADA SUNDARI DEVI *v.* TARIP MOLLAH (4) *distinguished.*

This was an Appeal preferred on the 9th of November 1908 against the decree of Babu Sripati Chatterjee, Subordinate Judge, 1st Court of Zillah Bakergunge, dated the 20th of May 1908, affirming the decree of Babu Dinesh Chandra Chatterji, Officiating Munsif, 1st Court at Bhola, dated the 20th of March 1907.

(2) 9 C. L. R. 449 (1881).
(3) I. L. R. 13 Cal. 1 (1886).
(4) 9 C. L. J. 490 (1909).

The facts of the case so far as they are material to this report will appear from the judgment.

Moulvis Serajul Islam and *Nuruddin Ahmed* for the Appellants.

Babus Girija Prasanno Rai Chaudhuri and *Kumar Sankar Roy* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal on behalf of the first two Defendants in a suit commenced by the Plaintiff-Respondent for recovery of possession of land included in an *osat nimhowla.* The Plaintiff claims to be the purchaser of a *nimhowla* at a sale in execution of a decree for arrears of rent obtained by the *howladar* against the *nimhowladar*, and asserts that he has, by service of notice upon the first two Defendants under sec. 167 of the Bengal Tenancy Act, annulled the incumbrances held by them. He consequently asks for ejectment of the Defendants from the disputed lands. The Courts below have concurrently made a decree in favour of the Plaintiff. The decision of the Subordinate Judge has been assailed before us on three grounds, namely, *first*, that the Plaintiff is purchaser of only a fourth share in the *nimhowla* tenure and is consequently not entitled to the benefit of the provisions of sec. 159 of the Bengal Tenancy Act; *secondly*, that the first two Defendants are the holders of only one-half of the *osat nimhowla* and are consequently not liable to be ejected at the instance of the Plaintiff; and, *thirdly*, that the onus was upon the Plaintiff to show that the interest of the first two Defendants is an incumbrance within the meaning of sec. 161 and is not a "protected interest" within the meaning of sec. 160 of the Bengal Tenancy Act. In our opi-

nion, there is no foundation for any of these contentions.

In so far as the first ground urged on behalf of the Appellant is concerned, it is clear that although the Plaintiff may in one sense be said to have purchased only an one-fourth share of the *nimhowla*, yet he has purchased, upon the facts found, an entire tenure which entitles him to claim the benefit of the provisions of sec. 159 of the Bengal Tenancy Act. That section provides that where a tenure or holding is sold in execution of a decree for arrears of rent due in respect thereof, the purchaser shall take subject to the interests defined in Chap. VIII as "protected interests" but with power to annul the interests defined in that chapter as "incumbrances." To entitle the Plaintiff to avail himself of the provisions of this section, he has to establish that he is a purchaser of a tenure sold in execution of a decree for arrears of rent due in respect thereof; in other words that what he has purchased constitutes an entire tenancy. Now the Courts below have found that the *nimhowla* mentioned in the plaint is an one fourth share of the entire *nimhowla* but that this one-fourth share has been separated from the remaining three-fourth share, that the land comprised in it and the rent payable for it have been completely separated, and that consequently this one-fourth share now constitutes by itself an entire tenancy. Under the circumstances the principle obviously applies that a share in a tenure which has been duly and effectively recognised by both the landlords and tenants as a separated share, constitutes a distinct tenure, and when such a tenure is sold in execution of a decree for arrears of rent due in respect thereof, the purchaser acquires the rights of a purchaser of an entire tenancy within the meaning of sec. 159 of the Bengal Tenancy Act. In support of this proposition, reference may be made to the decision of this Court in the case of *Gopi Nath Biswas* v. *Radha Shyam Poddar* (1). The first ground, therefore, cannot be successfully maintained.

In so far as the second ground urged on behalf of the Appellant is concerned, it clearly raises a question not urged before the learned Subordinate Judge, though it had been raised in the Court of first instance and decided against the first two Defendants. It was pointed out by the original Court that the lease granted to the Defendants on the 15th February 1896 shows that the lands in their occupation which comprised one-half of the lands of the *osat nimhowla* were treated as constituting an entire under-tenure. In fact, the lands included in the lease were assessed separately, and although they constituted one-half share of the original *osat nimhowla* acquired by the landlords, the new tenure was an entire tenancy by itself. This position was not controverted before the Subordinate Judge and in our opinion it cannot be successfully challenged. The second ground therefore fails.

In so far as the third ground is concerned, it has been argued that the burden is upon the Plaintiff to prove not merely that the under-tenure was created by the holders of the *nimhowla* but also to establish that the tenancy is not a protected interest within the meaning of sec. 160 of the Bengal Tenancy Act. In support of this position reliance has been placed upon the cases of *Durga Prosanna Ghose* v. *Kali Das Dutt* (2), *Gobinda Nath Shaha Chowdhury* v. *Reily* (3) and *Narmada*

(1) 5 C. W. N. lxxx (1900).
(2) 9 C. L. R. 449 (1881).
(3) I. L. R. 13 Cal. 1 (1886).

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Sundari Devi v. *Tarip Mollah* (4). The first two of these cases turn upon the construction of sec. 66 of the Bengal Act VIII of 1869, while the third case depends upon the interpretation of sec. 167 of the Bengal Tenancy Act of 1885. In our opinion, the cases relied upon are clearly distinguishable and do not lend any support to the contention advanced by the learned Vakil for the Appellant. In each of these cases, it was argued on behalf of the person who was sought to be ejected by the purchaser at a sale in execution of a rent decree that his interest had been created, not by the holders of the tenure sold but by the superior landlords before the intermediate tenancy was created. In the first of these cases, *Durga Prosanna Ghose* v. *Kali Das Dutt* (2), the defence was that the disputed *jungle-bury* tenure had been created, not by any holder of the *ganti* tenure sold in execution of the decree for arrears of rent, but by the superior landlords and was in fact in existence before the creation of the *ganti* tenure on the 21st February 1851. With reference to these allegations, the learned Judges held that the burden was upon the purchaser to prove that the interest of the Defendant which he sought to annul, was an incumbrance created by an act of the holders of the *ganti* tenure. The question which was raised in the other two cases was precisely of the same character, and it was ruled that the burden was upon the purchaser to prove that what he sought to annul was an incumbrance, that is, was a sub-tenure created by the tenant on his tenure or holding or in limitation of his own interest therein. In the case before us, there is no controversy that the *osat nimhowla* was created by the holder of the *nimhowla*; the only suggestion put forward is that it might have been so created with the consent given expressly in writing by the holders of the *howla* and might in this view be a "protected interest" under cl. (*g*) of sec. 160 of the Bengal Tenancy Act. Obviously, the burden is upon the party claiming this "protected interest" to establish the elements essential to validate his contention. The true rule plainly is that the burden is upon the purchaser to prove that the interest sought to be annulled is an "incumbrance" within the meaning of cl. (*a*) of sec. 161, and if he proves this, he starts his case sufficiently; the burden then shifts upon the Defendant to prove that he has a "protected interest" within meaning of sec. 160. If the contrary view were maintained the result would be that the Plaintiff purchaser would be obliged to prove a negative, namely, to show not only that the interest was an "incumbrance" but also that it was not a "protected interest." Such a position cannot possibly be maintained. The third ground must, therefore, be overruled.

The result is that the decree made by the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 1635 OF 1909.

CARNDUFF, J. N. R. CHATTERJEA, J. 1912, Heard, 24, 25 and 29, April. Judgment, 8, May.	HARI MONI DEBI, Plaintiff, Appellant, *v.* MOTI SHEIKH, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 159, 160, 161, 167—Suit by auction-purchaser to

(2) 9 C. L. R. 449 (1881).
(4) 9 C. L. J. 490 (1909).

HARI MONI DEBI *v.* MOTI SHEIKH.

annul incumbrance—Onus of proof—Defendant if must prove his interest to be "protected"—Evidence Act (I of 1872), sec. 106—Second appeal—Evidence adduced on both sides, but evidence considered only as produced by the party on whom onus wrongly placed—Finding, if of fact.

In a suit by a purchaser of a tenure or holding at a rent sale to annul an alleged incumbrance the onus is in the first place on the Plaintiff to show that the interest sought to be annulled is an "incumbrance," but when once that is established the onus shifts on to the incumbrancer to prove that his incumbrance is saved through being a "protected interest."

NARMADA SUNDARI DEVI *v.* TARIP MOLLAH (3) *referred to.*

SOMIR JAMA *v* MOHABHARAT BAKTU (2) *approved.*

The existence of such a "protected interest" as a right of occupancy is a matter specially within the knowledge of the person claiming it and the onus under sec. 106, Evidence Act, is on him.

The proposition that as soon as there is a conflict of evidence, the question of onus disappears presupposes not only the existence of evidence on both sides but also consideration of both by the Court, so that where the Court of Appeal below dismissed the Plaintiff's suit on the ground of his failure to discharge an onus wrongly placed on him and ignoring altogether the evidence adduced by the Defendant, the High Court on second appeal interfered.

This was an Appeal preferred on the 5th of August 1909 against the decree of B. C. Mitra, Esq., District Judge of Berhampur, dated the 8th of May 1909, affirming a decree of Babu Durga Kanto Roy, Munsif of Kandi, dated the 25th of March 1908.

(2) 16 C. W. N. 777 (1910).
(3) 9 C. L. J. 490 (1909).

The appeal arose out of a suit brought by an auction-purchaser of a tenure or holding at a rent sale to annul an alleged "incumbrance" held by the Defendant, after notice served under sec. 167, Bengal Tenancy Act. The Defendant resisted the suit on the allegation that his interest was a "protected interest" within sec. 159 of the Act and as such not liable to annulment. The Defendant's plea was that he was an occupancy raiyat, whilst the interest purchased by the Plaintiff was that of a tenure-holder. The first Court gave effect to that plea and dismissed the suit. An appeal preferred by the Plaintiff against that decision was disposed of in these terms :—

"The only point in dispute in this appeal is whether the Defendant's landlord is a tenure-holder or a raiyat. If the former, then the Defendant, being an occupancy raiyat, is protected from ejectment under sec. 167. If the latter, then the Defendant is an under-raiyat, and cannot claim exemption unless he succeeds in proving that he has acquired occupancy rights.

"There is no doubt in this case that the burden of proof lies on Plaintiff. It was for him (?) to show that the Defendant's landlord's interest was a holding and not a tenure. The oral evidence coming from interested parties is not sufficient and does not appear to be much relied upon. The documentary evidence describes the tenancy as a *jamai* right or a *jote.* This does not mean that the tenancy is necessarily a holding and not a tenure. Nor does any presumption favourable to the Plaintiff arise from the smallness of area. No doubt, if a tenancy is more than 100 bighas, the presumption is that it is a tenure, but the converse presumption, that where the area is less than 100 bighas

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it is a holding, does not follow. Thus as the burden of proof is on the Plaintiff it cannot be held that the burden has been sufficiently discharged.

"The Appeal is, therefore, dismissed with costs and the cross-appeal also dismissed."

The Plaintiff thereupon preferred this Second Appeal.

Babus Mohendra Nath Roy, *Krishna Prosad Sarbadhikary* and *Monmatha Nath Roy* for the Appellant.

Babus Hemendra Nath Sen, *Sachchidanund Gupta* (for *Babu Haradhan Nag*) and *Kunja Behary Sen* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The point of law raised by this second appeal is as to the burthen of proving the existence or non-existence of a "protected interest" for the purposes of sec. 159 and the following sections of the Bengal Tenancy Act, 1885.

The Plaintiff, who is the Appellant before us, was the purchaser at a sale held in execution of a decree for rent of the tenure or holding of one Nistarini Debi, and having, in pursuance of the provisions of sec. 167 of the Tenancy Act, served a notice on the Defendant-Respondent, as being the sub-tenant of of Nistarini and, therefore, an incumbrancer within the meaning of the Act, he sued the latter for the recovery of *khas* possession of the land concerned. The defence was that Nistarini Debi was a tenure-holder, that the Respondent was an occupancy tenant under her and that consequently the incumbrance which the Appellant was seeking to annul, was under cl. (*a*) of the definition in sec. 160 a "protected interest" which could not be annulled. Both the Courts below held that the onus was on the Appellant to prove that the Respondent's interest was not a "protected interest" and that, as he had failed to discharge the onus, his suit must be dismissed.

We are unable to accept this view of the law as to the *onus probandi* in a case of this kind. Sec. 159 gives the auction-purchaser power to annul, in the prescribed manner, any "incumbrance" such as is defined by sec. 161, cl. (*a*), and at the same time provides that he shall take subject to any "protected interest" within the meaning of sec. 160. Now, no doubt it rests upon the auction-purchaser in the first instance to show that the interest which he wishes to annul, is an "incumbrance": but it seems to us that, if and when that is established, the onus shifts on to the incumbrancer to prove that his incumbrance is saved through being a "protected interest." In other words, it was for the Appellant to show at the outset that the Respondent's sub-tenancy was a sub-tenancy created by the defaulting tenant Nistarini Debi: but, as soon as this was established, it was for the Respondent to prove that Nistarini Debi was a tenure-holder and that he had acquired a right of occupancy under her. This is, we think, in accordance with first principles. For the general rule is that the burthen of proving any particular fact rests on him who alleges, not on him who denies, it: That is to say, the issue must be proved by the party who states the affirmative, and not by the party who states a negative. Moreover, the provision as to "protected interests" has the effect of introducing a restriction upon, or exception to, the rights of the auction-purchaser, and, as was explained in *Rash Behari Bosu* v. *Hara-*

moni Debya (1), the person pleading a certain exception is bound to bring himself within it. And, finally, the existence of such a "protected interest" as a right of occupancy is a matter specially within the knowledge of the person claiming it, on whom, therefore, the onus is placed by sec. 106 of the Indian Evidence Act, 1872. We observe too, that our view accords with that taken by Mookerjee and Teunon, JJ, in *Somir Jama* v. *Mohabharat Baktu* (2), while it is not, as will presently appear, opposed to the decision of Brett and Chitty, JJ., in *Narmada Sundari Devi* v. *Tarip Mollah* (3).

Returning to the facts before us, we find that there was really no onus of proof for the Appellant to discharge. For the Respondent had admitted in his written statement that he held, and had from the inception of his sub-tenancy held, under Nistarini Debi and her predecessors-in-interest, and it was, therefore, of course unnecessary for the Appellant, to adduce any evidence to show that the Respondent's sub-tenancy was a sub-tenancy created by Nistarini Debi, that is to say, an "incumbrance" within the meaning of sec. 160, cl. (*a*) of the Tenancy Act. And this distinguishes the case from that of *Narmada Sundari* v. *Tarip Mollah* (3), in which it was not only not admitted that the Defendant's tenancy was a sub-tenancy under the defaulting *gantidar* but expressly alleged that the sub-tenancy had been created long before the *ganti*.

Our conclusion, then, is that the onus was wrongly placed upon the Appellant by both the Courts below. But it is contended by the Respondent that, even if this be so, there was evidence on both sides, and no question of onus arises. As to this contention, it must be conceded that, as soon as there is a conflict of evidence, the question of onus disappears. But conflict implies and predicates not only the existence of evidence on both sides but also consideration of both by the Court; and in this case it seems to us patent that, if any evidence was produced by the Respondent, the lower Court of appeal at all events ignored it altogether. The judgment speaks for itself and cannot be misunderstood. It deals exclusively with the Appellant's evidence, oral and documentary; it decides nothing but that that evidence was insufficient to prove that Nistarini was a raiyat and not a tenure-holder; and nothing could be clearer than that the learned District Judge would have dismissed the appeal and the suit even if the Respondent had not adduced a scrap of evidence of any kind. In these circumstances we think that we must require him to reconsider the case anew in the light of our ruling as to the initial mistake made both by him and by the Court of first instance. Should a case be made out for the admission of further evidence, it will be open to him to receive it or direct that it be taken by the first Court.

In the result, the appeal is allowed, the appellate judgment discharged and the case remanded for redisposal in accordance with the foregoing directions. Costs will abide the result.

Case remanded.

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(1) I. L. R. 15 Cal. 555, 557 (1888).
(2) 16 C. W. N. 777 (1910).
(3) 9 C. L. J. 490 (1909).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 379 OF 1908.

COXE, J.
IMAM, J.
1912,
Heard, 26 and 27, March.
Judgment, 3, April.

MOWAR KALI CHURN SINGH, Appellant,
v.
MOWAR SHEO BUKSH SINGH and others, Respondents.

Civil Procedure Code (Act V of 1908), sec. 11—Res judicata—*Suit by Mitakshara coparcener for declaration of right to a share, resisted by Defendant setting up impartibility and primogeniture—Decree in Plaintiff's favour if bars Defendant's eldest son who was not joined in the suit from setting up same defence in subsequent suit for partition.*

Plaintiff sued the Defendant's father and others for a declaration of his right to a certain share in certain properties which he alleged had descended to him and the Defendants as ancestral property governed by the ordinary Mitakshara law. The Defendant's father resisted the suit on the plea that the property had descended to him alone under a custom of primogeniture. Plaintiff obtained a decree in that suit, the plea of Defendant's father regarding the custom of primogeniture being rejected. In a second suit by the Plaintiff for partition of the properties, Defendant who was no party in the former suit, took up the same plea of primogeniture, he being the eldest son of his father :

Held—*That the Defendant was barred by the rule of* res judicata *from taking up the same defence.*

That under sec. 11, Civil Procedure Code, what had to be considered was what the Defendant himself claimed and as, according to his case, he was claiming through his father he was bound by that decision; and the fact that according to the Plaintiff's case the Defendant as a coparcener of his father did not derive his right through his father was no answer to the plea of res judicata.

This was an Appeal preferred against the decree of Babu Ram Lal Dutt, Subordinate Judge of Palamau, dated the 23rd of May 1908.

The facts of the case material to this report will appear from the judgment.

Babus Tara Kishore Choudhury, Nagendra Nath Ghosh and *Mr. J. W. Chippendale* for the Appellant.

Babu Mohendra Nath Ray, Dr. Sarat Chandra Basak and *Babu Harihar Prosad Sinha* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is a suit for partition of property which was admittedly at one time a *jaigir* of one Dhurup Singh, the common ancestor of the Plaintiff and the Defendants. It apparently descended to his eldest son, Bhukan Singh, but in Bhukan Singh's time was resumed, and after that was again granted in the name of Pahalwan Singh, the third son of Dhurup Singh, and not in the name of Baiju Singh, the second son, who was the Plaintiff's ancestor. It is a matter of controversy in this case whether the *jaigir* was given exclusively to Pahalwan Singh or given to him as the representative of the whole family.

Only one name is recorded as *jaigirdar* in the Collector's Register. After Pahalwan Singh, Jhao Singh was recorded, after him Odit Singh, after him Ghinu Singh and after Ghinu, the present Defendant No. 3, Nursing Dyal Singh. In the time of Ghinu Singh, a suit was brought by the present Plaintiff for declaration of his rights, which seems to have been almost identical in nature with the present suit except that partition was not sought.

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The Plaintiff succeeded and obtained a decree which was affirmed on appeal by this Court.

In the present case the learned Subordinate Judge has found that this decision was wrong, that the *jaigir* belonged to Nursing Dyal Singh alone and that the Plaintiff was not in possession and not entitled to succeed. The Plaintiff appeals to this Court.

It appears to us that the decision of the learned Subordinate Judge cannot be sustained. In our opinion the matter is now a *res judicata*.

The issues in the former suit, as we gather from the decision of this Court, were as follows :—*Firstly*, is the Plaintiff in possession of the property in suit ? If not, can the suit proceed ? *Secondly*, does the rule of primogeniture prevail in the family of the parties ? *Thirdly*, was the property in suit granted in *jaigir* to Pahalwan as alleged by the Defendants. On the first point, the learned Judges observed that it was contended on behalf of the Defendants that the Court below was wrong in holding that the possession of the Plaintiff was made out so as to entitle him to maintain his suit for a declaratory decree. But they agreed with the Court below in the conclusion arrived at, namely, that the possession of the Plaintiff was made out. On the second point, they held that it lay upon the Defendants to prove that there was any special custom governing the succession to this *jaigir* as against the ordinary Hindu law of succession and that the Defendants had failed to discharge that burden, or in other words that the rule of primogeniture was not proved to prevail in the family of the parties. On the third point, they held that the Plaintiff's ancestor along with other members of the family had been in possession of the lands of the *jaigir* by virtue of their right by inheritance and that the grant of the *jaigir* was not to Pahalwan Singh alone.

These findings seem to us completely to dispose of the present suit in which these identical questions are raised. It is nobody's case that the Plaintiff has been dispossessed since the decision of the former suit. The only reason given for holding that the suit is not concluded by the rule of *res judicata* is that if, as is alleged by the Plaintiff, the family is governed by the ordinary Mitakshara law it must be held that the Defendants obtained an interest in the property at birth and did not derive their rights from Ghinu. It would follow therefore that as they were not parties to the former suit though they were alive at the time they are not bound by the decision.

With this question we are only concerned in so far as it affects the Defendant No. 3. The contesting Defendants are Defendants Nos. 1 to 10. Of these, Defendants Nos. 1, 2, 9, and 10 were parties to the former suit while Defendants Nos. 4 to 8 disclaim all title to the property. As regards Defendant No. 3 we find, on reference to his written statement, that he states distinctly that the property is impartible and governed by the rule of primogeniture. In that case it is perfectly clear from the decision in *Sartaj Kuari* v. *Deoraj Kuari* (1) that he obtained no right at birth at all and could not properly have been made a party to the former suit during his father's life-time. In these circumstances, it appears to us that he must be regarded as claiming under Ghinu.

It does not appear to us to be of any importance what the Plaintiff's case is. A reference to sec. 11, C. P. C., shows that

(1) I. L. R. 10 All. 272 (1881).

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what has to be considered in these cases is what the Defendant himself claims, and as we have said above on the allegations in his written statement he must be regarded as claiming under Ghinu.

Reference has been made to an alternative claim put forward by the Defendants Nos. 4 to 8. If they had put forward the alternative case that even though the rule of primogeniture did not apply, yet the *jaigir* was granted to Pahalwan Singh alone, something might have been said for it. But the only alternative prayer they put forward is that if the Plaintiff succeeds in getting a decree for partition, that is to say, if it is found that others besides Pahalwan Singh's descendants are interested in the *jaigir*, the share of these Defendants also may be separated. To this prayer, the Plaintiffs have no objection.

We have been invited to go into the merits of the case, but we think that it is not proper for us to consider the correctness of a former decision of this Court based on the same materials with regard to the same matters in controversy and between persons whom we regard as the same parties.

It appears to us therefore that the appeal must be allowed with costs and a preliminary decree given to the Plaintiff for partition.

Appeal allowed.

[CRIMINAL APPELLATE JURISDICTION.]

APPEAL NO. 133 OF 1912.

HOLMWOOD, J.
IMAM, J.
1912,
Heard, 23 and 24, April.
Judgment, 1, May.

EMPEROR
v.
MOTI LAL CHANDER and anr., Appellants.

Bengal Excise Act (V, B. C. of 1909), secs. 2 (14), 2 (20), 9 (2), 10, 46, 52, 55, 57—Medicinal drugs if necessarily exciseable because spirit is an ingredient —Importing of exciseable articles, offence of, when committed—Transport—Possession—Taking orders to supply, if abetment of transport—Delivery when takes place—Cocoanut, milk of, if exciseable.

The unreported decision of O'Kinealy and Ameer Ali, JJ., that spirits of wine sold by a chemist for medicinal purposes are not liable under the Excise Act, has been overruled by the enactment of the new Excise Act V, B. C. of 1909; but that GONESH CHANDRA SIKDAR *v.* QUEEN-EMPRESS (1) *is no longer good law is not so clear.*

Semble (*without deciding the question*): *The meaning of the Legislature in amending the Act was to prevent chemists and vendors of drugs selling intoxicating liquors or otherwise dealing with them as medicinal preparations, and not to declare that all drugs* bonâ fide *prepared in accordance with the British or other recognised Pharmacopœias are exciseable merely because alcohol is used in their preparation and the notifications of the Board of Revenue if they declared that spirit found in the prepared drugs rendered the drugs themselves exciseable would be* ultra vires.

Liquor as defined in sec. 2 (14) of the Bengal Excise Act must be intoxicating liquor and the enumeration of all the liquids that follow does not make them liquor unless they are intoxicating.

(1) I. L. R. 24 Cal. 157 (1896).

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Held—*That if articles which are subject to both customs and excise duties escape the customs they can be dealt with by the Excise Authorities either in transport or when an attempt is made to export them, but the excise duty on imports does not apply to articles that are liable to a similar duty in the customs.*

Where medicinal drugs containing spirit which had been manufactured in Chandernagar within French territories were consigned from Chandernagore station by rail to Howrah and from there taken to a Calcutta shop, in pursuance of orders given to the manufacturer by the manager of the Calcutta shop:

Held—*That assuming that the articles were exciseable, after they had passed undetected by the customs authorities, no charge could be framed at the instance of the Excise Authorities against persons concerned in the transaction of importing exciseable articles, but the Excise Authorities could proceed for illegal transport or export or possession of the articles imported.*

Held, *on the evidence, that delivery of the articles to the Calcutta firm had taken place before the transport of the same commenced and the mere fact of the persons who despatched them from French territory having arranged that an agent of theirs should be present at the Calcutta shop to see that the goods were in order when opened did not prevent possession passing to the Calcutta firm; and they were not liable to conviction for illegal transport or possession of exciseable articles.*

Taking an order for foreign goods which are exciseable may constitute abetment of their import but not of their transport.

The expression "juice drawn from any cocoanut" in sec. 2 (20) of the Excise Act does not mean the milk of the cocoaunt but the juice of the tree.

This was an Appeal preferred on the 5th of March 1912 against an order of Mr. E. Keays, Second Presidency Magistrate in Calcutta, dated the 25th of January 1912.

The material facts of the case appear from the judgment.

Mr. J. N. Roy with *Babus Monmatha Nath Mukherjee* and *Probodh Chandra Chatterjee* for the Appellants.

Mr. P. L. Roy with *Babu Jatindra Mohun Ghosh* for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal from the judgment and sentence of the Second Presidency Magistrate of Calcutta, who has convicted the Appellants, Mati Lal Chandra and Promotha Lal Chandra, of transporting exciseable articles from Chandernagore to Calcutta under sec. 46, Act V of 1909, and of being in possession of exciseable articles knowing the same to have been unlawfully imported under sec. 52 of the same Act both read with sec. 55 of the Act and sentenced them under sec. 57 to a fine of Rs 1,000 each or in default one month's rigorous imprisonment.

The facts are as follows:—There is a manufactory of drugs known as the Indian Pharmacy Co., situate in French territory at Chandernagore within the compound of the Distillery of the French Government. This factory is ostensibly owned by a lady, named Giribala Dassi, widow of the gentleman who originally started the business.

The accused persons are her nephews and the first is a pleader at Hughly, the second a clerk in the office of the Director of Commercial Intelligence in Calcutta. Their family house is at Chandernagore, but they seem to habitually reside in Calcutta. For the purposes of this case

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we may take it on the evidence, though the Appellants disputed this, that these gentlemen both have an active interest in the management of the Chandernagore business. On the 29th August 1911, the accused No. 2 received an order from Messrs. B. K. Pal, large wholesale and retail druggists in Calcutta, for three cases of Tinctures consisting of 25 one pound bottles of each of (1) Tincture of Cinchona, (2) Tincture of Cardamom, (3) Spirits of Nitric Ether, (4) Tincture of Ginger. This order is Ex. B in the case and is of some importance. It is headed "Indian Pharmacy," it is on a printed Invoice slip of B. K. Pal & Co., and it says "Please supply" the tinctures already mentioned and is signed B. K. Pal & Co., admittedly by one Haridhan Nag, P. W. 2, who is Manager and Superintendent of the godown and signs for Messrs. B. K. Pal.

On the 2nd September, a Saturday, one Tarini Charan Mukerjee alleged by the prosecution to be the Sircar of the Indian Pharmacy conveyed the three cases from Chandernagore to Howrah where they were consigned to him and took them thence in a carriage to Messrs. B. K. Pal's godown at 16, China Bazar Lane, and delivered them to the Manager. The same evening a letter was received from the 2nd accused Ex. 2 which is also of great importance and runs as follows :—

"Re your order of 29th August 1911. The medicines of the above order have been despatched under your instructions. Please order them to be opened and counted." Then follows an interpolation "in presence of our agent" in smaller writing and different ink but we have no reason to doubt it is in the same handwriting, *viz.*, that of P. L. Chandra.

The letter goes on : "The order of the 29th ultimo will be attached to the Bill when it will be presented to you afterwards, as is the custom with you and elsewhere. But it is impossible for us to attach it with our invoice as it has never been the practice with you or anywhere. Hope you will do what is needful." From this it would appear that some message oral or written had been sent by Messrs. B. K. Pal to the 2nd accused.

On the 5th September, the two accused came to B. K. Pal's shop as they say to discuss prices for a contract for which they were tendering as Messrs. B. K. Pal expected to get a large order from the Government of the U. P. or the Punjab. The correspondence seems to show it was connected with Oudh but this is immaterial. An excise officer saw them enter the shop and leave again for the godown at China Bazar. He informed Mr. Wilson the excise officer who had long been on the look out for these Chandernagore medicine sellers and he went to the godown and says that he found them sitting at a table with price lists, one of which is Ex. 1 before them, and the three boxes of medicines, two closed and one open. The letter Ex. 2 and the challan Ex. 3 and other documents Exs. 4 and 5 were found on the table. He made a search-list Ex. 6 and seized all the articles. Upon this evidence the accused have been acquitted of importing exciseable articles but convicted of transporting and possessing the 3 cases of medicines in question.

The points raised in the appeal by the defence are 1. That these tinctures are not exciseable articles. 2. That the accused are not proprietors of the Indian Pharmacy nor its agents. 3. That T. C. Mookerjee is not their Sirkar but the agent of Messrs. B. K. Paul or at least became so as soon as the goods were delivered to him for conveyance to them under a com-

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pleted contract of sale. 4. That the possession proved in this case at the time of seizure is the possession of B. K. Pal & Co., and not the possession of the accused. 5. That to prove transport you must prove direct connection of the accused with the act of transport.

The first point gives rise to a question of law which is of extreme difficulty and importance but in the view we take it is not necessary to the decision of this appeal. In Act VII of 1878 (B. C.), exciseable articles are defined as including spirituous and fermented liquors and intoxicating drugs as defined by this Act.

Fermented liquor includes malt liquor of all kinds; tari, fresh or fermented, *pachwai* diluted or undiluted, and any other intoxicating liquor which the Local Government may from time to time declare to be included in this definition.

Spirituous liquor includes any spirituous liquor imported into India or manufactured in India by any process of distillation.

Now in the case of *Gonesh Chandra Sikdar* v. *Queen-Empress* (1), Macpherson and Banerjee, JJ., held that "spirituous liquor" in sec. 53 of the Act is not intended to include a medicinal preparation merely because it is a liquid substance containing alcohol in its composition. The case would be different if alcohol was manufactured separately for the purpose of being used in the preparation of a medicine.

They point out that the terms "spirituous liquor" is not defined in the Act. What is given as the definition of the term is, strictly speaking, no definition at all. It merely says "spirituous liquor includes, etc.," as above. But we observe that the medicinal preparation there under consideration was manufactured from gur or treacle mixed with other ingredients used for medicinal purposes. The Judges say the case would have been different if the accused had been found manufacturing alcohol or spirits separately for the purpose of being used in the preparation of a medicine. But what was found to have been manufactured in that case by the processes of fermentation and distillation is not alcohol or spirit separately, but the compound substance, the medicine, at once.

Again in an unreported case the judgment in which is filed with the record before us, Criminal Revision No. 180 of 1892, O'Kinealy and Ameer Ali, JJ., held that spirit of wine sold by a chemist for medicinal purposes was not liable under the Excise Act. They rely on sec. 66 of that Act and then they say that rectified spirit of wine is a drug largely used in making up other drugs, and if a chemist sells it *bonâ fide* as a medical drug and as a medical drug only he is not liable. In the case before us the articles are tinctures prescribed by the British Pharmacopœia and there is no doubt as to their being *bonâ fide* medicinal preparations. Now in the new Excise Act, B. C., Act V of 1909, a definition of liquor has been given and "exciseable article" has been defined as any liquor or intoxicating drug as defined by or under this Act. We have nothing to do with intoxicating drugs and have only to see what the definition of liquor is and that definition runs as follows: Liquor means intoxicating liquor, and includes spirits of wine, spirit, wine, *tari*, *pachwai*, beer, all liquid consisting of or containing alcohol and any substance which the Local Government may, by notification, declare to be liquor for the purposes of this Act.

(1) I. L. R. 24 Cal. 157 (1896).

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It will be observed that the only defining words in this clause are "Liquor means intoxicating liquor" and the rest of the clause is open to the observations made by the Judges in *Gonesh Chandra Sikdar's* case (1). That the clause covers spirits of wine which is in itself, apart from its medicinal use, a liquor which can be drunk as an intoxicating liquor there can be no doubt and the decision in the unreported case we referred to above has therefore been clearly overruled. But that *Gonesh Chandra Sikdar's* case (1) is no longer good law is not so clear. To be an exciseable article liquor must be intoxicating liquor and the enumeration of all the liquids that follow does not make them liquor unless they are intoxicating. Now none of these drugs before us could conceivably be used as an intoxicating liquor. The poisonous drugs they contain would kill a man long before he had taken a sufficient quantity of alcohol to intoxicate him and we can hardly think that the Legislature can have intended to penalize the use of a beneficent drug like Sweet Spirits of Nitre which has saved the lives of thousands of children and is the basis of all the most efficient fever mixtures in this country, where malaria is the greatest scourge. The real object of this prosecution is to prevent smuggling of drugs prepared in French territory with French spirits in Bond into British territory. This can be effected under the the customs law, it is idle to urge that the Government cannot afford to keep up a customs station if necessary on the French frontier.

As a matter of fact it would be wholly unnecessary inasmuch as there is a customs establishment at Hughly and the Station Master at Chandernagore, which station is in British territory, could be empowered to detain all articles exported from French territory, just as local Post Masters are empowered in respect of the parcel post, and have them examined if suspected to contain articles liable to duty. It so happens that the customs duty on drugs containing alcohol is exactly the same as that levied on exciseable articles. The matter being *res integra* we should be inclined to hold that the meaning of the Legislature in amending the Act was to prevent chemists and vendors of drugs selling intoxicating liquors or otherwise dealing with them as medicinal preparations.

It in effect says you shall not sell brandy or gin or other intoxicating spirits because they are included in the British Pharmacopœia under the name of Spiritus Vini Gallici or Spiritus Juniperi, etc., nor shall you by merely mixing a little cinnamon or other harmless medicament with spirits palm off an exciseable article as a *bonâ fide* medicine, and as one instance you shall not sell that exceedingly dangerous intoxicant, rectified spirit of wine, as a medicine without a license or transport it without a permit.

The argument that unfermented *tari* is not an intoxicating liquor does not help the prosecution inasmuch as that was also an exciseable article under the old Act, and as it is impossible to say when it may become intoxicating by a natural process of fermentation over which the owner has no control, the Legislature has very rightly declared it to be an intoxicating liquor from the first, as it is undoubtedly a potentially intoxicating liquor in its nature.

A rather curious argument which was adduced by the prosecution may be glanced at here since it may be reproduced

(1) I. L. R. 24 Cal. 157 (1896).

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in other cases unless disposed of once for all.

This is that "Juice drawn from any cocoanut" is mentioned and the astounding argument is put forward that this refers to the milk of the cocoanut itself whereas it is obviously to be read with the word "tree" the words being any cocoanut, palmyra, date or other kind of palm tree, and means the juice of the palm tree of whatever species and not its fruit.

A much stronger argument is derivable from the fact that "denatured spirit" is treated as an exciseable article and is subject to duty under the Act. "Denatured" means effectually and permanently rendered unfit for human consumption. But it may be that "denatured spirit" is only exciseable by virtue of the notification which makes it liquor. It certainly is not intoxicating liquor and would not be exciseable but for the special notification. Had it been necessary for the decision of this appeal to come to a finding whether all drugs *bonâ fide* prepared in accordance with the British or other recognised pharmacopœias were exciseable merely because alcohol is used in their preparation we should have felt it our duty to refer the question to a Full Bench in this form, "Does the change in the law enacted in Act V, B. C. of 1909, make the decision in *Gonesh Chandra Sikdar* v. *Queen-Empress* (1) no longer sound law?"

The argument that the notifications of the Board treat all spirits used in the preparation of drugs as exciseable articles has no force.

If the law is as we have above indicated those notifications would be *ultra vires* if they said that the spirit found in the prepared drugs rendered the drugs themselves exciseable. But they are careful to say nothing of the kind.

In the notification under sec. 4, a new clause (*h*), dated 6th January 1911, says that perfumed spirits and spirits used in drugs, medicines or chemicals whether manufactured in India or imported from foreign countries shall be taxed (if liable to taxation) as foreign and not as country liquor.

This cannot affect the question though it may indicate that the Board of Revenue takes a different view of the law to what we do. That this is so is patent from a letter on the record from the Personal Assistant to the Excise Commissioner pointing out in answer to a question from the Indian Pharmacy that all their tinctures are liable to excise duty when imported into British India unless they can prove that the spirit used is foreign liquor and has paid the full duty imposed thereon by the Indian Tariff Act or the Bengal Excise Act. But this is rather discounted by another letter from the same gentleman to the Collector of Hughly in which he says that the Ipecacuanha Wine and Tincture of Bryonia manufactured by Moti Lal Chandra of Chandernagore are proved by analysis to be of a strength of 100·38, 54 or 61·46 U. P. and 6. 40 U. P. respectively and that they are therefore spirits and not medicines.

This seems to admit that if they were *bonâ fide* medicines as the articles in this case admittedly are they would not be liable.

Then there is the notification under sec. 19 imposing certain rates of duty upon spirit used in drugs, medicines, etc., which is Rs. 7-13 per proof gallon. This does not either affect the question. The spirits are undoubtedly exciseable but the finished drugs are apparently in the view we have expressed not so. About 3 as.

(1) I. L. R. 24 Cal. 167 (1896).

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6 p. would have to be laboriously collected on each bottle of tincture after analysis and the duty would be impossible to collect. The procedure adopted in the firm of Messrs. David Waldie who have a manufactory of drugs similar to the French one in British territory at Serampore has been described to us at our request by the learned Counsel Mr. P. L. Roy for the Crown. We must here express our full appreciation of the very able and exhaustive way in which he dealt with the legal difficulties that arise in this case and the great help he gave us in elucidating them. It appears that the spirits used by them go up in bond so that no customs duty is paid, but Messrs. Waldie by arrangement with Government pay excise duties on the finished tinctures on a declaration which Government accepts that so much spirit goes to each gallon of tincture. This arrangement is no doubt convenient with a large firm having a permanent location at a British Excise head-quarter but it does not show that the finished drugs are exciseable articles. It only shows that by special engagement Messrs. Waldie & Co. pay the duties on the spirits used after the drugs issue from their factory and not before as they are liable to do. Obviously this could not be done in the case of a small retail trade or of small imports from foreign territory made at odd times.

In the latter case the customs must intervene and this brings us to the contention which Counsel for the Crown necessarily had to make that the decision of the learned 2nd Presidency Magistrate was erroneous when he held that the accused could not be convicted of importing. The learned Masgistrate bases his contention quite rightly in our opinion on the wording of sec. 9, sub-sec. (2). It is argued that the words "was liable on importation to duty" import the condition that the duty has been paid. But as the Magistrate points out there is a clear distinction between imports and articles exported or transported. The customs are supposed to look after imports of non-exciseable articles and articles which are subject both to customs and excise.

If such articles escape the customs they can be dealt with by the Excise Authorities either in transport or when an attempt is made to export them, but the excise duty on imports does not apply to articles that are liable to a similar duty in the customs. In other words two import duties cannot be charged and it is not the business of the Excise to enquire whether customs have been paid until transport begins and the Inland Revenue is affected.

It is perfectly clear that these articles ought to have been dealt with by the Customs Authorities but because this was not done the accused are not thereby rendered liable to punishment under the Excise Act. As regards the exemptions notified under sec. 90 of the Act it is clear that the Board intended to exempt only such articles as had paid duty under sec. 10 and wished to take powers to tax the spirit contained in tinctures which had not already paid duty. There is no doubt that such spirit can be taxed in transport or export but that does not make the drugs exciseable articles. Supposing the alcohol had been distroyed or masked by some chemical process in making the drug. It is clear from the wording of all the notifications that it is separated spirit and not the combined drug that is exciseable. If as we are inclined to hold these drugs are not exciseable articles the customs are the only authority that can deal with them. But assuming for the purposes

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of this case that they are exciseable articles we have now to see whether the present accused can be said to have transported them and whether at the time of their seizure at 16, China Bazar Lane, they were in the possession of the accused. We think both these questions must be answered in the negative.

Sec. 46 says "if any person transports" and sec. 55, which is the section relied on to make the owner or person interested liable by implication, only applies to manufacture, sale or possession. It does not apply to import, transport, or export. It is sec. 56 which makes the holder of a license, permit or pass liable for the misconduct of his servant or agent in matters of import, transport or export and it is not contended that the accused are the holders of licenses, permits or passes. The persons actually engaged in the transport are the Manager Siddeshwar who ordered it and the Brahmin Tarini Charan Mookerjee who carried it out. It is faintly suggested that accused No. 2 might be charged with abetment of transport inasmuch as he took the order for the supply of the goods. But to begin with, that is not what he is charged with, nor does the act of taking an order for foreign goods constitute an abetment of their transport though it might be an abetment of their import.

We do not think that the evidence is at all sufficient to make out that this Tarini Charan Mookerjee was a servant in the employ of the Indian Pharmacy, though he may have been a person acting on behalf of Siddeshwar, the Manager, and of B. K. Paul & Co., as a kind of go-between in this illicit trade.

It is in evidence that this Tarini Charan Mookerjee only personally conveyed goods to B. K. Paul & Co., though he counter-signed the consignment notes addressed to other firms.

Now the consignor being in French territory and not coming to the station himself to forward the goods it is the practice of the Railway not to accept his signature on the consignment bill unless it is counter-signed by some person who knows him. The counter-signature of his own servant would obviously be of very little value to the Railway Company and it must therefore be held that the Railway authorities regarded him as an independent witness not in the sole employ of the Indian Pharmacy. It is clear that B. K. Paul & Co. alone derived benefit from this importation without duty from French territory. They had been been carrying it on for some years and their managers must be regarded as accomplices. We cannot therefore place any reliance on their unsupported statements that T. C. Mookerjee was the Sircar of the Indian Pharmacy, which, they aver, they learnt from the accused themselves. The evidence of the Deputy Inspector of Excise, Hem Chander Banerjee, who was employed to watch accused No. 2 and saw him in a number of Chemists' shops canvassing his wares, is clear that he does not remember any other shop than B. K. Pal's that was supplied through T. C. Mookerjee. For the same reason we cannot accept their evidence that delivery had not been taken of the goods which form the subject-matter of this case, and that the price of this consignment was still under discussion and a dispute still going on as to the presentation of the bill. The evidence is half-hearted and inconsistent and it is perfectly clear from the admissions made that the discussion of prices that Mr. Wilson found going on, was with regard to the proposed tender

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Contents.

NOTES.

THE THIRD CRIMINAL SESSIONS WILL COMMENCE from date, Holmwood, J., presiding.

The constitution of Benches and the distribution of business amongst them from date are as follows :—

PATNA GROUP AND THE PRIVY COUNCIL DEPARTMENT.—The Hon'ble the Chief Justice, and the Hon'ble Mr. Justice N. R. Chatterjea.

PRESIDENCY GROUP.—The Hon'ble Mr. Justice Brett and the Hon'ble Mr. Justice Chapman.

BURDWAN GROUP.—The Hon'ble Mr. Jus ice Mookerjee and the Hon'ble Mr. Justice Beachcroft.

RAJSHAHI GROUP.—The Hon'ble Mr. Justice Sharfuddin and the Hon'ble Mr. Justice Richardson.

REGULAR APPEALS OF ALL THE GROUPS.—The Hon'ble Mr. Justice Chitty and the Hon'ble Mr. Justice Teunon.

CRIMINAL BUSINESS (other than undefended cases) and applications in connection with orders passed by Civil Courts under secs. 195 and 476 of the Code of Criminal Procedure.—The Hon'ble Mr. Justice Carnduff and the Hon'ble Mr. Justice Imam.

ORIGINAL SIDE.—As before.

WE ARE GLAD TO NOTICE THAT THE HON'BLE Mr. Deva Prosad Sarbadhicary who was nominated by the Calcutta University to represent that body in the Congress of Universities in England has been given the honorary Degree of Doctor of Law by the Aberdeen University. We congratulate Dr. Sarbadhicary on his new honour and appreciate the compliment paid to the Calcutta University by the conferring of this distinction on its representative.

THE REVERSAL OF THE HIGH COURT JUDGMENT in the case of *Clarke* v. *Brojendra Kishore*, is being made the occasion of a fresh onslaught on the High Court of Calcutta, because it has not been swayed by executive influence in arriving at its decision in a political trial. That Judges with a legal training have been singled out for attack ostensibly for their freedom from executive bias, will not surely lower them in public estimation. It is only the critics who are really making fools of themselves. Sir John Rees for instance went so far as to suggest in Parliament a revision of the composition of Indian High Courts by ostracising from them men of legal training and manning them by the appointment of executive officers as High Court Judges.

MR. REES IS QUITE AT LIBERTY TO RETAIL HIS own fantastic ideas in Parliament. But the worst of such irresponsible suggestions is that there are people in India who are apt to take them seriously and make them the occasion for fomenting fresh unrest. It is the Calcutta High Court that has paved the way to peace and order that now prevail in this country. If it gets abroad now that the High Courts in India would be in future so constituted that the people are to have no protection against the arbitrary and irresponsible acts of executive officers it is sure to give rise to grave political troubles.

TO-DAY THE HIGH COURT COMPLETES THE 50TH year of its existence. It is perhaps to be regretted that its Jubilee is not being fittingly celebrated.

But to those associated with the administration of justice by the High Court as well as to all who are concerned in the good administration of the country the occasion cannot but call up old and historic memories and solemn thoughts for the future.

THE HISTORY OF THE HIGH COURT IS THE HISTORY of the establishment of the reign of law and order in this Province. The first few years of the supremacy of the East India Company in these Provinces were years in which chaos reigned supreme. The old system of Government and judicial administration was thoroughly dislocated and demoralised and no new system of law or judicial tribunals established. The Company was concerned with its revenues and its sole look out was for dividends. Gradually it came to be understood that even for the purposes of revenue collection, good administration would be of great assistance, and tentative attempts were made to regulate some purely revenue matters till Warren Hastings introduced the first comprehensive change in the system of administration which laid the foundation of the rule of law in India in 1772 by the establishment of the Sudder Courts. This was supplemented in the Presidency Towns by the Supreme Courts which were established under the Regulating Act of 1773.

THE JUDGES OF THE SUDDER DEWANY SAT IN their old premises in Sudder Street, and subsequently, in order to be outside the local jurisdiction of the Supreme Court in the premises where the Military Hospital now is in Bhowanipur and the Judges of the Supreme Court sat in their premises on the site of the present High Court —passing their time, in the intervals of their judicial work, in occasional bickerings against one another. For a long time there was little love lost between His Majesty's Judges in the Supreme Court and the Company's Judges of the Sudder Dewany Adawlut and the Sudder Nizamat Adawlat. And occasionally questions arose regarding conflict of jurisdiction which did not surely add to the good feeling of the two Courts for each other. Besides, the dual system of administration of justice led to practical difficulties, specially in respect of jurisdiction over Europeans and of the law to be administered, for the Supreme Court applied English law while the Sudder Court and the Mofussil Courts subordinate to it administered the Hindu and Mahomedan law supplemented by rules of equity and good conscience.

AS FAR BACK AS 1852-53, EVIDENCE WAS GIVEN before the Parliamentary Committee for East Indian affairs relating to the disadvantages of the dual system of legal administration and strong opinions were expressed in favour of the amalgamation of the Supreme and Sudder Courts. When the India Bill of 1852 was introduced Sir Charles Wood wanted to introduce a provision for the amalgamation. But the Indian Law Commissioners advised the postponement of the amalgamation till a common law of procedure was established. The Codes of Procedure were passed in 1859 and in 1861 the Indian High Courts Act was passed, in pursuance of which the High Court at Fort William was established by the amalgamation of the Sudder and the Supreme Courts on the 1st July 1862.

THE ESTABLISHMENT OF THE HIGH COURT DID not, to outward appearance, immediately introduce any very great change. For the Supreme Court really survived as the Original Side of the Calcutta High Court and the Sudder Courts as its Appellate Side. The Courts also continued to sit in their respective old houses till the present High Court buildings were completed ten years later. The feeling of aloofness was, however, gone and a great deal more of community of laws was established.

SIR BARNES PEACOCK, THE GREATEST NAME IN the Indian Judiciary, who had come out to India as Law Member of the Governor-General's Council and was at the time of the establishment of the High Court the Chief Justice of the Supreme Court, became the first Chief Justice of Bengal, the common head of both the Courts, though he was not the first to act in that capacity; for Sir Elijah Impey who came out as the first Chief Justice of the Supreme Court was also appointed later on the Chief Judge of the Sudder Court.

ONE REMARKABLE CHANGE INTRODUCED BY THE High Courts Act was the opportunity it afforded to Indian lawyers of ability to rise to the high position of High Court Judges. In those days the appointment of an Indian to any position of importance and responsibility was sure to send up a cry from the European community as if their life and property were at stake. A great outcry was raised against the appointment of an Indian gentleman of great ability and learning to the comparatively unimportant office of a Presidency Magistrate of Calcutta as late as 1858. The provision in the Letters Patent for recruiting Judges from the Vakils and members of the Provincial Judicial service was therefore a great forward move. Under this provision Babu Romaprasad Roy was

appointed the first Indian Judge of the Calcutta High Court though he never sat as one, and in fact Babu Sambhunath Pandit was the first Indian Judge who sat as such. Since then distinguished lawyers drawn from the ranks of Vakils have equally distinguished themselves on the Bench and have secured for themselves a name on the roll of the great Judges who have made the High Court in the space of a few years the great institution to which every member of the public looks instinctively for protection from oppression and injustice.

THERE ARE MEN STILL LIVING AND SOME IN active practice who remember the day when the High Court was first established. The fifty years just passed represent to them perhaps the most eventful period of their lives. But fifty years is too short a period in the life of an institution and specially an institution like the High Court. But the true measure of such a period can be gathered only from the amount of useful work crowded in o i-. It is without doubt a strenuous fifty years' life that the High Court has just completed. And here we may note that the usefulness of a Court of justice cannot be estimated wholly or even principally by the number of sensational cases decided by it. Cases raising great political or constitutional issues no doubt require careful and impartial handling by His Majesty's Judges. But the amount of public interest that such cases create would, if there was nothing else, be sufficient to secure for them that degree of painstaking consideration on the part of the judges which all knotty questions of law and policy necessarily demand. But such cases do not after all affect the hearth and the home of the villager or the raiyat as immediately as for instance a simple decision on a question of occupancy right or a contested succession to a Hindu female's property.

LIKE THE ENGLISH LAW COURTS, THE HIGH Courts of India are not merely interpreters of law but also makers of new law. To a superficial observer it may seem as if the enormous output of legislation by the Supreme and Local Legislatures has placed the law-making power of the High Court within very narrow bounds. In point of fact however this is not so. The whole of the Hindu and the Mahomedan law has been left untouched by the legislature. The land laws of the various Provinces have no doubt been elaborately framed in Statutes, but there are gaps in them which cannot wait for the Legislature to fill up, and it falls on the High Court to lay down such rules of law, consistent with the terms of the Codes, as may best suit the circumstances. At least half if not more of the law one finds in an annotated edition of the Bengal Tenancy Act, for instance, is Judge-made law. As a result of the last fifty years' development we have also a fairly complete code of Hindu and Mahomedan law. We do not say that the law thus laid down is beyond criticism; but it would be idle to deny that the rules of Hindu and Mahomedan law as also those determining the relations of landlords and tenants and other branches of law as laid down by the High Court have on the whole given satisfaction to the communities concerned.

DURING THESE 50 YEARS, HARDLY ANY CHANGE has been effected in the constitution of the High Court. The latest Parliamentary Statute relating to the High Courts has enabled the Government to increase the number of judges beyond the former maximum of 16 and this provision has been availed of for the purpose of increasing the number of Judges of the Calcutta High Court alone. Power has also been taken under the Statute to reduce or divide the local jurisdiction of the High Court. But the power has not been exercised yet. Should this power be exercised now, the High Court of Calcutta as we know it will cease to exist. It would be a great pity if this Fiftieth Anniversary of the High Court should in a way also foreshadow its dea h. A new High Court confined only to Bengal, and under the ægis of the Governor of Bengal, may no doubt have a great future before it, but it will not be the "Calcutta High Court," which enjoys the unique distinction amongst all the Indian High Courts of not being subject to any of the local Governments.

THE CASE OF *Vissanji* v. *Shapurji* REPORTED in our last issue was a rather hard case. The case arose out of one of the transactions relating to the Dwarkadas Dharamsey insolvency in Bombay. It appears that Dwarkadas Dharamsey applied to the Plaintiffs in the case for a loan of Rs. 1,50,000 which they refused. On that Dwarkadas represented to the Plaintiffs that he was raising a loan of 11 lakhs on a first mortgage of the Tricumdas Mills and that the Plaintiff's loan of a lakh and-a-half would be paid out of that amount when raised. The Defendant was negotiating for that loan on behalf of Dwarkadas Dharamsey and at the request of Dwarkadas he signed a letter addressed to the Plaintiff in the course of which he said, "In consideration of your having at my request acceded to the proposal of the Secretaries, Treasurers and agents of the Tricumdas Mills Company Limited to advance to the Mills the sum of rupees one lakh and fifty thousand, I hereby bind myself to you to procure a loan within two weeks of rupees eleven lakhs as the first mortgage of the Mills block property

and to pay you thereout the said sum of rupees one lakh and fifty thousand agreed to be advanced by you to the Mills."

SUBSEQUENTLY THE DEFENDANT PROCURED THE loan but Dwarkadas refused to complete the transaction. Thereupon the Defendant gave notice of this to the Plaintiffs and stated that under the circumstances his liability under the contract had ceased. The Plaintiffs took no action on that notice. If the Plaintiffs had then intimated to the Defendant that they would look to him for payment the Defendant might possibly have instituted proceedings against Dwarkadas to protect his risk. Shortly afterwards Dwarkadas became insolvent and the Plaintiffs sued Defendant on the guarantee. Their Lordships held that the Plaintiffs had given an unconditional undertaking that a loan would be procured and that being so, nothing that subsequently happened could affect the terms of the agreement or liabilities thereunder.

THERE CAN BE NO DOUBT, VIEWING THE AFFAIR as a business transaction, that the parties had none of them contemplated the contingency that happened but they had both acted upon the assumption that Dwarkadas would be willing to complete the negotiations with the Defendant. And there can be no doubt also that it was very hard for the Defendant to be bound down to a promise made on an assumption of a state of facts which had ceased to exist without his fault. From the circumstances of the case also it would seem that all that the Plaintiffs were anxious to get from the Defendant was an assurance that he was actually negotiating the loan without evidently contemplating that Dwarkadas might refuse to negotiate.

COMING TO THE LEGAL ASPECT OF THE QUESTION, there is no doubt that subsequent events cannot possibly vary the terms of the contract and the parties must be bound to the terms they used in the sense in which they used them at the date of the contract. But what did the parties contemplate? Their whole intention, not merely as expressed in their words, but taken along with the circumstances present at the time, should be taken into consideration. Taking all these circumstances, can it be said that the Defendant took the risk of the contingency that had happened? No doubt, it was open to the Plaintiffs to insist that the Defendant should undertake all risks but can it be said that they contemplated it and that they understood the Defendant to undertake to raise a loan for the Mills whether they wanted it or not?

NO DOUBT THE WORDS OF THE LETTER READ BY themselves are categorical and contemplate no contingencies, but taking the words with the circumstances it may reasonably be said that both the parties proceeded on the assumption that the Mills would take the loan when raised and there was no question of taking risks on that—there was no contract relating to that contingency. If then the assumption failed, on principle it would seem the contract also would fall to the ground. Their Lordships of the Judicial Committee, however, seem to have tied down the Defendant to the words of the contract irrespective of implied assumptions. This seems rather hard, having regard specially to the fact that there was no default or laches on the part of the Defendant and that the Plaintiffs might surely have had their remedy if they had taken action in time when the Defendant gave them notice of Dwarkadas's failure to complete the loan transaction. If it was a case in which both sides took the risk of Dwarkadas failing to complete the transaction, it seems scarcely consistent with equity and good conscience to fasten the responsibility for the failure on the party who was not guilty of any default or laches.

CURRENT INDIAN CASES.

Civil Procedure Code, Or. XLI, r. 17—Order dismissing appeal for default if a decree.

An order dismissing an appeal for default is not a decree within the meaning of sec. 2 of the Civil Procedure Code.

Mookerjee and Carnduff, JJ.

RUKMINIMAYI v. PARAN, I. L. R. 39 Cal. 341.

Penal Code, sec. 292—Obscenity, test of—Religious poem of allegorical character based on an ancient sacred book.

Under sec. 292, the test of obscenity would be whether the writing in question is calculated to deprave and corrupt those into whose hands the work might fall. Where a work would have such influence its publication would be an offence though the writer might have an ulterior laudable object in view.

Objectionable passages contained in a religious or classical work would not necessarily make its publication punishable as of obscene literature. Publication of an extract from it of its obscene passages, where its publication tends to deprave and corrupt those whose minds are open to immoral influences would however be an offence.

But where a story which appears objectionable when read as relating to immoral acts of human beings is extracted from a religious book and relates to divine beings whose works are not to be judged by human standards and where the extracts would not inspire impure thoughts in those who read it by reason of its relation to divine beings its publication is not punishable. In this case the offending book was a story relating to the acts of Krishna viewed as a divine incarnation. The

story was taken from Oriya *Haribansa*, a religious book of great antiquity and related an incident which taken as acts of human beings would be obscene, but which on the face of it could not possibly be the act of a human being. The language used was not more obscene than in the original and the learned Judge found that it would not raise impure thoughts in people who believed in the divinity of Radha and Krishna. It was *held* that the publication of the work was not an offence under sec. 292 of the Penal Code.

N. R. Chatterjea, J.

KHERODE CHANDRA *v.* EMPEROR, I. L. R. 39 Cal. 377.

Land Acquisition Act, sec. 54—"Award," meaning of—Refusal to restore a case dismissed for default.

In this case there was a claim case before the Land Acquisition Judge which was dismissed for default. An application for its restoration on the ground that the pleader's clerk had not informed the claimant of the date of hearing was dismissed. On appeal, a preliminary objection having been taken, it was *held* that under sec. 54 of the Land Acquisition Act, an appeal lay only against an "award." As the order in question was not an award the appeal was held to be incompetent.

Jenkins, C. J., and *N. R. Chatterjea, J.*

I. L. R. 39 Cal. 393.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FOR AUSTRALIA.]

LORD MACNAGHTEN. LORD SHAW. LORD MERSEY. LORD ROBSON. 1912. 22, February.	ROBERT DUNE and another, *v.* JAMES BYRNE.

Charitable bequest—Gift of funds to Archbishop to be expended as he might judge most conducive to the good of religion, if gift for charitable purpose.

The Reverend Denis Joseph Byrne, a Roman Catholic clergyman in charge of the Roman Catholic Mission at Dalby, in the State of Queensland, disposed by will of the residue of his estate in the following words :—

"I will and bequeath . . . . that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese."

The question was, was that a good charitable bequest? In the Supreme Court of Queensland the Full Court unanimously held that it was. The High Court of Australia, by a majority of three Judges to two, declared the bequest void.

For the Appellants it was urged that inasmuch as according to the authorities a gift to a Roman Catholic Archbishop and his successors, without more, would be a good charitable gift, there was to be found in this will an overriding charitable intention sufficient to supply the lack of certainty—if lack of certainty there was in the declared object of the bequest. Their Lordships rejected this argument. LORD MACNAGHTEN in delevering the judgment of the Board observed that a similar argument had been advanced and rejected in the Court of Appeal in England in the case of *Re Davidson*, 1909, 1 Ch. 567; and that it was difficult to see on what principle a trust expressed in plain language whether the words used be sufficient or insufficient to satisfy the requirements of the law can be modified or limited in its scope by reference to the position or character of the trustee.

For the Respondent it was contended that even if the trust declared be a charitable trust the words "wholly or in part" left it uncertain how much of the subject-matter of the gift was impressed with the trust, because the trustee was authorised to apply part only of the residue to the purpose specified in the will. On this point their Lordshsps held that on the true construction of the will the effect of the words in question was merely to give the trustee a discretionary authority to break in upon the capital of the trust fund.

On another point, however, their Lordships decided that the trust was too indefinite for the Court to execute it as a charitable bequest. The fund was to be applied in such manner as the Archbishop might "judge most conducive to the good of religion" in his diocese. A thing may be "conducive," and in particular circumstances "most conducive," to the good of religion in a particular diocese or in a particular district without being charitable in the sense which the Court attached to the word, and indeed without being in itself in any sense religious. *Cocks* v. *Manners*, L. R., 12 Eq. 574. As to what might be considered "most conducive to the good of religion" in the diocese of Brisbane the Archbishop was given an absolute and uncontrolled discretion. That being so, apart from a certain line of decisions cited at the Bar, there would be an end of the case. The language of the bequest (to use Lord Langdale's words) would be "open to such latitude of construction as to raise no trust which a Court of Equity could carry into execution," *Baker* v. *Sutton*, 1 Keen 224, 233. If the property, as Sir William Grant said in *James* v. *Allen*, 3 Mer. 17, "might consistently with the will be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute."

To the argument that this was a gift for religious purposes, and that a gift for religious purposes was a good charitable gift, the answer

was that this was not in terms a gift for religious purposes, nor were the words synonymous with that expression. Their Lordships agreed with the opinion of the Chief Justice that the expression used by this testator was wider and more indefinite. On this part of the case, *Re White*, 1893, 2 Ch. 41, was referred to. In their Lordships' opinion the Court of Appeal in that case did not mean to lay down any new law, or to extend the law as laid down in former decisions. All they did was to hold, as had often been held before, that a bequest for religious purposes was a good charitable gift. It was too late in their opinion to depart from long-established decisions, although the Master of the Rolls did observe that "a religious society may or may not be a charitable society in the sense in which that expression is used."

In the result their Lordships dismissed the Appeal but having regard to the great divergence of judicial opinion in this case and the fact that the difficulty was occasioned by the testator himself, they directed that the costs of both parties as between solicitor and client ought to be paid out of the estate.

Messrs. Buckmaster, K. C., and Galbraith for the Appellant.

Messrs. Danckwerts, K. C., Wheeler and Power for the Respondents.

B. D. *Appeal dismissed.*

PRIVY COUNCIL.

[Appeal from Newfoundland.]

Lord Macnaghten. Lord Shaw. Lord Mersey. Lord Robson. 1912. 23, April.	The Reid Newfoundland Company *v.* The Anglo-American Telegraph Co., Ltd.

Limitation—Suit for money accountable by Defendants as trustees.

This was an appeal from a judgment of the Supreme Court of Nowfoundland in an action brought on the 2nd November 1905 by the Anglo-American Telegraph Company against the Reid-Newfoundland Company, wherein the Defendants had pleaded the Statutes of Limitations (21 Jac. 1. chapter 16, and local statutes) as to so much of the Plaintiffs' claim as accrued prior to the 2nd November 1899. The Plaintiffs had replied that the plea disclosed no defence because the action was taken on a specialty contract under which the period of limitation was 20 years. The Supreme Court had decided, by a majority of two out of three Judges that the Plaintiffs' replication was good.

By an agreement under seal made on the 11th August 1888 between the Newfoundland Railway Company (the former owners of a portion of the Appellants' Railway system) of the first part, F. H. Evans, the Receiver and Manager of the said Newfoundlaud Railway Company, of the second part, and the Respondents of the third part, it was agreed, among other things, that the Respondents should erect and maintain along the lands forming the roadways of the Southern Division of the Railway Company's railway between S. John's and Harbour Grace, and between Harbour Grace and Carbonear, a "special wire" for the Railway Company, their successors and assigns for use in and above the operation of the said railway as therein defined, and the Newfoundland Railway agreed "not to pass or transmit any commercial messages over the said special wire, except for the benefit and account of the Telegraph Company."

By a series of transactions which need not be described in detail the rights of the Newfoundland Railway Company became vested from 1st April 1898 in one R. G. Reid, and from 1901 in the Appellants, "subject to the subsisting contract with the Anglo-American Telegraph Company as regards the telegraph line along the said railway."

Since the 1st April 1898 R. G. Reid and the Appellants used the "special wire" in and about the operation of railways other than the railway between St. John's and Harbour Grace, and between Harbour Grace and Carbonear. In fact they used it for all the purposes of their business, including the new or extended lines of Railway and their shipping business, and other commercial undertakings.

The Respondents accordingly brought this action against the Appellants for (1) an account of all telegraphic messages sent by R. G. Reid and the Appellant Company over the special wire since the 1st April 1898, other than messages connected with the operation of the railway as defined by the contract of the 11th August 1888, (2) payment of the amount found to be due, and (3) damages.

The Supreme Court held, by a majority, that as the agreement of the 11th August 1888 was under seal the Appellants were liable as on a specialty.

Lord Robson in delivering their Lordships' opinion said it was not necessary to determine this question on which the learned Judges disagreed. The claim of the Respondents rested on surer ground. The Appellants took over the railway together with the "special wire" comprised in the agreement of the 11th August 1888, with notice of the limitations and conditions attached to the user of that wire. It seems to their Lordships that when and as often as the

Appellants used the special wire for the transmission of unprivileged messages, an obligation in the nature of a trust arose on their part, and it became their duty to keep an account of the profits accruing from such use of the wire, and to set those profits aside as moneys belonging to the Respondents. To such a duty, so created, the Statute of Limitations could have no application unless by express statutory provision. The Appellants were accountable as trustees, and, in giving to trustees the protection of the Limitation Acts, the Trustee Act, 1898 (Newfoundland), 61 Vict., cap. 38, to which reference was made in the course of the argument, withheld such protection from a trustee when the proceedings are taken to recover property, or the proceeds thereof, s ill retained by the trustee, and converted to his own use.

The principle is laid down in *Burdick* v. *Garrick* (L.R., 5 Ch. A. 233.) In that case an agent was entrusted with property which he was authorised to sell and he was directed to invest the proceeds in the name of his principal. Under this authority he received certain moneys and paid them into his own account at his bank. Afterwards, in an action for an account, the agent pleaded the Statute of Limitations, but Lord Hatherley, L. C., said :—

"How a person who is intrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see."

And the Court held that the Statute of Limitations had no application. Lord Justice Giffard followed in the same sense, and stated the principle broadly in these terms (afterwards cited with approval by Lord Macnaghten in *Lyell* v. *Kennedy* [14 A. C., p. 463]) :—

"I do not hesitate to say that where the duty of persons is to receive property and to hold it for another and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it."

In *Lyell* v. *Kennedy*, Lord Selborne, in deciding hat the facts were sufficient to establish a fiduciary character against a manager of property who had received rents on behalf of a principal, said :—

"For the constitution of such a trust no express words are necessary; anything which may satisfy a Court of Equity that the money was received in a fiduciary character is enough."

Their Lordships accordingly dismissed the appeal with costs and directed that the accounts be referred to the Registrar to be made up from the 1st April 1898, when the special wire began to be used for unprivileged messages, until the discontinuance by the Appellants of the use of such wire.

Messrs. Danckwerts, K. C., and Moore for the Appellants.

Sir R. Finlay, K. C., and *Mr. Rowlatt* for the Respondents.

B. D. *Appeal dismissed with costs.*

CALCUTTA HIGH COURT

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

TESTAMENTARY AND INTESTATE JURISDICTION. Before FLETCHER, J. IN THE GOODS OF BINODINY DASSI, deceased. 17th June 1912.

Will—Attesting witnsss, verification by—Examination of attesting witness by Court in Chambers; if sufficient verification of petition for probate.

A Hindu Lady, Sreemutty Benodiny Dassi, who was governed by the Bengal School of Hindu Law, died on the 10th December 1911, after having made and published her last Will on the 27th May 1900. By the said Will she appointed Raj Chunder Dey and Nidhoo Nath Dutt, the executors thereof. The execution of the said Will was attested by two witnesses, Kamini Kumar Guha and Kally Nath Bose. The said Kamini Kumar Guha predeceased the testatrix On the death of the testatrix, one of the executors, *viz*, Nidhoo Nath Dutt requested the said Kally Nath Bose to verify the petition for probate which he intended to make, but the said Kally Nath Bose refused. Thereupon the said Nidhoo Nath Dutt applied to Fletcher, J., in Chambers for an order that the said Kally Nath Bose do on a date to be fixed appear before the Court to be examined with reference to his attesting the said Will. An order was made in terms of the said petition and on the 17th June 1912 the said Kally Nath Bose was exemined *viva voce* before the Judge in Chambers.

Mr. B. L. Mitter appeared for the Petitioner.

Held—That the evidence of the said Kally Nath Bose should be treated as his verification provided in sec. 67 of the Probate and Administration Act (V of 1881). The learned Judge having regard to the indigent circumstances of the said Kally Nath Bose did not order him to pay the costs of the application and examination *viva voce*, but directed that the said costs would be costs in the said probate proceedings. His Lordship then admitted the said Nidhoo Nath Dutt's petition for probate.

R. N. M.

CIVIL APPELLATE JURISDICTION. Before CARNDUFF AND CHAPMAN, JJ. APPEAL FROM APPELLATE DECREE No. 2591 OF 1909. MOHOMED SADAT ALI MIDHI, Defendant, Appellant *v.* HARA SUNDARI DEBYA AND OTHERS, Respondents. Heard, 12th June. Judgment, 18th June 1912.

Hindu widow in possession of tenure with husband's co-sharers—Rent paid by latter—Decree for contribution against widow, sale in execution if passes absolute title.

The Plaintiff, as reversionary heir of her father after the death in 1898 of her widowed mother Jagadiswari Debya, sued for a declaration of her title to, and the recovery of possession of, a share in a *shikimi taluk*. In 1873 a decree for rent of the taluk was obtained against Jagadiswari and her co-sharers. The latter satisfied the claim, brought a suit for contribution against Jagadiswari, and were given a decree, in execution of which a share of the taluk was sold and purchased on the 20th May 1876, by the Appellant, a Mahomedan. Both the Courts below decreed the Plaintiff's suit, and this appeal was preferred by the Defendent.

Held—That where a suit for rent against a Hindu widow was brought in respect of arrears which had accrued due after her husband's death and when she was in enjoyment of the property, the liability for rent should be regarded as her personal liability and did not attach to the reversion unless and until the landlord proceeded to bring the tenure itself to sale under the special provisions of the rent law.

Babus Dwarka Nath Chuckerbutty and *Tarak Chandra Chakrabarti* for the Appellant.

Babus Mohendra Nath Ray and *Monmotho Nath Ray* for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before CARNDUFF AND CHAPMAN, JJ. APPEAL FROM APPELLATE DECREE No. 1266 OF 1910. FAZLER RAHIM *alias* RANEE MIAH, Defendant, Appellant *v.* NARENDRA KISHORE ROY, AND OTHERS, Plaintiffs, Respondents. Heard, 12th and 14th June. Judgment, 14th June 1912.

Thakbust map, entries in, if sufficient to prove inclusion of land at the Permanent Settlement—Chitta prepared by Government as proprietor, if public document.

The appeal arose out of a suit brought for the recovery of possession of certain lands claimed by the Plaintiffs as appertaining to a mehal purchased by them at sale under the Bengal Land Revenue Sales Act of 1859. The Plaintiffs, having made this purchase, proceeded to issue notices for the annulment of encumbrances under sec. 37 of the said Act and they were unsuccessful in obtaining possession of the land and had to institute the present suit. They rested their case mainly on the *thakbust* map of 1865. The Defendants set up the title of the owners of certain other shares in the mehal and relied on their part on certain *chittas* prepared by the Government in 1843-44 when the pergunnah was measured.

The Court of first instance gave preference to the *chittas* and dismissed the suit on the strength of the evidence afforded by them. The lower Appellate Court, on the other hand, took a contrary view, holding that the evidence of the *thakbust* map was superior to that of the *chittas* and decreed the suit. The Defendant appealed to the High Court.

Held—That an entry in a *thakbust* map was not insufficient to entitle a Court of fact to hold that the disputed lands were really included in the estate at the time of the Permanent Settlement.

A *chitta* prepared by Government when interested as a proprietor of the estate was not a public document.

Babu Dhirendra Lal Kastagir for the Appellant.

Babus Akhoy Kumar Banerjee and *Romes Chunder Sen* for the Respondent.

A. T. M. *Case remanded.*

EMPEROR *v.* MOTI LAL CHANDER.

for a large order by an up-country Government and that accused said they could execute it at a lower rate than that quoted by other firms, or in their own price lists, if a large quantity was ordered.

Their price lists had been with B. K. Paul & Co. for years and there is no evidence that they had ever been disputed. They had ordered the goods, had accepted them and were in possession both in law and fact. The mere presence of an agent of the seller to see that the goods are in order when opened does not keep the sale uncompleted. It is a common practice for wine merchants to indemnify their customers for bottles broken in transit but that does not prevent the property passing to the consignee when delivery has been taken. We find on the evidence that the accused were not in possession either actual or potential of the incriminating articles.

That being so the convictions and sentences must be set aside and the fines if paid must be refunded.

Accused acquitted.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD MACNAGHTEN. LORD SHAW. LORD MERSEY. LORD ROBSON. MR. AMEER ALI. 1911, Heard, 14, June and 28, November. 1912, Judgment, 3, May.	CHAMPAT SINGH and others, Decree-holders, Appellants, *v.* JANGU SINGH, since deceased (now represented by HANWANT SINGH) and another, Judgment-debtors, Respondents.

Practice—Redemption decree under appeal by mortgagee—Deposit of decretal amount by mortgagor—Duty of mortgagee to withdraw under protest—Responsibility of mortgagee for loss of right in deposit by lapse of time although amount of decree increased by Appellate Court—Ex parte *judgment, slip in order founded on, responsibility.*

In a suit for redemption the Court of the Judicial Commissioners in India passed a decree entitling the mortgagees to recover a certain sum on account of principal and interest, from which decree the mortgagees appealed to the Privy Council who increased the amount. Pending the appeal the mortgagors had deposited the amount of the decree of the Judicial Commissioners, which however the mortgagees did not withdraw, as they might have done without prejudice to their pending appeal, either by arrangement or the sanction of the Court in India or the sanction of the Board which would have been given as a matter of course,

Held—*That if the amount deposited has lapsed to Government under the Rules owing to the same not having been withdrawn in time, the mortgagees must give credit for the amount.*

A person who obtains an ex parte *judgment is responsible for any slip in the order founded on the judgment.*

This was an Appeal against an order and decree of the Court of the Judicial Commissioner of Oudh, dated the 5th August 1907, passed in execution proceedings, which affirmed the order and decree of the District Judge and Subordinate Judge of Sitapur, dated the 27th April 1907, and the 5th February 1907, respectively.

The principal question for determination on the present appeal was whether the Appellants' application for execution of His Majesty's Order in Council, passed on the 28th July 1906, in Privy Council Appeal, No. 34, of 1904 (Oudh, No. 6 of 1902), between Lekha Singh and Jangu

Singh, Appellants, and Champat Singh and others, Respondents, was within time.

The history of the litigation previous to the said Appeal, may be briefly stated. In the year 1837 the Appellants' ancestor mortgaged the Tihar Estate in the Province of Oudh to the ancestors of the Respondents, who got possession of it. Subsequently, in the year 1867, the representatives of the mortgagors sued the representatives of the mortgagees for redemption. While the suit was pending some of the mortgagors compromised the suit in respect of one-third share of the said estate, and executed a fresh mortgage, dated the 14th January 1867, for a term of 30 years.

In 1897, the Appellants and their predecessors brought a suit for redemption of the said mortgage against the Respondents and others in the Court of the Subordinate Judge of Sitapur. The said Judge delivered a judgment and passed a decree on the 14th September 1898 in favour of the Plaintiffs in terms following:—

"It is ordered and decreed by this Court, that under sec. 198 of the Civil Procedure Code, a decree be passed in favour of the Plaintiffs as against the Defendants; and it is further ordered that the Plaintiffs should deposit in Court within three months Rs. 3,519-10-11 together with interest at Rs. 2 per cent. from the date of execution of the document to that of realization, and then obtain possession."

Both parties appealed against the said decree. The Plaintiffs' appeal related to the payment of interest only, and the Defendants appealed against the whole decree. The District Judge of Sitapur dismissed both the appeals on the 30th January 1900.

The Plaintiffs, decree-holders, preferred a second appeal against the said decree to the Court of the Judicial Commissioner of Oudh. The Defendants, judgment-debtors, filed objections under sec. 561 of the Code of Civil Procedure. The said Court rejected the objections and allowed the appeal by reducing the amount of interest on the 11th April 1902, and passed a decree for redemption of the property on payment of the money within three months from the 11th April 1902.

The judgment-debtors, Respondents, submitted to that part of the said decree of the Court of the Judicial Commissioner which fixed the time for payment of the mortgage money, and appealed to His Majesty in Council against the decree reducing the amount of interest payable.

The appeal was heard *ex parte* by their Lordships of the Judicial Committee, and their judgment allowing the appeal was delivered on the 27th July 1906. Thereupon His Majesty's Order in Council was passed on the 28th July 1906, restoring the decree of the District Judge. In the course of the order it was among other things stated:—

"That on the 14th September 1898, the Court of the said Subordinate Judge made its decree in the said suit declaring that the Respondents were entitled to redeem the said properties on payment of the principal money (Rs. 3,519-10-11) with interest at 2 per cent. to the date of realization, and awarding proportionate costs to the parties: that both parties appealed from the said decree of the 14th September 1898, to the Court of Judicial Commissioner of Oudh: that by an order of the Court of the said Judicial Commissioner, dated the 8th December 1899, the present Appellants were permitted to represent all the Defendants, and on the same day the Court of the said Judicial

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Commissioner decided that the appeals lay to the Court of the District Judge of Sitapur and returned the Memoranda of Appeal for presentation to that Court: that on the 30th January 1900, the Court of the said District Judge made two decrees dismissing both the Appeals with Costs."

The Appellants filed the present application on the 17th January 1907, in execution of His Majesty's said Order in Council, and deposited the mortgage money. The Respondents filed objections to the said application on the 21st January 1907. They stated therein that the time fixed by the decree, dated the 14th September 1898, of the Subordinate Judge of Sitapur for payment of the mortgage money expired on the 14th December 1898; and that as the said decree was not a decree for redemption of a mortgage, the Court had no power to extend the time for payment. The Appellants filed their reply to the said objections on the 29th January 1907.

The Subordinate Judge of Sitapur passed his order on the 5th February 1907. He was of opinion "that the decree of the Privy Council cannot be construed as a decree for redemption;" and that the payment of the mortgage money was made beyond the time fixed by the said decree. He accordingly rejected the application for execution.

The Appellants appealed against the said decree to the District Judge of Sitapur who affirmed the order of the said Subordinate Judge on the 27th April 1907.

The Appellants preferred a second appeal against the said decree to the Court of the Judicial-Commissioner of Oudh, which dismissed the second appeal on the 5th August 1907. In the course of judgment they (Messrs. Chamier and Sanders) said :—

On behalf of the Appellants it is admitted that they are not entitled to execute the decree of the Subordinate Judge unless that decree is treated as a decree for redemption of a mortgage, because unless it is a decree for redemption of a mortgage the Court executing the decree has no power to extend the time limited in the decree, but it is contended that according to the decree of the Subordinate Judge that was before their Lordships of the Privy Council there was no time limited for depositing the money.

It is quite clear from the judgment of the Subordinate Judge that he had no intention of passing a decree for redemption of a mortgage. He held distinctly that the Appellants who were the Plaintiffs in his Court were not proprietors of the property In the closing passage of his judgment he directs that the Plaintiffs shall pay the sum found due by him within three months and this provision was, as it ought to have been, entered in the decree prepared in the Court of the Subordinate Judge. But in the printed record there is a mistake in the decree. The words "within three months" which appear in the judgment and in the original decree do not appear in the print at page 86. The Appellants cannot have been misled by this mistake for, as I have already said, they made efforts to obtain an extension of the time fixed by the Subordinate Judge, but it is suggested that their Lordships of the Privy Council must have been under the impression that there was no time fixed in the decree for payment of the money or they would have extended the time. We do not know whether the mistake was corrected in the printed copy which was signed by the Registrar and sent to the Privy Council. The learned Advocate for the Appellants contends that the Order in Council shows that their Lordships were under the impression that the decree passed by the Subordinate Judge was one for redemption of a mortgage. He relies upon the passage "that on the 14th of September 1898, the Court of the said Subordinate Judge made its decree in the said suit declaring that the Respondents were entitled to redeem the said properties on payment of the principal money Rs. 3,519-10-11, with interest at 2 per cent. to the date of realization." But this passage, like several passages before it and after it, is merely an extract from the petition presented by the Appellants. It

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may be that the Appellants in their petition to the Privy Council represented the decree of the Subordinate Judge as a decree for redemption of a mortgage, but it is impossible to suppose that their Lordships were under the impression that the Subordinate Judge's decree was one for redemption of a mortgage. They may have been misled by the mistake in the print if it was not corrected, and it may be that if they had known that the decree gave three months' time only to the Appellants they would have given the Appellants further time within which to pay the money. But there is no reason to suppose that they were misled. At all events we must take the decree of the Subordinate Judge as it stands. It is quite clear that that decree is not one for redemption of a mortgage and that we cannot, while executing that decree, extend the time. This has been ruled over and over again in pre-emption and other cases. It may be that the mistake in the printed record furnishes ground for an application for review but that is a matter upon which we cannot express an opinion. It is quite clear that we cannot give the Appellants any relief."

Hence this appeal.

Mr. L. DeGruyther, *K. C.*, and *Mr. Bhugwandin Dubé* for the Appellants submitted that the view taken by the Court below of His Majesty's Order in Council was erroneous.

Mr. K. Brown for the Respondents supported the Court below, but their Lordships intimated that they would advise His Majesty to allow the appeal, and asked Counsel to settle the minutes.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—This was an appeal from an order of the Judicial Commissioners dismissing an application by the Appellants, as mortgagors, for the execution of a redemption decree. The mortgage in respect of which the decree was made was a usufructuary mortgage for a period which has expired, but there was a provision for payment on redemption of a sum in respect of interest. The mode of calculating interest was a matter in controversy in the redemption proceedings in regard to which this Board differed from the view of the Judicial Commissioners.

By the judgment of this Board, dated the 28th of July 1906, the Respondents, the mortgagees, were held entitled to simple interest at the rate of 24 per cent. per annum on Rs. 3,519, the original mortgage debt as from the 14th of January 1867, the date of the mortgage, as well as to mesne profits until redemption.

In 1902, previously to the judgment of this Board of the 28th of July 1906, the mortgagors had deposited in Court Rs. 3,844, a portion of which they afterwards withdrew, leaving in Court Rs. 3,335, a sum sufficient to satisfy the interest payable in respect of the mortgage according to the judgment of the Subordinate Judge of Sitapur affirmed in substance by the Judicial Commissioners in April 1902, and on the 5th of December 1902 the mortgagors were let into possession of the mortgaged premises, although an appeal to His Majesty against the order of the Judicial Commissioners was then pending.

After the judgment of this Board possession of the mortgaged premises was restored to the mortgagees on the 12th of November 1906.

On the 15th of December 1906, the mortgagors deposited in Court Rs. 40,000 and again applied for possession of the mortgaged premises.

The sum of Rs. 40,000 *plus* the sum of Rs. 3,335, making together the sum of Rs. 43,335, was more than sufficient to discharge the interest due in respect of the mortgage in accordance with the judgment of this Board of the 28th of July 1906, amounting on the 15th of December

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1906, to Rs. 37,239-2-11, together with the amount due to the mortgagees for costs which amounted to Rs. 3,765, making together the sum of Rs. 41,004-2-11.

On the opening of the present appeal it became obvious that the refusal of the Judicial Commissioners to restore the mortgagors to possession was due to a misconception of the effect of their Lordships' judgment of the 28th of July 1906, or to a slip in the order founded on that judgment. The error, if there was a slip in the order, is attributable to the mortgagees, as their appeal was heard *ex parte.* Their Lordships therefore intimated that they would humbly advise His Majesty that the present appeal should be allowed, and minutes were to be settled by the Counsel for the parties. The learned Counsel, however, were unable to agree, and the matter has been referred to their Lordships.

It is stated that the sum of Rs. 3,335 has now lapsed to the Government under the Rules.

It appears that after having been restored to possession the mortgagees obtained a decree against the mortgagors for the sum of Rs. 9,800, which was the agreed amount of the mesne profits received by the mortgagors during the period of their possession.

On behalf of the mortgagors Mr. DeGruyther offered to set this amount, Rs. 9,800, against the amount of mesne profits received by the mortgagees since the deposit in Court of the sum of Rs. 40,000 by the mortgagors. Their Lordships think that this is a fair and reasonable proposal and that effect ought to be given to it.

Their Lordships also think that if the sum of Rs. 3,335 has lapsed to the Government, and is not forthcoming, the mortgagees must give credit for that amount as they ought to have taken it out of Court without prejudice to their pending appeal either by arrangement or with the sanction of the Court in India or the sanction of this Board, which no doubt would have been given as a matter of course.

Their Lordships think that the proper order, therefore, will be that the mortgagors should be restored to possession forthwith, and that the mesne profits received by the mortgagees since the 15th December 1906, should be set off against the decree for Rs. 9,800 and taken in satisfaction of that decree and interest, and (the mortgagees being entitled to draw out of Court Rs. 41,004-2-11, the amount due to them for interest and costs calculated up to the 15th of December 1906), the balance of the amount in Court increased by the addition of the sum of Rs. 3,335, if that sum has lapsed to the Government, should be paid out to the mortgagors.

Their Lordships will humbly advise His Majesty accordingly.

Their Lordships will make no order as to costs.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

B. D. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 199 OF 1897.

PRINSEP, J. STEVENS, J. 1898, Heard, 6, July. Judgment, 11, July.	MOHUNT JIB LAL GIR, Objector, Appellant, *v.* MOHUNT JAGA MOHAN GIR, Petitioner, Respondent.

Probate and Administration Act (V of 1881), sec. 37—Mohunt of math*—Death—Application by claimant to office for letters of administration—Trust estate—Beneficiary—*Shebait *and idol, relation of.*

A mohunt is not the owner of the property of the* math, *and on his death a person claiming to be his successor in office cannot apply under Act V of 1881 for letters of administration in respect of the* math *property. Sec. 37 of the Act is intended to apply only to property in which the deceased person had ownership so as to constitute it a portion of his estate although he held it in trust.

RANJIT SINGH *v.* JAGANNATH PROSAD GUPTA (1) *distinguished.*

This was an Appeal preferred on the 23rd of June 1897 against a decision of C. M. W. Brett, Esq., District Judge of Bhagalpur, dated the 7th of June 1897.

The Respondent, Jaga Mohan Gir, applied on the 11th February 1897 before the District Judge of Bhagalpur for letters of administration to the trust estate of the Sibsara *math* on the death of the previous Mohunt, Sabhaput Gir, which had taken place on the 14th December 1896. He based his claim to succession on the fact that after the death of the late Mohunt he was, according to the custom of the endowment, selected as the fittest *chela* to succeed by the other *chelas* and the Gosains of the *math* and that his selection was confirmed by the Mohunts of the neighbouring *maths* who had been summoned for that purpose on the Bhandara ceremony day.

Jib Lal Gir his opponent (Appellant) denied the custom as alleged and asserted that the senior *chela* succeeded by right of seniority, and that he as senior *chela* was entitled to succeed, that the Peti ioner had no right to succeed to the office, that the Petitioner along with certain other persons had been bound down to keep the peace in a proceeding under sec. 107, Cr. P. C., in which it had been held by the Magistrate that he the objector had lawfully succeeded to the Mohuntship and was in possession of the estates and effects appertaining to the *math.* He accordingly prayed for the dismissal of Jaga Mohan's application and simultaneously also applied for grant of letters of administration to himself.

On the 9th April 1897 before evidence had been recorded in the case, the objector (Appellant) moved that the application of Jaga Mohan Gir be rejected on the ground that the application could not be granted under Act V of 1881. It was urged on his behalf that the applicant based his title not on succession but on election, that moreover the deceased Mohunt owned a life-estate only which determined on his death and that he merely occupied the position of a trustee. On behalf of the Petitioner it was urged that the objection was opposed to the prevailing practice, that sec. 37 of Act V 1881 contemplated the appointment of an administrator to a trust-estate on the death of the sole or surviving trustee and that the necessity for such appointment was recognised in *Ranjit Singh* v. *Jagannath Prosad Gupta* (1) amongst other decisions of the High Court.

The District Judge held that it was

(1) I. L. R. 12 Cal. 375 (1886).

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incorrect to assume that the trust-estate held by the late Mohunt determined on his death. "The trust estate in the case of this endowment appears to be perpetual and the death of a trustee does not bring it to an end." There was no reason why an application to administer such an estate should not be entertained. Sec. 37 of Act V of 1881 clearly laid down that administration to such a trust-estate might be granted. Referring to *In re Bhyrub Bharutee Mohunt* (2), *Dukharam* v. *Luchmun* (3) which were cases under the Succession Certificate Act, he held there was no real analogy between an application for letters of administration to such a trust-estate and one under the Succession Certificate Act.

He accordingly dismissed the preliminary objection.

The case was heard in due course on the merits and the learned District Judge decreed the Petitioner's claim.

The Defendant appealed.

Dr. Rash Behary Ghose, *Babu Lal Mohan Dass*, *Dr. Ashutosh Mukherjee* and *Babu Ashutosh Mukherjee* for the Appellant.

Mr. Hill and *Babus Saligram Singh* and *Jogesh Chandra Dey* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The parties in this case are rival claimants to the succession to the Mohun ship of a *math*. The Petitioner, now Respondent, sought to have his claim determined by applying in the Court of the District Judge under Act V of 1881 for letters of administration to enable him to administer the estate of the *math* in succession to the deceased Mohunt, in whose place he alleged himself to have been elected after the Mohunt's death.

A preliminary objection was taken in the Court of the District Judge that such an application did not lie under Act V of 1881 ; but the objection was disallowed and in the end letters of administration were granted to the Petitioner, the present Respondent.

The objector has preferred the present appeal against the order of the District Judge upon the whole case ; but we have in the first instance heard arguments only upon the question of law raised in the preliminary objection disallowed by the Court below, which is embodied in the first paragraph of the grounds of appeal, as, if that be decided in favour of the Appellant, it becomes unnecessary to consider the case upon its merits.

The learned District Judge considered that the objection was unsustainable as being "based on the incorrect assumption that the trust-estate held by the late Mohunt is determined by his death." "The trust-estate," he goes on to say, "in the case of this endowment appears to be perpetual and the death of a trustee does not bring it to an end. It is to administer this estate that the application is made, though the application itself has perhaps not been correctly worded." The learned Judge referred to several cases ; but we are of opinion that the only one which has a material bearing upon the present case is that of *Ranjit Singh* v. *Jagannath Prosad Gupta* (1).

We are inclined to think that the learned Judge has unconsciously used the word 'estate' in different senses. When he says that the trust-estate in the case of the endowment appears to be perpetual,

(2) 21 W. R. 340 (1874).
(3) I. L. R. 4 Cal. 954 (1879).

(1) I. L. R. 12 Cal. 375 (1886).

he seems to be intending to decide against the contention noticed by him early in the judgment, "that the late Mohunt had a life-estate only, which determined on his death," but the word 'estate' seems here to be used in two different senses, neither of which is that in which it is used in Act V of 1881, where it invariably denotes the property and credits left by a deceased person. To avoid confusion we shall use the term in the latter sense only.

Some questions have been argued before us, as to whether the relation of a *shebait* to an idol can be correctly described as that of a trustee and whether ownership on the part of a trustee is not necessary to constitute a trust, which we do not think necessary to discuss here, because we are of opinion that assuming them to be decided in favour of the Petitioner-Respondent, his application must be held to be outside the scope of Act V of 1881.

The preamble of the Act sets forth that "it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act, 1865, does not apply." The form of letters of administration prescribed by sec. 77 of the Act sets forth that that of which letters of administration are granted is "the property and credits of late of——, deceased." That the deceased Mohunt in the present case had no ownership in the property of the *math* which was in his charge is not disputed; the only contention which has been raised in this connection is that such ownership was not necessary to constitute him a trustee. Be that as it may, if he had no ownership in the property of the *math*, we are unable to understand how it could form any portion of his estate, or how letters of administration purporting to affect the *math* property could be given as letters of administration of his "property and credits" in accordance with the prescribed form.

The provision relied upon as bringing the case within the scope of the Act is sec. 37 of the Act and the case in *Ranjit Singh* v. *Jagannath Prosad Gupta* (1) is relied upon in support of the applicability of that section to cases of this kind. Sec. 37 occurs in Chap. III, which is headed "Of Limited Grants" and in division (c) of that chapter, headed "For special purposes." It runs as follows:—"Where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary or to some other person on his behalf."

This provision may not be taken apart from the other provisions of the Act, the object of which, as we have seen, is to provide for "the grant of probate of wills and letters of administration to the estates of deceased persons" and not for the administration of trust property generally.

Again the definition of an "administrator" in sec. 3 of the Act is "a person appointed by competent authority to administer the estate of a deceased person when there is no executor" and if we examine Chap. VI of the Act, "Of the Powers of an Executor or Administrator" and Chap. VII "Of the Duties of an Executor or Administrator," we see that their provisions have no relation to the ordinary functions of the *shebait* of an idol. No doubt the *shebait* "administers"

(1) I. L. R. 12 Cal. 375 (1886).

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the affairs of the idol in the sense that he carries on the general management of them; but that is not "administration" in the restricted technical sense in which, *i.e.*, the word is used with reference to the estate of a deceased person.

Looking to the object of the Act, we think that sec. 37 can apply only to property in which a deceased person had ownership so as to constitute it a portion of his estate although he held it in trust.

We think that the case in *Ranjit Singh* v. *Jagannath Prosad Gupta* (1) is distinguishable from the present case. In that case a testatrix had by her Will dedicated certain immoveable property to the *sheba* of an idol and appointed an executrix whom she also constituted *shebait* and to whom she gave power to appoint the next *shebait*. The executrix died without having made any such appointment and the sister's son of the testatrix thereupon applied for letters of administration with a copy of the Will annexed to be granted to him in respect of the *debutter* property. It was held that letters of administration could be granted under sec. 45 of the Act, because there still remained some portion of the estate of the testatrix to be administered. The learned Judges in considering whether that case came within the scope of Act V of 1881 referred in the first place to sec. 45 and after stating the provisions of that section they say at page 379:—

"In the present case what has happened is that the executor appointed by the Will has died; and the estate of the testator, for reasons already explained, has yet to be administered. In this view it would seem that administration might well be applied for and granted under the Act. We may also refer to sec. 37 of the Act as bearing upon this matter."

After noticing the terms of sec. 37 they say: "It may be doubtful whether in using the word 'beneficiary' in the above section the Legislature ever contemplated the case of an idol. But regard being had to what has for a number of years been understood in our Courts to be the true position of an idol in regard to dedicated properties, we do not see why as a *cestui que* trust an idol may not be a 'beneficiary' within the meaning of that section"

With regard to this general proposition we do not consider it necessary to express any opinion in the present case. In our view it would not, if we accepted it, suffice for the decision of the case with which we are dealing. In the present case in order to bring the property of the idol within the purview of sec. 37 of the Act, it is necessary in our opinion not only that the idol should be a 'beneficiary' within the meaning of that section, but that the property should be property left by the deceased, that is a portion of his estate. It would appear that the main ground on which the provisions of Act V of 1881 were held to be applicable in the reported case was that the executrix who had obtained probate of the Will of the testatrix had died leaving a part of her estate unadministered. No such circumstance exists in the present case and we accordingly do not feel pressed by the ruling in the reported case.

The appeal is decreed with costs in both Courts. Pleaders' fee 5 gold mohurs.

Appeal allowed.

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(1) I. L. R. 12 Cal. 375 (1886).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 645 OF 1911.

COXE, J.
IMAM, J.
1912,
Heard,
5, March.
Judgment,
27, March.

RANI KESHABATI KOERI,
Judgment-debtor,
Appellant,
v.
MOHON CHANDRA
MONDUL, Decree-holder,
Respondent.

Ghatwali tenure, income from, if may be attached—Receiver, if may be appointed for Ghatwali lands—Rents and profits not due at the date of appointment.

The rents and profits of a Ghatwali tenure may be attached in execution of a decree in the life-time of the Ghatwal though the estate itself cannot be attached.

KUSTOORA KOOMAREE *v.* BENODE RAM (3), SURAJMAL *v.* KRISTO PERSHAD (7), UDOY KUMARI *v.* HARI RAM (6), RAJ KESHORE *v.* BUNSHIDAS (8) *considered.*

Where the lower Court in execution of a decree against the Ghatwal attached the Ghatwali estate, placed it under a Receiver and directed the tenants not to pay rents to anybody other than the Receiver.

Held, *that although the order of attachment of the estate was erroneous, the appointment of a Receiver was sanctioned by authority.*

Quære—*Whether a Receiver may be appointed to collect rents and profits that have not accrued at the date of appointment.*

This was an Appeal preferred on the 13th of December 1911 against an order of Mr. W. H. Thomson, Subordinate Judge of Zillah Dumka, in Sonthal Pergunnahs, dated the 1st of December 1911.

The facts of the case appear from the judgment.

(3) 4 W. R. Mis. 5 (1865).
(6) I. L. R. 28 Cal. 483 (1901).
(7) 10 C. W. N. cclx (1906).
(8) I. L. R. 23 Cal. 873 (1896).

Dr. Rash Behary Ghose and *Babu Gunoda Charan Sen* for the Appellant.

Babus Mohendra Nath Roy and *Peary Mohun Sikdar* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal against an order of the Subordinate Judge of Dumka allowing an attachment of the estate of the judgment-debtor and appointing a receiver.

By a compromise between the parties in Appeal from Original Decree No. 467 of 1907 it was decreed that the decretal amount was to be paid to the decree-holder in three instalments and failure to pay any two consecutive instalments was to entitle the Plaintiff decree-holder to realise the entire amount due at the time of such default by executing the entire decree, it being further stated in the petition of compromise that the decretal amount was realisable from the estate of the late Raja Udit Narain Singh (the deceased husband of the judgment-debtor) as well as from the Defendant judgment-debtor personally.

There having been default in the payment of two consecutive instalments the decree-holder applied for execution of his entire decree and prayed for realisation of the decretal amount by the appointment of a receiver for 13 taluks mentioned in the schedule to the application. This application states as a ground for the realisation of the decretal amount by means of a receiver the fact that in another suit the 13 taluks had been declared Ghatwali. On this application the judgment-debtor was called upon to show cause why her estate should not be attached and placed under a receiver. She appeared and applied for two weeks' time which application was refused and the whole of her estate with some exceptions specified in the order was attached and the Deputy

Commissioner was appointed receiver, the Court issuing directions to the mustagirs and raiyats not to pay rents to anybody other than the Deputy Commissioner or his duly constituted agents. The judgment-debtor was forbidden to make any collections during the continuance of the attachment.

Though the order relates to two matters, *viz.*: attachment and the appointment of a receiver, this appeal is in respect of the latter only. A preliminary objection that no appeal lay was raised on behalf of the Respondent but as it was not pressed we need not deal with it at any length. It will be sufficient for us to say that in our view an appeal does lie against the order of the Subordinate Judge.

Though in the grounds of appeal no exception has been taken to the attachment the argument on behalf of the Appellant addressed to us has been directed mainly to show that a Ghatwali estate is not liable to attachment and sale in execution of a decree and we have been referred to the cases in *Nilmony Singh* v. *Bakra Nath* (1), *Ram Chunder* v. *Madho Kumar* (2), *Kustoora Koomaree* v. *Benode Ram* (3), *Benode Ram* v. *Court of Wards* (4), *Benode Ram* v. *Court of Wards* (5) and *Udoy Kumari* v. *Hari Ram* (6).

On a consideration of these cases we are unable to say that they go so far as to lay down that the surplus rents and profits of Ghatwali tenures cannot be attached in the life-time of the Ghatwal, though they do lay down that the estate itself cannot be attached. The case of *Kustoora Koomaree* v. *Benode Ram* (3) is clear authority for the proposition that the surplus proceeds of a Ghatwali tenure collected during the life-time of the judgment-debtor are his personal property and thus liable to be taken in execution. In *Surajmal* v. *Kristo Pershad* (7), it was held that the income of a Ghatwali property was not itself Ghatwali property and as such was liable to be sold. The appointment of a receiver in this case is in entire accord with the view taken in the case of *Udoy Kumari* v. *Hari Ram* (6) which like *Raj Keshore* v. *Bunshidas* (8) came from the Sonthal Pergunnahs. It may be open to question whether a receiver ought to be appointed to collect rents and profits that have not accrued at the time of the appointment but we do not think that we ought in the present case to dissent from the decision in *Udoy Kumari* v. *Hari Ram* (6). For all that we know to the contrary, rents and profits may have accrued prior to the appointment. Had there been merely a prohibitory order issued to the Ghatwal not to receive any rents and profits from the raiyats and also to the raiyats not to pay their rents to the Ghatwal without the appointment of a receiver the order might have been open to question but the appointment of a receiver to receive the rents and profits seems to us an order sanctioned by authority. The order for attachment of the estate may be erroneous but as the practical effect of the appointment of the receiver is merely to ensure that the rents and profits are properly dealt with we do not think it necessary to interfere. We therefore, in the view

(1) I. L. R. 9 Cal. 187 (1882).
(2) I. L. R. 12 Cal. 484 at p. 490 (1885).
(3) 4 W. R. Mis. 5 (1865).
(4) 7 W. R. 178 (1867).
(5) 6 W. R. 129 (1866).
(6) I. L. R. 28 Cal. 483 (1901).

(3) 4 W. R. Mis. 5 (1865).
(6) I. L. R. 28 Cal 483 (1901).
(7) 10 C. W. N. cclx (1906).
(8) I. L. R. 23 Cal. 873 (1896).

we take, dismiss this appeal, but in the circumstances we do not allow costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 80 OF 1911.

BRETT, J. SHARFUDDIN, J. 1912, Heard, 26 and 29, April. Judgment, 29, April.	KHITISH CHANDRA ACHARYA CHOWDHURY, Plaintiff, Appellant, *v.* KHULNA LOAN COMPANY, LTD. and anr, Defendants, Respondents.

Putni Regulation (VIII of 1819), Sec. 17, cl. (c)—*Antecedent balances, if recoverable by resale of the tenure.*

Under the provisions of sec. 17, cl. (c) of the Putni Regulation, arrears of rent for a period antecedent to the period to recover the rent of which the tenure had been sold must be regarded as personal debts recoverable under the ordinary procedure for the recovery of debts and not by resale of the tenure.

JAGANNATH *v.* MOHIUDDIN MIRZA (2) *followed.*

PEARY MOHAN MUKHOPADHYA *v.* SREERAM CHANDRA BOSE (1) *dissented from.*

This was an Appeal preferred on the 10th of February 1911 against an order of Mr. T. C. Mukerjee, District Judge of Zillah Khulna, dated the 17th of December 1910, affirming an order of Babu Ashutosh Sirkar, Subordinate Judge of Zillah Khulna, dated the 30th of July 1909.

The facts of the case are briefly as follows :—

The Appellant had the putni taluk then held by one Moulvi Mafazal Rahaman sold for arrears of rent due thereon for the last half of 1313, B. S. The sale was held on the 1st Jaista 1314, B. S., under Regulation VIII of 1819. In the sale notification there appeared these words "এই মহালের উপর সরকারের যে দাওয়া থাকে তাহা নিলাম দ্বারা লোপ হইবে না" which meant that if the *sarkar* had any demand upon the mehal it would not be extinguished by reason of the sale. The Khulna Loan Company, Ltd., became the purchaser at the sale. Thereafter the Appellant sued the old tenant for arrears due on account of a previous period, obtained a decree and in execution of the decree put up the putni tenure again to sale. The Khulna Loan Company, Ltd., objected to the tenure being sold and this objection prevailed in both the lower Courts.

Hence this appeal.

Babu Satish Chandra Ghosh for the Appellant.

Babu Surendra Chandra Sen for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against an order of the District Judge of Khulna confirming an order of the Subordinate Judge of that place on an application for execution of a decree. It appears that the decree was for rent of a certain putni taluk which had been previously sold for subsequent arrears of rent and purchased by the Khulna Loan Company, Ltd. The decree-holder, in execution of his decree, sought to recover the decretal amount, being rent for antecedent period, by sale for the second time of this putni taluk. Both the lower Courts held that he was not entitled to execute his decree by sale of the putni taluk after it had already been sold once for subsequent arrears of rent and that his remedy lay in a suit against the original

(1) 6 C. W. N. 794 (1902).
(2) I. L. R. 37 Cal. 747 (1910).

KHITISH CHANDRA ACHARYA CHOWDHURY *v.* KHULNA LOAN COMPANY, LTD.

tenant for recovery of the amount of rent due for the previous years as a money debt. The learned pleader who appears in support of the appeal contends, on the authority of the case of *Peary Mohan Mukkhopadhya* v. *Sreeram Chandra Bose* (1), that his client is entitled to have the tenure resold and that the orders passed by both the lower Courts are wrong and should be set aside. We are unable to accept this contention as valid. We had the same matter before us in the case of *Jagannath* v. *Mohiuddin Mirza* (2) and we hold that, under the provisions of sec. 17, cl. (*c*) of the Putni Regulation (VIII of 1819), arrears of rent for a period antecedent to the period to recover the rent of which the tenure had been sold must be regarded as personal debts recoverable under the ordinary procedure for the recovery of debts and not by resale of the tenure. We see no reason to differ from the view which we expressed in that case and we think that that concludes the present appeal. We, therefore, dismiss the appeal with costs, three gold mohurs.

H. C. S. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2263 OF 1908.

MOOKERJEE, J.	SREEMATI RAMSONA
TEUNON, J.	CHOWDHURI and others,
1911,	Plaintiffs, Appellants,
Heard, 2 and	*v.*
3, February.	NABA KUMAR SINGHA
Judgment,	CHOWDHURI and others,
27, February.	Defendants, Respondents.

Putni Regulation (VIII of 1819), sec. 14—Irregular sale under, if voidable or void—Sale if may be impugned collaterally—Limitation Act (XV of 1877), Sch. II, Art. 12.

Where a putni has been sold under the Putni Regulation and no suit has been brought under sec. 14 of that Regulation to set aside that sale,

Held—*That the sale cannot be impugned as invalid collaterally by way of defence in a suit brought by a purchaser of the putni for ejectment.*

Irregularity in the service of notices in such sale does not make the sale a nullity. Irregular sales under the Regulation are voidable and not void and they can only be avoided by the procedure laid down in the Regulation and within the time allowed for such suit by Art. 12, Sch. II of the Limitation Act.

This was an Appeal preferred on the 9th of November 1908 against the decree of Babu Kishore Lal Sen, Subordinate Judge, 1st Court of Zillah Dacca, dated the 12th of June 1908, affirming the decree of Babu Mohim Chandra Chakraverty, Munsif, 1st Court at Naraingunj, dated the 24th of May 1907.

The facts of the case will sufficiently appear from the judgment.

Babu Harendra Narain Mitter for the Appellants.

Babus Jogesh Chandra Roy and *Prokash Chandra Majumdar* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The subject-matter of the litigation, which has resulted in this appeal, is an one-third share in a putni taluk created on the 19th July 1888 by Nawab Assanulla as zemindar in favour of one Hara Lochan Das. On the 10th August 1889, the lessee transferred to the first Defendant, Sonamala, the one-third share now in dispute, which was subsequently conveyed by Sonamala on the 2nd January

(1) 6 C. W. N. 794 (1902).

(2) I. L. R. 37 Cal. 747 (1910).

1897 to the second Defendant, Naba Kumar Singh. On the 14th April 1893, Hara Lochan transferred the remaining two-thirds share to Probhat Chandra Nag, now represented by his infant son, the fourth Defendant Prokash Chandra Nag. It does not appear, however, that either of the transferees got his name registered in the books of the landlord under the provisions of sec. 5 of the Putni Regulation of 1819. Default was made in the payment of rent to the zemindar, and the result was that the putni was sold on the 14th May 1894, under sec. 8, cl. (2) of the Putni Regulation. The fifth Defendant, Basanta Kumar Sen, was declared the purchaser at this sale for a sum of Rs. 51. On the 9th May 1895, Probhat Chandra Nag, the transferee of a two thirds share, commenced an action for reversal of the sale under sec. 14, against the purchaser Basanta Kumar and the zemindar Nawab Assanulla. The original putnidar, Hara Lochan, as also the transferee of the one-third share, the present first Defendant Sonamala, were joined as parties Defendant. The Plaintiff, Probhat Chandra, asked for reversal of the entire sale, as he was bound to do upon the principle explained in the cases of *Unnoda* v. *Erskine* (1), *Suresh* v. *Akkowri* (2) and *Ram Charan* v. *Drobomoyee* (3), that the sale of a putni cannot be declared good or bad in part. The Plaintiff further stated that he had failed to induce his co-sharer Sonamala to join as a co-Plaintiff, but had no objection, if upon her application, she was transferred from the category of Defendant to that of Plaintiff. The suit was resisted by the purchaser Basanta Kumar as well as by the zemindar Nawab Assanulla; they denied that the sale was in any way irregular, and also suggested that the Court had no jurisdiction to entertain the suits, as the value of the disputed property exceeded the limits of its pecuniary jurisdiction. During the pendency of this litigation, the Plaintiff came to terms with the purchaser, and the result was that on the 23rd November 1895 the purchaser executed a conveyance in favour of Probhat Chandra in respect of a two-thirds share of the putni for a sum of Rs. 300. This was intimated to the Court, and the Plaintiff declined to proceed with the suit, which was thereupon dismissed with costs in favour of the zemindar. On the 11th August 1896, the auction-purchaser Basanta Kumar transferred the one-third share, which still remained with him, in favour of the Plaintiffs in the present litigation. The Plaintiffs were unable to obtain possession, and commenced this action on the 26th February 1906, for declaration of title by purchase and for recovery of possession. The principal Defendants resisted the claim on the ground that the sale under the Putni Regulation was void as contrary to law, and that, consequently, the Plaintiffs had acquired no title under their purchase from the purchasers at that sale. In answer to this contention, it was argued on behalf of the Plaintiffs that so long as the putni sale stood unreversed, their title could not be impeached collaterally. The Courts below have overruled this contention, and have treated the suit as if it were one brought by the putnidars for reversal of the sale. They have found that the Plaintiffs had failed to prove that the notices required by the Regulation had been duly served and have dismissed the suit on the ground that they had not acquired a valid title by their purchase.

(1) 12 B. L. R. 370 (1873).
(2) I. L. R. 20 Cal. 746 (1893).
(3) 17 W. R. 122 (1872).

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The Plaintiffs have appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed on the ground that as the putni sale has not been set aside in the manner provided by the Regulation, and as any suit now commenced for the purpose would *be primâ facie* barred by limitation, the title of the Plaintiffs cannot be successfully impeached, and there is, in substance, no valid answer to their claim. On behalf of the Respondents, it has been argued that the validity of the putni sale may be collaterally impeached in the present suit as constituted, and that the Plaintiffs are not entitled to succeed till they establish that they have an unimpeachable title. The question raised is one of considerable importance and apparently one of first impression, but we feel no doubt as to the manner in which it ought to be answered in view of well-recognised principles.

Sec. 14 of Reg. VIII of 1819 provides that it shall be competent to any party, desirous of contesting the right of the zemindar to make the sale, whether on the ground of there having been no balance due or any other ground, to sue the zemindar for the reversal of the sale, and upon establishing a sufficient plea to obtain a decree with full costs and damages; the purchaser shall be made a party in such a suit, and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss at the charge of the zemindar or person at whose suit the sale may have been made. Art. 12 of the second schedule of the Limitation Act provides that a suit to set aside a sale of a putni taluk, sold for current arrears of rent, must be instituted within one year from the date when the sale would become final and conclusive had no such suit been brought. These provisions plainly indicate that the sale is treated not as void but as voidable. A sale under Reg. VIII of 1819 does not require to be confirmed. Such a sale becomes final and conclusive when the whole of the purchase-money has been paid under sec. 9 of the Regulation, and the period of one year runs from the date of such payment, *Bhuban* v. *Girish* (4). It has not been suggested before us that the arrears, for the recovery of which the sale was held at the instance of the zemindar, were not due, but even if such an allegation were made, it would be worthy of note that sec. 14 of the Putni Regulation contemplates a suit for reversal of the sale on the ground that no balance was due; consequently, in such a contingency, the question might arise whether the principle of the decisions in *Byjnath* v. *Lala Seetul Pershad* (5), *Harkhoo* v. *Banshidhar* (6) and *Bal Kishen* v. *Simpson* (7), namely, that a sale for arrears of revenue when no arrears are due is not a legal sale because the Collector acts entirely without jurisdiction, would be applicable to putni sales held when no balance was due to the zemindar. In any event when a putni sale is impeached on the ground that the notices required by the Regulation have not been duly served, the sale must be treated as a voidable sale capable of reversal in a suit properly constituted and commenced under sec. 14 of the Putni Regulation. This view receives considerable support from the principle which underlies the decisions of the Judicial Committee in *Tasaddak* v. *Ahamed* (8), *Gobinda Lall* v. *Ramjanam* (9) and

(4) 13 C. L. J. 339 (1894).
(5) 10 W. R 66 (1868).
(6) I. L. R 25 Cal. 876 (1898).
(7) I. L. R 25 Cal. 833 (1898).
(8) I. L. R. 21 Cal. 66 (1893).
(9) I. L. R. 21 Cal. 70 (1893).

Malkarjun v. *Narhari* (10). These decisions recognise the important doctrine that the omission to serve statutory notices, though it may affect the validity of a sale and render it liable to be reversed in an appropriate proceeding, does not render the sale a nullity which may be ignored by the person whose property has been sold. This principle may not be of universal application, as indicated by the decision of a Full Bench of this Court in *Purna Chandra Chatterjee* v. *Dinabandhu Mukerjee* (11), where it was ruled that the omission of the Collector to serve a notice under sec. 10 of the Public Demands Recovery Act of 1895 destroys his jurisdiction to hold the sale. In the case before us, however, it is impossible for us to hold that the sale was a nullity, because the notices required by the Regulation were not proved to have been duly served. But reliance was placed by the learned Vakil for the Respondents upon the cases of *Maharaja of Burdwan* v. *Tarasundari* (12), *Maharaja of Burdwan* v. *Krishto Kamini* (13), *Maharani of Burdwan* v. *Krishna Kamini* (14), *Mahomed* v. *Abdul* (15), *Surnomoyee* v. *Girish Chandra* (16), *Hurrodyal* v. *Mahomed Gazi* (17), *Raj Narain* v. *Ananta Lal* (18), *Bejoy Chand* v. *Atulya* (19), *Bhugwan* v. *Sudderally* (20), *Bykunta Nath* v. *Mahtap Chand* (21), *Hara* v. *Juggarnath* (22), *Raghub* v. *Brojo Nath* (23) and *Bejoy Chand* v. *Amirta Lall* (24) to shew that compliance with the provisions of the Regulation as to the issue and service of the requisite notices is essential for the validity of the sale. These cases are clearly distinguishable; they merely shew that the validity of the sale is affected by the failure of the zemindar to comply with the provisions of the Regulation, and the sale is liable to be annulled in a suit instituted under sec. 14, but they do not shew that the sale may be treated as a nullity.

The learned Vakil for the Respondents, however, strenuously contended that upon general principles the validity of a statutory sale may be attacked collaterally in a suit for ejectment brought by the purchaser or his representative in interest, and in support of this view, he relied upon the analogy of the doctrine recognised in some judicial decisions that an objection to the validity of an execution sale may be raised by way of defence in a regular suit although the objection is one within the scope of sec. 244 of the Civil Procedure Code of 1882 [*Bhiram Ali* v. *Gopi Kanth* (25), *Chandra Mani* v. *Halejennessa* (26), *Durga Charan* v. *Karamat Khan* (27), *Thathu* v. *Kondu* (28), *Venkataramna* v. *Menatchisundara* (29)]. In answer to this argument, it may be pointed out that the doctrine upon which reliance is placed has not uniformly been accepted in this Court [*Dwarka Nath Pal* v. *Tarini Sankar Roy* (30), *Durga Charan* v. *Kali*

(10) I. L. R. 25 Bom. 337 (1900).
(11) I. L. R 34 Cal. 811 (1907)
(12) I. L R. 9 Cal. 619 ; L. R. 10 I. A. 19 (1882).
(13) I. L R. 9 Cal. 931 (1883)
(14) I L. R. 14 Cal 365 (1886)
(15) I. L. R. 12 Cal. 67 (1885).
(16) I. L. R. 18 Cal. 362, 373 (1891).
(17) I. L. R. 19 Cal. 699 (1891).
(18) I. L R. 19 Cal. 703 (1892).
(19) I. L. R. 32 Cal. 953 : S. C. 3 C. L. J. 46 (1905).
(20) I. L. R. 4 Cal. 41 (1878).
(21) 17 W. R. 447 (1872).
(22) 11 W. R. 87 (1869)
(23) 14 W. R. 489 (1870).
(24) I. L. R. 27 Cal. 308 (1899).
(25) I. L. R. 24 Cal. 355 (1897).
(26) 9 C. L. J 464 (1908).
(27) 7 C. W. N. 607 (1903).
(28) I. L. R. 32 Mad. 242 (1908).
(29) 19 Mad. L. J. 1 (1904).
(30) I. L. R. 34 Cal. 199 (1907).

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Prasanna (31) and *Murullah* v. *Barullah* (32)]; the matter is indeed, by no means, free from difficulty, and when it arises directly for consideration, it may require careful examination. In any event, the application of the doctrine would *primâ facie* be limited by the conditions imposed by sec. 47 of the Civil Procedure Code of 1908, which provides in sub-sec. (2) that the Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under that section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional Court-fees. The restrictions indicated shew conclusively that there are weighty reasons why the validity of the sale should not be allowed to be impeached collaterally in the present suit. In the first place, in a suit for reversal of the sale, the zemindar is a necessary party, as is manifest from the provisions of sec. 14 of the Regulation. In the second place as the validity of a putni sale must be challenged in its entirety, the jurisdiction of the Court in which the suit for reversal is instituted, must be determined with reference to the value of the entire putni, whereas in a suit for possession of a share of the putni taluk by the representative of the purchaser under the Regulation, it is the value of the share in controversy which determines the jurisdiction of the Court. In the third place, if a suit for reversal of the sale were now to be commenced, it would obviously be successfully met by the plea of limitation, because even if the Defendants as Plaintiffs in such a suit sought to avail themselves of the provisions of sec. 14 of the Limitation Act, for exclusion of the time during which they have defended the present suit [*Jagatindra* v. *Dindyal* (33) and *Mangu Lal* v. *Kandhai* (34)], it could be of no avail as against the zemindar who is not a party to this litigation, while if they relied upon the provisions of sec. 18, for exclusion of the time during which they had been kept by the alleged fraud of the purchaser from knowledge of their right to ask for reversal of the sale, it could be of no avail as against the zemindar, as the latter is not a party to this suit, and as they themselves must have been apprised of the fraud, if any, before the 29th May 1906, when they filed their written statement. But even if these difficulties could be overcome, it would have to be shown that the dismissal of the previous suit against the zemindar was no bar to a second suit of similar scope and description. Apart however, from these considerations, we are unable to accede to the contention of the Respondents, that, as a matter of principle, the validity of such sales ought to be allowed to be challenged collaterally. The three decisions of the Judicial Committee to which we have already referred [*Tasaddak* v. *Ahamed* (8), *Gobinda Lall* v. *Ramjanam* (9) and *Malkarjun* v. *Narhari* (10)], undoubtedly militate against such a theory. It must further be remembered that the tendency of Courts is against collateral impeachment, except in the case of private transaction before they have passed from the domain of contract into that of judgment [*Clough* v. *L. & N. W. Ry. Co.* (35), *Eastern Mortgage* v. *Rebati* (36), *Baroda* v. *Gajendra* (37)]. For illustrations, refer-

(31) I. L. R. 26 Cal. 727 (1899).
(32) 9 C. W. N. 972 (1905).

(8) I. L. R. 21 Cal. 66 (1893).
(9) I. L. R. 21 Cal. 70 (1893).
(10) I. L. R. 25 Bom. 337 (1900).
(33) 1 W. R. 310 (1864).
(34) I. L. R. 8 All. 475 at p. 485 (1886).
(35) L. R. 7 Exch. 26 (1871).
(36) 3 C. L. J. 260 (1906).
(37) 9 C. L. J. 383 at p. 393 (1909).

ence may be made to *Surnamoyee Dassi* v. *Ashutosh Goswami* (38) and *Gora Chand* v. *Makhan* (39), although where a decree obtained by fraud is sought to be used against a person he is allowed, under statutory provisions (sec. 44 of the Indian Evidence Act) to shew the true nature of the decree, notwithstanding that no steps have been taken by him for reversal of the decree [*Nistarini* v. *Nando Lal* (40) and *Rajib Panda* v. *Lakhan* (41)]. In the absence of such a statutory provisions and in the face of an express statutory mode for reversal of the sale, we are not prepared to hold that it ought to be allowed to be impeached collaterally. The general rule is that a judgment rendered by a Court having jurisdiction over the parties and the subject-matter, unless reversed or annulled in some appropriate proceeding, is not open to contradiction or impeachment in respect to its validity, verity or binding effect, by parties or privies in any collateral action or proceeding [*White* v. *Rose* (42), *Rogers* v. *Wood* (43), *Briscoe* v. *Stephens* (44)]. The same doctrine has been maintained in the American Courts in numerous cases, amongst which may be mentioned three decided by the Supreme Court of the United States [*Thompson* v. *Whitman* (45), *Dunham* v. *Jones* (46) and *Gunn* v. *Plann* (47)], as also the case of *International Wood Company* v. *National Assurance Company* (48). No doubt, the position may be different when a judgment shews on its face that it is void for want of jurisdiction either of the person or the subject-matter; such a judgment may possibly be treated as a nullity and collaterally impeached by any person interested, wherever it is brought in question. But that doctrine has no application to a case like the present where the validity of the sale is plainly intended by the Legislature to be determined in a suit, properly constituted and brought in a Court of competent jurisdiction, within the time allowed by law, and against parties sought to be affected by the result. We are, therefore, of opinion, that the conclusion is inevitable that the Defendants ought not to have been allowed to challenge the validity of the sale in the present suit. We do not, however, decide whether the Defendants may not subject to the law of limitation, have some remedy on the ground of fraud if fraud is established against the purchaser at the putni sale and other persons who may have assisted him in the attainment of his fraudulent object.

The result consequently is that this appeal must be allowed, the decrees of the Courts below discharged, and the Plaintiffs awarded a decree for the one-third share of the putni taluk in dispute. In the circumstances disclosed, however, and in view of the great delay in the institution of the suit, we direct each party to bear his own costs throughout the litigation, for in deciding the question of costs, we are entitled to consider not merely the conduct of the parties in the actual litigation, but also the matters which led up to the litigation [*Harnett* v. *Vise* (49)].

Appeal allowed.

(38) I. L. R. 27 Cal. 714 (1900).
(39) 6 C. L. J. 404 (1907).
(40) I. L. R. 26 Cal. 891 (1899).
(41) I. L. R. 27 Cal. 11 (1899).
(42) 3 Q. B. 493 (1842).
(43) 2 B. & Ad. 245 (1831).
(44) 2 Bing. 213; 27 R. R. 597 (1824).
(45) 18 Wallace 457.
(46) 159 U. S. 584.
(47) 94 U. S. 664.
(48) 105 Am. St. Rep. 288 (1904).
(49) 5 Ex. D. 307 (1880).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 415 OF 1912.

HOLMWOOD, J. IMAM, J. 1912, 19, April.	BHAGBAT SHAHA, Accused, Petitioner, *v.* SIDDIQUE OSTAGAR, Complainant, Opposite Party

Criminal Procedure Code (Act V of 1898), secs. 423 (1), (d), 522—Order under latter section if may be passed on appeal.

In confirming a conviction passed by a Subordinate Magistrate, the District Magistrate cannot pass an order for delivery of possession under sec. 522, Cr. P. C., when no such order was passed by the trying Magistrate.

This was a Rule granted on the 25th of March 1912 against an order of Mr. S. Ahamed, Sub-Deputy Magistrate of Dacca, dated the 30th of November 1911, convicting the Petitioner under sec. 448, I. P. C., and sentencing him to a fine of Rs. 50 an appeal from which order was dismissed by Mr. H. M. Cowan, Additional District Magistrate, dated the 19th of January 1912, the District Magistrate in dismissing the appeal having passed a further order for delivery of possession under sec. 522, Cr. P. C.

The facts of the case briefly stated are as follows: Complainant's employer, Ananda Sha, took possession of certain rooms of his brother's portion of the house by a Civil Court peon as a purchaser in a Civil Court auction on 13th August last.. On the same evening principal accused Bhagbat entered into the house with a number of men and caused the. padlock of the door to be broken by his men and placed their females inside in spite of his protest whereon complainant called his master, Ananda, to the scene on whose opposition the accused party retired.

The defence set up by accused was that on 13th August the complainant's employer tried to take possession of the disputed rooms by a Civil Court peon. Hearing about this Bhagabat proceeded to the spot and finding the contents of the rooms removed forbade the peon to deliver possession of the disputed rooms on the ground that his father had purchased the said rooms from Gobinda Sha before Ananda's auction purchase; that thereupon the peon went away without delivering possession. Late in the evening Bhagbat went to the spot on hearing that Ananda Sha and his men were abusing inmates of Soleman's house and taking forcible possession thereof. On having remonstrated Ananda abused him and assaulted his men. For this Bhagbat instituted a criminal case against Ananda and his men and it was alleged that for this reason this counter-case was started. Bhagabat admitted the fact of his having seen Ananda's party taking possession of the rooms by removing articles and putting a padlock through the Civil Court peon. This statement on his part according to the learned Sub-Deputy Magistrate clearly amounted to an admission of his having trespassed there and of Ananda having received the delivery of possession through the Court peon. Upon these and other findings the Sub-Deputy Magistrate found Bhagabat Sha guilty of an offence under sec. 448, Cr. P. C., and sentenced him to pay a fine of Rs. 50.

On appeal by the accused, the District Magistrate held as follows:

"Complainant got possession of part of a *bari* through Civil Court. On the evening of the same day accused's party came and broke complainant's padlock and took possession. There is good evidence that accused took forcible possession after the delivery of legal possession to com-

BHAGBAT SHAHA *v.* SIDDIQUE OSTAGAR.

plainant. There is no evidence to contradict it. The appeal is dismissed. Under sec. 522, Cr. P. C., I direct that complainant be put in possession of the place of which the peon gave possession according to the auction purchase in the proceeding in the Civil Court."

Mr. J. N. Roy and *Babu Bhupendra Chandra Guha* for the Petitioner.

The JUDGMENT OF THE COURT was as follows:—

We are of opinion that this Rule must be made absolute on the ground on which it was issued. The considerations which moved the Full Bench in the case of *Mehi Singh* v. *Mangal Khandu* (1) seem to apply with equal or even more force to an order under sec. 522, Cr. P. C. It is clear that the confirming of a conviction on appeal where the Magistrate had not thought it necessary to act under sec. 522 cannot make such an order a consequential relief, or an order ancillary in character for which no separate authority is needed. Separate authority under sec. 522 was distinctly needed before any Criminal Court could have such extraordinary powers as are given thereby. The power is an unusual one. It is one certainly not inherent in the ordinary Courts of Criminal Jurisdiction and it certainly could not be exercised by any person other than the Court which convicted of an offence attended with criminal force and held independently that by such force any person had been dispossessed of any immoveable property; and that independent finding must of course be the finding of the Court of first instance. The Appellate Court cannot come to an independent finding upon a matter which is not before it in appeal. We do not think it necessary to discuss the divergence of opinion between this Court and the Bombay Court as regards the time at which such an order should be passed; but we may say that were we to agree with the view taken by the Bombay Court in *Narayan Govind* v. *Visaji* (2). The want of jurisdiction in the Appellate Court would thereby be rendered still more clear; for the Bombay Court says that an order made under sec. 522, Cr. P. C., restoring possession of immoveable property to a person who has been dispossessed of it by criminal force is an independent order, and may therefore be made subsequent to the date of the conviction of the offender and need not be made at the same time as the conviction. If that is so the Court which had the conviction before it on appeal obviously had nothing whatever to do with the order under sec. 522 and could not pass an independent order directing restoration of the property.

The Rule is made absolute and the order under sec. 522 set aside.

Rule made absolute.

(1) 16 C. W. N. 10 at p. 13 (1911).

(2) I. L. R. 23 Bom. 494 (1898).

[CRIMINAL APPELLATE JURISDICTION.]

APPEAL NO. 1029 OF 1911.

HOLMWOOD, J.
SHARFUDDIN, J.
1912,
Heard, 26 and 27, March.
Judgment, 1, April.

SURESH CHANDRA SANYAL, Accused, Appellant,
v.
THE KING-EMPEROR.

Sedition—Indian Penal Code (Act XLV of 1860), sec. 124A—Publication—28 and 29 Vict., c. 18—Evidence Act (I of 1872), sec. 45, Illus. (c), *expert evidence—Its admissibility—Comparison out of Court.*

Sending a seditious matter by post

SURESH CHANDRA SANYAL *v.* THE KING-EMPEROR.

addressed not to a private individual but to the representative of a large number of men (e.g., *captain of a school*) *amounts to publication if it is opened by anybody.*

The one thing required for the admission of the evidence of an expert witness as to handwriting is that the writing with which the comparison is made should be proved beyond question or doubt to be that of the person alleged.

The evidence of an expert in handwriting is inadmissible if there is no comparison with proved or admitted handwriting in open Court in the presence of the party affected.

CRESWELL *v.* JACKSON (1), COBBET *v.* KILMINSTER (2) *referred to.*

SREEMUTTY PHOODEE BIBEE *v.* GOBIND CHUNDER ROY (3) *followed.*

This was an Appeal preferred on the 22nd of December 1911 against an order of Mr. J. G. Dunlop, District Magistrate of Pabna, dated the 4th of December 1911, convicting the Appellant under sec. 124A, I. P. C., and sentencing him to undergo rigorous imprisonment for 2 years.

The facts of the case are as follows :—

Babu Kshirode Chandra Sen, Head Master of the Rungpur Zillah School, got a cover bearing the post mark of Bera in the District of Pabna addressed to the Captain, Rungpur Zillah School. He opened it and found it to contain an anonymous leaflet in Bengali entitled "Matripuja." Being of opinion that it was seditious, he sent the leaflet and cover to the Magistrate. The Magistrate in his turn sent it to the Commissioner who forwarded it to the District Magistrate of Pabna. The Magistrate handed it over to the Superintendent of Police for enquiry. As the result of the enquiry, information was obtained and some house searches were made resulting in the discovery of some literature, in the possession of one Suresh Chandra Sanyal, a student of the Bera H. E. School. The leaflet and the literature discovered were sent to Mr. Charles Hardless, junior, and his opinion was obtained establishing the identity of the handwritings. Sanction was obtained and a complaint was lodged by the Superintendent of Police to the District Magistrate of Pabna against the accused for committing an offence under sec. 124A of the Indian Penal Code. The Magistrate found the accused guilty and sentenced him to two years' rigorous imprisonment.

Mr. J. N. Roy with *Babu Purna Chandra Roy* for the Accused.

Mr. Caspersz for the Crown.

THE JUDGMENT OF THE COURT was as follows :—

This is an appeal from the judgment and sentence passed by the District Magistrate of Pabna upon the Appellant, Suresh Chandra Sanyal, under sec. 124A of the Indian Penal Code.

He has been convicted of forwarding a certain seditious leaflet called "Matripuja" to the Captain of the Rungpur School and sentenced to two years' rigorous imprisonment.

There is no doubt as to the highly seditious nature of the leaflet and it is fully admitted by the defence that no question arises on this point.

We also think on full consideration of the facts that the sending of this leaflet by post addressed not to a private indi-

(1) 2 Foster and Finlason's Nisi Prius Rep. 24 (1860).
(2) 4 F. & F. 490 (1865).
(3) 22 W. R. 272 (1874).

vidual by name but to the representative of a large body of students amounts to publication and that the intention of the sender was undoubtedly to stir up disaffection to the Government among the students of the Rungpur Zillah School.

But the case entirely fails on the point of proof of handwriting and we may dispose of it quite shortly on that ground. Two Mahomedan boys who appear to be on bad terms with the accused give vague evidence as to their belief that the incriminating documents and others which were used for purposes of comprison are in the handwriting of the accused. Their knowledge of his handwriting is largely based on having seen him write on the black board at school and having overlooked his exercise books.

As to this test their evidence is discrepant and in our opinion worthless and as regards the writing in chalk on the black board the expert witness, Mr. C. Hardless, junior, himself says that such a comparison is in his opinion impossible as it obviously is.

The expert was given certain writings found in accused's possession to compare and he has stated that in his opinion all these writings are by one hand. Now although the writings appear to us to differ very considerably in character even on the points on which Mr. Hardless places most reliance we are quite prepared to receive his evidence with every respect and might have acted upon it had any document that was either proved or admitted to be in the accused's handwriting been placed in his hands. But in this case we are met with the curious anomaly that no such documents has been used for purposes of comparison.

Now it is settled law that the one thing that is required for the admission of the evidence of an expert witness as to handwriting is that the writing with which the comparison is made should be proved beyond question or doubt to be that of the person alleged.

The Statute 28 and 29 Vict., c. 18, sec. 8, lays down in express terms that the comparison by a witness of the disputed writing for the purpose of giving an expert opinion must be with any writing proved to the satisfaction of a Judge to be genuine, see *Creswell* v. *Jackson* (1) and *Cobbett* v. *Kilminster* (2), and though this condition is not expressly laid down in sec. 45 of the Evidence Act which is only a general section as to the admissibility of expert evidence yet it is clearly indicated in the Illus. (*c*) to the section where the comparison is assumed to be made in all cases with a document which is proved or admitted to have been written by the alleged writer of the document in question.

This Rule was taken for granted in India in what appears to be the earliest reported case after the passing of the Evidence Act, *Sreemutty Phoodee Bibee* v. *Gobind Chunder Roy* (3), where the Judges, Markby and Ramesh Chandra Mitter, JJ., say that under ordinary circumstances they would assume that the comparison took place in open Court and that a comparison having been made without any objection by the party affected by it the signature on the *vakalatnamah* which was used for comparison must have been in fact admitted.

But on a finding that this was not so the decision of the lower Appellate Court was reversed and the Judges said that they considered, according to their ex-

(1) 2 Foster and Finlason's Nisi Prius Rep. 24 (1860).
(2) 4 F. & F. 490 (1865).
(3) 22 W. R. 272 (1874).

perience, that a comparison of signatures is a mode of ascertaining the truth which ought to be used with very great care and caution.

It is evident that this is doubly so in a criminal case where a large quantity of apparently very different handwriting is under comparison.

The assumption here is that a notebook found in the accused's possession is entirely in his handwriting. Now there is internal evidence in the book itself that it is not and the expert was not even asked to say whether all the writing in this book was by the same hand.

Nor was he asked to make any comparison in open Court with proved or admitted handwriting which was then available.

It is claimed by learned Counsel for the Crown that the comparison made by the expert months before when the documents were first discovered and when nobody knew whether they were in the same hand or not is a strong proof of his impartiality and should give greater weight to his evidence.

But unfortunately when there is no comparison in open Court before the accused with documents proved or admitted to be in his handwriting such evidence is inadmissible and having regard to the minute and scientific investigations which are now in practice made by handwriting experts by means of photographic enlargements and detailed measurements made out of Court we must emphasize the necessity for strictly complying with the law as to what has to be done in the Court itself.

These preliminary enquiries and scientific researches may be very necessary and very desirable but they cannot be allowed to supersede or in any way take the place of comparison in open Court with proved or admitted writings which alone renders the expert's testimony admissible.

To justify our finding on this point which is of course based on wholly independent legal considerations we may remark that in this case a very remarkable instance of the danger of relying on inspection made out of Court has come to our notice.

There is an address copied into the accused's notebook at page 73 in which the word 'Rungpore' twice occurs. This has been greatly relied upon by the expert for comprison with the same word occurring on the envelope Ex. 2 in which the incriminating document was sent.

Now not only is this entry wholly unproved but it appears to us to be an interpolation in the notebook made in a different handwriting to the rest of the page and the last curve of the R is of a wholly different character to that on the envelope being curved in and rounded instead of outwards as we have written it above and as it appears on the envelope. On the other hand the unusually elongated tail of the g and the unusually short shaft of the p seem to be laboriously imitated in the notebook from the writing on the envelope and it is obvious that it could be quite possible to put matters before the expert in a private examination which were not in the original document at all and so deceive him into giving evidence in all good faith upon writing which really had no connection with the case.

We do not say that this is so in this particular case, but the suspicion that an entry such as this in the notebook *primâ facie* arouses, illustrates the danger of substituting that which is not evidence, namely, the expert's private examination of the documents out of Court for that

which the law has under the safeguards of extreme care and caution made admissible as evidence on condition that the examination is made in open Court in the presence of the party affected.

It is clear that on this ground the finding that the accused either wrote or forwarded by post the incriminating document falls to the ground. That he was in possession of highly seditious literature and that he habitually sent for, purchased and read such literature is certain and may give rise to a strong suspicion that he was engaged in disseminating such pernicious writings among his friends and associates. But he is only one of a secret society in the village of Bera which has been deposed to by the D. S. P. and the publication of this particular missive has not been brought home to him.

Whether he could have been arraigned under scc. 108, Cr. P. C., or under sec. 153A, I. P. C., it is not for us to enquire. But we have to consider whether or not there should be a re-trial in this case and we think that having regard to the fact that the accused has been 8½ months in jail as an under-trial prisoner and as a convict combined, that his conduct even if it could be shown to be criminal has been amply punished and that we may hope that he will realise the folly and wickedness of tampering with sedition, and as he is young enough to reform and become an useful member of society, that this will be a sufficient warning to him for the future, there is no need for a re-trial.

We set aside the convic ion and sentence and order the acquittal and release of the accused.

Accused acquitted.

THE
Calcutta Weekly Notes.

Vol. XVI.] MONDAY, JULY 8, 1912. [No. 33

Contents.

NOTES.

WE REPRODUCE IN ANOTHER COLUMN A VERY learned and thoughtful address by Sir John Macdonell, C. B., delivered before the First International Congress of Races on the "Relationship of International Law to the Subject Races." This eminent jurist shows how even liberal minded jurists and philosophers of the last century and their predecessors thought that the dominant races of the world had a right to domineer over other races and nationalities of the world by virtue of what they believed to be their superior civilization. Sir John points out briefly some of the inequities that have been perpetrated in different parts of the world in the name such civilization. He appeals evidently to the European nations not to wipe out all other forms of civilization from the face of the earth in the blind belief that they are inferior simply because they differ from that of their own. He further points out the fallacy of regarding communities of men as unprogressive simply because the records of their progress are unwritten or unavailable. He says with the foresight of a philosopher that people who appear on the surface to be unprogressive may one day determine the progress of the world along new lines and thus enrich mankind, and that it will be disastrous to progress and civilization to make all the races of the world conform to one single type of civilization. He therefore advocates that care should be taken to preserve to all races and nations in the world their own moral, intellectual and social ideals and institutions, and to foster and promote their development along their own national lines.

SIR JOHN CONSIDERS THAT THE ONLY MORAL justification that one nation can advance for controlling the affairs of another is that the latter is not yet fit to manage its own affairs and the relationship so arising, he regards as akin to that of a guardian and a ward. It, therefore, necessarily follows that whatever may be done by the former which is not for the benefit of the latter should be voidable and that the former must invariably act in the interest of the latter. Sir John also maintains that although a Government in the position of a guardian naturally considers itself to be the best judge with regard to the affairs of the ward yet for obvious reasons its judgments cannot in such matters be always unerring and it is but reasonable that it should make itself amenable to independent and disinterested outside influences and opinions. The step by which this is to be achieved, the learned author very properly says, is by promoting inquiry and acquisition of precise knowledge regarding the different races and nations now under tutelage, and by the establishment of societies for that purpose.

WE DESIRE TO DRAW THE POINTED ATTENTION OF the new Lord Chancellor to the neglect with which Indian Appeals are now treated in the Privy Council. It is nothing unusual to see only three members of the Judicial Committee, of whom two are usually ex-Indian Judges of no great celebrity, trying cases from India. Things are different with Colonial Appeals which are heard by a tribunal consisting usually of all the Law Lords as well as the Lord Chancellor.

THERE IS NO REASON WHATSOEVER WHY THERE should be this difference. Questions affecting property, status and personal rights of Indian citizens are by no means of less importance than those of Colonials, and to bring together all the legal talent of England to try Colonial cases and to entrust Indian cases to three Judges indifferently selected is to make a most invidious distinction. With the sole exception of Lord Macnaghten hardly any English lawyer of distinction has presided over the Board in trying Indian cases during the

last and the previous sitting of the Judicial Committee. And this state of things has been regarded as highly unsatisfactory by the Indian litigants and the public alike.

WHEN INDIAN LITIGANTS APPEAL TO HIS MAJESTY in Council for justice they do so in the expectation that their grievances will be judged by a tribunal which represents the highest legal talent of England. It would be idle to contend that the highest tribunal for Indian Appeals as it has been constituted of late has in any degree come up to their expectations. Litigants and lawyers alike are disposed under such circumstances to feel more confidence in the best Judges of the Indian High Courts than on the Judicial Committee as now constituted for the hearing of Indian Appeals. It was no doubt at one time considered necessary to appoint some Judges of Indian experience to assist the English Judges on questions of Hindu and Mahomedan law and customs, but no one in India expected that the result of that would be to displace the best English legal talent. If the Board continue to be constituted as it is at present we have little doubt that the Indian public will soon lose the high regard in which the Judicial Committee has been held by them.

UNLESS THE AUTHORITIES IN ENGLAND SEE TO justice being done to India in this matter the cry may very well be raised that the final Court of Appeal for Indian causes should be in India where it would give its best and undivided attention to Indian cases alone and be more responsive to public opinion than any Court in England can be. We cannot profess to be very much in sympathy with such a cry, but if India is consistently treated with the neglect with which it has been treated by the Judicial Committee of late, and if we cannot expect a more liberal allotment of the English Law Lords than we have had of late on the Board of the Judicial Committee, we are afraid the cry if raised would be hard to resist. We are strongly in favour of the final Court of Appeal continuing in England not merely because there we expect to have the services of the best English Judges, but we expect such Judges to be free from local prejudices.

LORD HALDANE MORE THAN ANY OTHER PUBLIC man of England is pledged to give equal justice to all the Empire and his scheme of an Imperial Court of Appeal is a practical demonstration of his faith in the true principle of the unity of the Empire in a common administration of equal justice. We trust that now that he is the Lord Chancellor of England, he will, with his well-known sympathies for India, exert his influence to secure for India equal treatment with the Colonies, at any rate in the administration of justice by the Imperial Court of Appeal.

ALTHOUGH THE JUBILEE OF THE CALCUTTA High Court was privately celebrated by His Lordship the Chief Justice at his residence on Monday last, yet the occasion has aroused an amount of public enthusiasm throughout the Presidency which is quite unique and unprecedented. In spite of adverse weather, the Chief Justice's party was very largely attended not merely because of the high regard and esteem in which this historic Court has been held by the public, but also because of the deep feeling of personal attachment that every member of the profession feels toward the Chief Justice. The party was a great success and the personal attention shown by the distinguished host to all his guests left nothing to be desired. But what was more remarkable was the number of messages of deep appreciation and unbounded confidence in the Court that poured into his Lordship's hands, in the course of the evening, from almost every district and every sub-division of the Presidency. This spontaneous expression of loyalty was quite a revelation even to those who knew that the High Court of Justice is the most popular institution amongst all the branches of British administration that exist in this country. The members of the legal profession in Calcutta received a rude shock at the announcement recently made for the dismemberment of the Calcutta High Court. They were hesitating whether they should celebrate the Jubilee of the High Court on the eve of its prospective dissolution. But encouraged by the example of their professional brethren throughout the Presidency they have decided to put out of their mind all mournful thoughts of the evil day and to commemorate the 50th anniversary of the Calcutta High Court in a manner that will make all of them feel that they too have not been wanting in their duty to her who has been truly an *alma mater* to them.

IT IS A GREAT PITY THAT WE HAVE NOT BEEN able to trace any record as to how the High Court of to-day was ushered into existence. The only thing we know is that after its creation it first commenced its sittings on the Original Side on the 7th of July 1862. It was created by Royal Letters Patent which was published in a Gazette Extraordinary of the 1st of July 1862. Then it quietly absorbed into itself the various jurisdictions, both English and indigenous, the Supreme Court, the Sadar Dewani and the Sadar Nizamut Adwaluts. As we have said before, no Court in India

can be created to-day even by Royal Charter which would have the proud privilege of claiming such a comprehensive jurisdiction. Its history though not extending over many centuries still occupies quite a unique place in the annals of the historic law Courts of the world. How Warren Hastings laid the foundation of this Court at Murshidabad and how the English system of administration of justice came gradually to be blended with the Indo-Mahomedan system, will always form a most fascinating chapter in the history of the constitutional law of the country. Although we may not be able to point to any definite landmark when this blending commenced yet we possess definite records as to how the Supreme Court which was merged into the present High Court in 1862, was formally opened in this city in 1774, replacing the Mayor's Court and other Courts then existing.

THE FOLLOWING ACCOUNT OF THE OPENING OF the Supreme Court at Calcutta, which we reproduce from Smoult and Ryan's Rules and Orders of the Supreme Court, will surely be found of interest by the public and the profession :—

THE OPENING OF THE SUPREME COURT.

AT A

Supreme Court of Judicature,

HELD AT THE TOWN HALL OF CALCUTTA,

At Fort William in Bengal, on Saturday, the 22nd day of October, in the year of our Lord

1774.

PRESENT :

The Hon. Sir Elijah Impey, Knight ... *Chief Justice.*
The Hon. Robert Chambers, Esq. ...
The Hon. Stephen Cæsar Lemaistre, Esq. ... *Puisne Justices.*
The Hon. John Hyde, Esq. ...

The Hon. Sir Elijah Impey and the other Judges take and subscribe the oaths of office and allegiance. The following entry appears on the rolls, signed by the three Puisne Justices.

"The said Sir Elijah Impey Knight, Chief Justice of the Supreme Court of Judicature at Fort William in Bengal, appointed by letters patent of Our Sovereign Lord the King, under his great seal of Great Britain, dated at Westminister, the twenty-sixth day of March, in the fourteenth year of his Reign, and Robert Chambers, Stephen Cæsar Lemaistre, and John Hyde, Esquires, Justices of the same Court, appointed by the said letters patent, being here assembled, according to the direction of the said letters patent. We the said Robert Cbambers, Stephen Cæsar Lemaistre and John Hyde, have now administered to the said Sir Elijah Impey, the several oaths and the declaration above written, and the said Sir Elijah Impey in the presence of us, so assembled, hath here taken, made and subscribed the said oaths and declaration respectively. In witness whereof we hereunto put our hands and do hereby record the same."

[Then the Court appointed Masters of the Court of Equity and other officers of Court who took the oaths of allegiance and oaths of office.

The report then proceeds :—]

The Court ordered that a Mandamus should issue to Charles Sealy, late Register of the Mayor's Court, to deliver all the Records and Muniments of that Court into this Court.

The Court ordered that a Mandamus should issue to Stephen Bagshaw, late Clerk of the Courts of Oyer and Terminer and Gaol Delivery, to deliver all the Records and Muniments of the said Courts into this Court.

The Court adjourned to Monday the 7th day of November next, at eight of the clock in the forenoon.

INTERNATIONAL LAW AND SUBJECT RACES.*

[BY SIR JOHN MACDONELL, C. B.]

At the outset is the question : How far, if at all, is International Law applicable to the relations between subject and dominant, between civilised and uncivilised races? According to one view, they are not in any way applicable ; according to another, they are so, but only partially, and with many qualifications. I pass over as not meriting notice in this Congress the contention which is rarely nowadays made in so many words, that a high degree of civilisation carries with it a right to impose the will of the superior upon the inferior ; that as between them might is right and that the former may do exactly as they think fit in virtue of their superiority.

Turning to statements less uncompromising, I proceed to cite those of one or two writers. The first is by Mr. John Stuart Mill :

> There is a great difference (for example) between the case in which the nations concerned are of the same, or something like the same, degree of civilisation, and that in which one of the parties to the situation is of a high, and the other of very low, grade of social improvement. To suppose that the same international customs, and the same rules of international morality, can obtain between one civilsed nation and another, and between civilised nations and barbarians, is a grave error, and one which no statesman can fall into, however it may be with those who, from a safe and unresponsible position, criticise statesmen. Among many reasons why the same rules cannot be applicable to situations so different, the following are among the most important. In the first place the rules of ordinary international morality imply reciprocity. But Barbarians will not reciprocate. They cannot be depended on for observing any rules. Their minds are not capable of so great an effort, nor their wills sufficiently under the influence of distant motives. In the next place nations which are still barbarous have not got beyond the period during which it is likely to be for their benefit that they should be conquered and held in subjection by foreigners. Independence and nationality, so essential to the due growth and development of a people further advanced in improvement, are generally impediments to them. . . . A violation of great principles of morality it may easily be; but barbarians have no rights as a nation, except a right to such treatment as may, at the earliest possible period, fit them for becoming one. The only moral laws for the rela-

* A paper contributed to the First Universal Races Congress. Reproduced from *The Journal of the Society of Comparative Legislation*, May 1912.

tion between a civilised and a barbarious Government are the universal rules of morality between man and man (*Dissertations*, iii. p. 161).

I have quoted this page as expressing the views of those—and they are many—who lay stress on the absence of reciprocity and the benefits of civilisation as justifying the application of different rules from those which are in force between civilised States.

[The author here quotes from continental jurists in support of similar doctrines.—Ed.]

These statements are, for several reasons, not satisfactory; if not inaccurate, they lack precision and definiteness. In the first place, the modern practice of nations and the teaching of modern writers do not, on the whole, whatever may be done on particular occasions, accord with some of these opinions. Modern text-books treat, sometimes at great length, the relations and duties of civilised States to inferior or backward races. In point of fact there has always been some recognition of duties by civilised nations to uncivilised or semi-civilised nations with which the latter have been brought into contact: recognition generally imperfect; often compatible with gross cruelty; often serving as a cover or excuse for wrong-doing. One of the chief subjects of discussion among the earliest students of International Law (*e.g.* Francisco Victoria and Baldasaree de Ayala) was the relations and duties of the Spanish and Portuguese conquerors to the indigenous inhabitants.

Further it is to be noted that there is not a clear line of separation between civilised and barbarous nations; they often differ from each other by small degrees; the sharp distinction drawn in the passage which I have quoted from Mill between civilised nations and barbarous, does not help one in solving the actual problems, which for the most part relate to the dealings of nations with different types of civilisations, the relative value of which in the eyes of imperial observers, if such existed, might be dubious. What is the test of superiority? There is the often suggested test of proficiency in war, according to which the Turks some centuries ago were probably supreme among all nations, the Italians, contemporaries of Michael Angelo and Leonardo da Vinci, not excepted. There is the test of wealth; a test the justice of which, if applied to individuals, would be denied. There is the test of morality, the existence of a legal moral code and conformity of conduct thereto; a test the application of which, if possible, might lead to startling results. Nor is the distinction between the progressive and non-progressive races so clear to modern ethnologists as it was to those who knew little. The so-called stationary races are often merely those whose changes are unrecorded. As Professor Royce justly remarks, this test has never been so fairly applied by civilised nations as to give exact results. So long as there exists what M. Tarde calls the "irrésistible orgueil primitif que porte toute tribu, si infime qu'elle soit, à se considérer supérieure à ses voisins," the application of a well-accepted test is impossible. The superiority for which writers such as Gobineau and Houstin Chamberlain claim will never be conceded. But what is clear is that the world would be poorer if one type of civilisation were to be universal; what we cannot be sure of is, that an unpromising race, if left to itself, may not be the starting-point of a development which will enrich mankind.

I am only summarising the teaching of a great majority of writers when I say that, apart from the conventions which I am about to mention, some at least of the rules of International Law are assumed by almost all writers to apply to such communities; even as to communities outside the purview of International Law, there are duties to be performed, duties which may be stated and formulated. At all events this holds good of communities with regular Governments, though with social organisations and moral ideas unlike our own.

One of the most characteristic modern developments in the relations between States generally, between dominant and subject races, is the establishment of Protectorates by powerful States over weaker, some of the latter being on a plane of civilisation equal to that of the former. Gradually are being evolved principles as to the reciprocal duties of protecting or protected States, including the treatment of the indigenous inhabitants.

[The author here refer to some treaties and conventions that exist amongst some of the Chief States of the world which would go to show that they recognise their duty to the non-dominant races but such international duty has so far been limited only with regard to three matters, namely, restrictions in respect of "slave trade," "importation of arms" and "importation of spirituous liquors."—Ed.]

It is at least plain from this brief recital of facts that there is some recognition of the duties of great States to weak and subject races; some recognition, too, of the need of joint action; some agreement as to these duties. It is no less true that these duties are still imperfectly recognised; that many points of importance are left unsettled; and that the organisation, official and non-official, needed to make them really effective is imperfect and rudimentary. The development of a code of duties of nations towards the less fortunate or less gifted, or more backward, races may require time; considering the slow rate at which the code of duties of civilised nations towards each other was worked out, it is possible that this new

chapter may require much time. But some principles seem already fairly well recognised, and among them these—

1. If certain races are in the position of minors, not fit in their present condition to be their own masters, those who claim superiority and control ought to be able to justify their position as guardians. The greater the unfitness of the former, the greater the duties imposed on the latter. Every Government asserting the right to control the destinies of such races ought to show by its conduct that it is not acting towards its wards as an injust guardian; that it is not exploiting their labour or squandering their estates. Could we say that the Native departments of all Governments with an idigenous population under their control even now satisfied the test: "The measure of your duties is their alleged unfitness"? What is no less clear is that in many respects the so called guardians are the least capable of judging fairly whether they have fulfilled such duties. No other judge may have jurisdiction; that circumstance does make them the less fallible.

2. There ought to be less of the intolerance of modern civilisation, equal to that of religious fanaticism, scarcely surpassed by any displayed by the Spanish conquerors of Mexico or Peru. If they were merciless, they had few means of carrying out their will, and they had at all events moments of contrition and doubts whether their work was altogether good in the eyes of Heaven, while the self-satisfaction of modern civilisation is rarely broken by an admission of failure. I am tempted to cite, if only as a rebuke to self-complacency which is too common on this point, a remarkable document entitled: "The true confession and protestation in the hour of death," by one of the first Spanish conquerors of Peru, named Marcio Serra de Lejesama, in 1589. Lejesama begins by declaring that he desires to relieve his mind and to give notice to his Catholic Majesty King Philip of his regret that he had taken part in the discovery and conquering of the lands of the Yncas.

"The said Yncas," proceeds the repentant Conquisador, "governed in such a way, that in all the land neither a thief, nor a vicious man, nor a bad dishonest woman was known. The men all had honest and profitable employment. The woods and mines and all kinds of property were so divided that each man knew what belonged to him, and there were no law suits. The Yncas were feared, obeyed, and respected by their subjects as a race very capable of governing. But we took away their land, and placed it under the government of Spain, and made them subjects. Your Majesty must understand that my reason for making this statement is to relieve my conscience, for we have destroyed this people by our bad examples. Crimes were once so little known among them that an Indian with one hundred thousand pieces of gold and silver in his house left it open, only placing a little stick across the door as a sign that the master was out, and nobody went in. But when they saw that we placed locks and keys on our doors, they understood that it was from fear of thieves, and when they saw that we had thieves amongst us, they despised us. All this I tell your Majesty to discharge my conscience of a weight that I may no longer be a party to these things. And I pray God to pardon me, for I am the last to die of all the discoverers and conquerors, and it is notorious that there are none left but me in this land or out of it, and therefore I now do what I can to relieve my conscience."

I may not have searched diligently enough, but in the many narratives of modern explorers, conquerors and pioneers of civilisation, I can recall few expressions of regret so deep as that of the confession by the Spanish conqueror, few cases in which the conscience of a modern explorer or promoter smites him, and he is filled with doubts whether it was right to break up tribal organisations and convert into masses of shifting atoms what were once strong cohesive organisations, the rudiments of nations, if not nations, full grown. Even when no cruelties have been practised towards native races, when on the contrary there has been a decree to deal fairly with them, the results have often been disastrous. The old tribal system is broken up, the best land is seized by settlers the natives are stinted either in regard to pasturage or hunting grounds. They are lured away by the attraction of high wages, and they become broken tribeless men, imitating the worst vices of their new masters; cut off from their old nation; the authority of their chiefs gone, no authority replacing for these children of Nature that which has been destroyed.

Some of these evils are inevitable; it is the the fashion to say or assume that all of them are so. . . . .

But I am justified in mentioning certain dominant prejudices, taking many forms, which have done mischief and are still at work, in dealing with the aborigines. One of these is an undue sense—undue in any large view of the matter—of the value of the present prevalent form of civilisation. It appears in the asumption that there is one form of society to which all others must conform on pain of perishing. This prejudice makes people forget how many different types of civilisation there have been—the Greek, the Roman, the Christian, the theocratic, the military, the industrial type—and that there has never been agreement as to their merits.

If the intolerance of civilisation, with its *compelle intrare*, has done harm, mischievous, too, has been the notion that the so-called uncivilised world is made up of races all of a piece; whereas under the vague desciption "uncivilised" are grouped a multitude of people radically different from each other; strong and weak, good and bad, progressive and stationary; some with the self-denying virtues in which are the roots of political aptitude; others unstable, egotistical, and incohesive.

3. I note a further point. That the conditions upon which treaties between civilised Govern-

ments, not uncivilised or semi-civilised communities, should be wholly different from treaties concluded between equals. I am quoting a rule of law, but one based on good sense, when I say that contracts to which minors are parties are voidable unless to their advantage. We all know how wantonly this has been disregarded; how the indigenous inhabitants have been tricked out of their lands; how a colour of legality has been given to gross frauds (Deherpe, *Essai sur le développement de l'occupation*, 1903, p. 76). I fully believe that such frauds are much rarer than they were—the opportunity for them now seldom occurs. But the principle above stated needs to be set down clearly.

It seems a truism to say that these races should retain their means of existence; a truism unfortunately often questioned in practice; a truism with far-reaching consequences as to the land of tribes, as to the operations of promoters, and as to the granting of concessions. This principle implies a land system made for them as well as for the whites; where they preponderate in number, one may fairly claim much more for them than for the latter.

The Act of Berlin of February 26, 1885, laid down certain useful rules (Arts. 34 and 35) as to the assumption of a protectorate over territories on the coast of the African Continent and the conditions of occupation. These rules relate only to the rights of parties to the Act; they are silent as to the rights of the indigenous population in the land. It did not condemn the doctrine that such land if not occupied by a civilised state was *res nullius*, or prescribe the conditions upon which treaties relating to such land should be recognised.

It might also be thought a truism, were it not so often disregarded, to say that the indigenous population should have the opportunities of development in their own way—which means education suited to their needs; no forcible conformity to one type.

5. The principle above stated implied something of reverence—at all events respect—towards these backward races; a desire to preserve their customs and law (so far as not cruel and mischievous).

So much—and it is necessarily imperfect—as to a few of the doctrines which have already obtained partial recognition, but which need explicit statement and application. Next, as to the organisation needed to give effect to them. In these days we at once think of Parliaments. But all the non-dominant races cannot have Parliaments. Yet they may have voices; not merely for the expression of political grievances, but for the maintenance and preservation of types of character and ideals; for the furtherance of national literature with racial elements; for the preservation of their institutions and monuments in art and literature; organs for the attainment of aims which the State does not necessarily secure and often destroys or imperils.

(*a*) First and foremost there should be fairly frequent meetings such as the present; gatherings from time to time when the whole situation may be reviewed, when people of different races may draw together, when the different forms which the same movement may take may be studied. If we must trust to public opinion, as is said, then public opinion should be enlightened by such gatherings as these. Sympathy ought to go hand in hand with knowledge, and it might be the object of such gatherings to study the scientific basis of truth, if any, underlying the theories as to race, and to discriminate between the mass of illusions and prejudices and scientific teaching. There should be more and more—and fortunately already there are many—societies representative of the interest of races. In no country, so far as I know, can Governments do all that is needed; in some they may be positively hostile to objects which certain races have much at heart. Some time ago a few of my friends formed the South African Native Races Committee. Its main object was to obtain and diffuse accurate information as to the native population of South Africa. Perhaps its chief work so far has been to bring about the formation of two similar societies in that country. Of late it has endeavoured to aid in procuring funds for the establishment of a college for South African natives. I cannot but think there is plenty of room for societies with like objects.

(*b*) My last suggestion is difficult to state without saying too much or too little, without seeming to question or ignore the power of diplomacy and the press. Often of late it must have been borne in upon many that it was desirable to obtain accurate information as to some of the questions with which this Congress is concerned—information not only accurate, but universally accepted as such; co-operation by inquirers whose competence or disinterestedness could not be questioned. Perhaps some day such investigators, forming a staff of trustworthy experts, will be available to throw light upon questions as to which official and non-official accounts differ.

To sum up these suggestions:—Closely connected with, if not a part of, International Law is a group of duties on the part of dominant races to those under their control or influence. These duites, now imperfectly recognised, may be made clearer; they may be enlarged; the observance of them may be made stricter by wise co-operation. Prizing and preserving diversity of race, we may attain to something like unity in spirit and policy.

Review.

A TREATISE ON THE LAW OF PARTNERSHIP. *By the Right Honourable Lord Lindley. Eighth Edition. By the Honourable Walter B. Lindley, T. J. C. Tomlin, M. A., B. C. L., (Oxon) and A. Andrews Uthwatt, B. C. L., (Oxon), with an Appendix of the Law of Scotland. By J. Campbell Lorimer, LL. B., K. C. London: Sweet & Maxwell, Ld., 3, Chancery Lane, W. C. 1912.* 42s.

This standard work on the Law of Partnership has been brought up-to-date by the present editors. The Law of Partnership is one of the few branches of the law which has been codified in England, But the work had already passed through five editions before the Partnership Act was passed in 1890, and in the sixth edition the sections of the Act were incorporated with the text of the treatise which was for that purpose carefully revised but of which the general arrangement and characteristic features were otherwise preserved. Larger changes were made with the approval and assistance of the author in the following edition with a view to adapt the treatise more completely to the existing state of the law. The passing of the Limited Partnership Act in 1907 has necessitated further changes in the scheme of the treatise and these have been duly carried out by the editors in the present edition.

The work, as is well-known, is an exhaustive commentary, critical as well as explanatory, of the whole law of Partnership, leaving out of course the Law of Companies which forms the subject of a separate treatise. Clubs, sub-partnerships and even the general law relating to co-ownerships are dealt with in order more clearly to bring out the special characteristics of partnerships proper. Books I to IV deal with Partnership proper whilst Book V is devoted to Limited Partnerships, first created by the Statute of 1907, alluded to above, and which removes to some extent the inherent defects of the English law conception of partnerships. But the English Law of Partnership, in spite of the changes introduced by Legislature is still in a far from satisfactory condition. The difficulty attending Parliamentary legislation stands in the way of any systematic and radical amendment of that law. The dead weight of the Common law notion that a firm has no existence of its own apart from that of the individuals composing it, stereotyped in a long series of judicial decisions, cannot be removed except by legislative action which has yet to be taken. In India the same notions have been imported and embodied in the chapter of the Indian Contract Act which deals with partnerships. The Indian Legislature is perhaps in a better position to make alterations in the existing law of partnership for India than the English Parliament, but the demand for such changes is not even yet sufficiently insistent, having regard to the backward condition of trade and commerce in this country and India will perhaps have to wait longer for the reform than even England. The Indian Legislature has however in contemplation extensive modifications of the Companies Act. The opportunity may well be utilized to give recognition, as has been done in England, to Limited Partnerships at any rate, and it is sincerely to be hoped that the opportunity will not be messed.

As regards the work itself, it hardly requires any detailed notice. It is a standard work in general use not merely in England but also in this country, and there can hardly be any doubt that a new edition like the present will find warm welcome amongst legal practitioners all over India.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and IMAM, JJ. RAM DAS SHA KULWAR, Petitioner *v.* DHURKHELU SURAHU AND OTHERS, Opposite Party. 10th June 1912.

Criminal Procedure Code, sec. 528—Transfer by Sub-Divisional Magistrate—Withdrawal of case and retransfer by District Magistrate.

The Petitioner had, on 29th April 1912, preferred a complaint before the Sub-Divisional Magistrate of Barrackpore alleging that the accused had, on the 27th April 1912, formed members of an unlawful assembly and in pursuance of the common object thereof criminally intimidated the Petitioner by coming to his shop armed with lathis and threatened to beat him. The accused were summoned for trial under sec. 147, Penal Code, and the case made over to an Honorary Magistrate, Rai S. C. Bhattacharya Bahadur, for disposal. In the course of the trial the complainant moved the Sub-Divisional Magistrate for a transfer of the case from the file of the said Honorary Magistrate and, on the 13th May 1912, the Sub Divisional Magistrate transferred the case to the file of Babu A. C. Mandal, Honorary Magistrate, who fixed the case for hearing on 21st May 1912. On the 28th May 1912, upon the application of the accused the District Magistrate withdrew the case from the file of Babu A. C. Mandal and made over the same to Rai S. C. Bhattacharya Bahadur for trial.

The Petitioner moved the High Court against this order urging on the authority of *Raghunatha,*

I. L. R. 26 Mad. 130, that the order of the District Magistrate was without jurisdiction.

Their Lordships in rejecting the application observed as follows :—

It is doubtful whether the decision in the matter of *Raghunatha*, I. L. R. 26 Mad. 130, has any application to Bengal, where the conditions are totally different and the wording of the section is perfectly clear that the District Magistrate may withdraw any case from any Magistrate subordinate to him and may inquire into or try any case himself or refer it for enquiry or trial to any other such Magistrate competent to inquire into or try the same. It does not therefore appear that the District Magistrate acted without jurisdiction, and if he had we should certainly in the exercise of our powers of revision have directed that an order precisely similar to that passed by him should issue from this Court, for the grounds given for transfer by the Sub-Divisional Officer show a great weaknesss and want of judgment and are not grounds upon which any complainant ought to be allowed to obtain transfer.

The application is rejected.

Babu Probodh Chandra Roy for the Petitioner.

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM ORIGINAL DECREE No. 542 OF 1908.

MOOKERJEE, J. 1911, Heard, 23, June and 1, September. Judgment, 7, September.

BRETT, J. VINCENT, J. 1910, Heard, 6 and 19, July. Judgment, 23, August.

SYED MAHAMAD MEHDI HUSAIN KHAN and anr., Plaintiffs, Appellants,
v.
SHEO SHANKAR PERSAD SINGH and ors., Defendants, Respondents.

Revenue Sale Law (Act XI of 1859), secs. 10, 11, 53—Separate account opened in favour of shareholder owning shares in specific portion of estate—Such shareholder if purchases at revenue sale free from incumbrance—Land Registration Act (VII of 1876, B. C.), sec. 70.

MOOKERJEE AND VINCENT, JJ., (BRETT, J., contra).—***Persons in whose favour the Collector has opened a separate account, though they are neither sharers in the whole estate nor proprietors of specific lands comprised therein but are shareholders in some only of the many villages comprised in the entire estate, do not, by purchase of the estate at a sale for arrears of revenue, acquire it free from incumbrances.***

The privilege given by sec. 53 of Act XI of 1859 to shareholders with whom separate accounts have been validly opened under sec. 10 or sec. 11 of the Act, has not been extended to shareholders in whose favour accounts have been opened under sec. 70 of the Land Registration Act, nor can such privilege be claimed by shareholders with whom separate accounts had been opened by the Collector before the passing of the Land Registration Act in contravention of secs. 10 and 11 of Act XI of 1859.

NANHU SHAHU *v.* RAM PROSAD (8) *approved.*

This was an Appeal preferred on the 30th of November 1908 against the decree of Babu Bankim Chandra Mitter, Subordinate Judge, 1st Court, of Zillah Saran, dated the 10th of September 1908.

The facts of the case will appear from the judgments.

The Appeal was heard in the first instance before BRETT and VINCENT, JJ., who having differed in opinion, the case was referred for decision to MOOKERJEE, J.

The dissentient JUDGMENTS of BRETT and VINCENT, JJ., were as follows:—

BRETT, J.—The entire Mehal Raiputti bearing Touzi No. 3143 in the Saran Collectorate was sold for arrears of revenue by the Collector, proceeding under the provisions of sec. 14, Act XI of 1859, and was purchased in the name of Defendant No. 7, Babu Gopal Dass.

Fifteen separate accounts or khatas, besides one for the residuary share, had been opened many years ago by the Collector, and Defendant No. 2 being the malik of khata No. 1 executed 3 deeds of mortgage in favour of Babu Sheo Shankar Persad Singh, Defendant No. 1, on the 9th December 1886, 13th December 1886, and 1st July 1893, respectively. Afterwards the share in respect of which khata No. 1 had been opened was sold for arrears of revenue due on that share, and purchased by Pardip Narain Singh, Defendant No. 6, subject to incumbrances. Defendant No. 1 afterwards brought a suit on the three mortgage bonds, No. 67 of 1897, against Defendants Nos. 2 to 6 and obtained a decree by consent for Rs. 17,281-10 0.

On the 25th March 1899, the share in

(8) 21 W. R. 38 (1869).

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respect of which khata No. 4 had been opened, and which belonged to Kalika Prosad Singh, was put up for sale for arrears of revenue due on that share. No bids being offered the Collector proceeded under sec. 14 of Act XI of 1859 and put up the entire estate, No. 3143, for sale, and it was purchased by Defendant No. 7 for Rs. 1,600.

Defendant No. 1 then took out execution of his mortgage-decree obtained against the proprietors of the share in respect of which khata No. 4 had been opened, praying for sale of that share in execution of his decree. Thereupon Defendant No. 7 brought a Suit No. 51 of 1904 to have it declared that his purchase of estate No. 3143 was free of all encumbrances, and asked for a temporary injunction restraining the Defendant No. 1 from selling the share. The injunction was granted on condition of Defendant No. 7 depositing Rs. 1,454-8, being the amount of interest due on Defendant No. 1's mortgage up to 1st August 1906. In that suit Defendant No. 1 pleaded that it was incompetent as Defendant No. 7 was merely a *benamidar* of the two Plaintiffs. The plea was allowed and the suit was dismissed. Defendant No. 1 then drew out the Rs. 1,458-8 from deposit.

On the 2nd March 1907, Defendant No. 7 executed a deed of conveyance of the entire estate No. 3143 in favour of the Plaintiffs for Rs. 12,000, the deed to be treated either as a deed of sale or a deed of release.

Defendant No. 1 again took out execution of his mortgage-decree and the share in respect of which khata No. 4 had been opened was advertised for sale on the 5th August 1907.

Plaintiffs instituted the present suit, on the 30th July 1907, for a declaration that Defendant No. 1 is not entitled to sell the share in respect of which khata No. 4 had been opened on the ground that Plaintiffs had purchased the entire estate free of all encumbrances. They also claimed as assignees of Defendant No. 7 to be entitled to recover from Defendant No. 1 the sum of Rs. 1,451-8-0 deposited by Defendant No. 7 to cover interest on the mortgage-debt of Defendant No. 1.

The Plaintiffs' case as set out in their plaint was that as the entire estate had been sold for arrears of Government Revenue and purchased by Defendant No. 7, a stranger, and subsequently purchased from him by the Plaintiffs, the Plaintiffs acquired the estate free from all encumbrances. In the suit brought by Defendant No. 7, No. 51 of 1904, to which reference has already been made it was held that Defendant No. 7 was merely a *benamidar* for the Plaintiffs, but at the same time the opinion was expressed in the judgment that, as the Plaintiffs were sharers in respect of whom a separate account had been opened by the Collector under the provision of secs. 10 and 11 of Act XI of 1859, they came within the exception stated in sec. 53 of the same Act, and they purchased the estate free of all encumbrances.

This latter ground, though not expressly stated in the plaint, was the one on which the Plaintiffs relied in support of their suit in the lower Court.

Numerous issues were framed in the lower Court but those which are of importance for the purposes of this appeal are Nos. 5, 10, 11 and 6.

Issue No. 5 is as follows:—Are the Plaintiffs purchasers of the estate free from encumbrances?

Issue No. 10 runs as follows:—Were the Plaintiffs such sharers in Mehal Rai-

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putti, Touzi No. 3143, before the Revenue sale, dated the 6th June 1890, as to come within the exception mentioned in sec. 53 of Act XI of 1859?

Issue No. 11 is as follows:—Was there any separate account validly and legally opened under secs. 10 and 11 of Act XI of 1859 on behalf of the Plaintiffs? If not whether the Defendant No. 1 is competent to question the validity and legality of the operation of the account effected before the Revenue sale?

Issue No. 6 is as follows:—Are Plaintiffs as assignees of Defendant No. 7 entitled to get a refund of Rs. 1,454-8-0 deposited by Defendant No. 7 in Court and withdrawn by Defendant No. 1?

The Subordinate Judge decided all these issues against the Plaintiffs.

The Plaintiffs claim to be sharers in the share in the estate in respect of which khata No. 5 had been opened by the Collector. In fact that separate account was opened on the 16th April 1872 by an order of the Collector of Saran. The original petition for the opening of a separate account was made by Ram Anugrah Singh, Rama Kanta Singh and Mussamat Sarawan Koer (apparently the widow of a deceased brother of the two first-mentioned persons). The Mehal Raiputti, Estate No. 3143, consists of 17 mouzahs and the petition stated that Ram Anugrah and Rama Kanta were proprietors of certain shares in 15 of these and that Mussamat Sarawan Koer was the proprietor of the same share in the remaining two mouzahs. An objection seems to have been raised in the office of the Collector to the three persons joining in one petition, and accordingly an amended petition was filed, as ordered by the Collector, excluding Mussamat Sarawan Koer and on this amended petition the order was passed on the 16th April 1872 directing that the separate account be opened.

Subsequently a portion of the shares of the heirs of Ram Anugrah Singh and of Rama Kanta Singh were sold by auction in satisfaction of decrees obtained against them by the Plaintiffs, and sale certificates were obtained by them on the 13th of June 1896. The Plaintiffs appear to have been registered afterwards in the Collectorate. So far as the materials on the record go, the Plaintiffs appeared to have purchased only a portion of the shares which descended to the heirs of Ram Anugrah and Rama Kanta. That point is not clearly dealt with in the lower Court. All that the Subordinate Judge says in his judgment is that "the Plaintiffs are fractional sharers in 8 or 9 mouzahs out of the 15 or 16 included in khata No. 5." No arguments appear to have been raised on the point that the Plaintiffs were not purchasers of the entire shares of Ram Anugrah and Rama Kanta, the sharers in whose favour the separate account No. 5 was originally opened.

The learned Judge held that because Ram Anugrah and Rama Kanta Singh were persons who owned shares only in 15 or 16 mouzahs out of the 17 or 18 comprised in the mehal, and as such were neither sharers in all the mouzahs making up the mehal, nor the sole owners of the 15 or 16 mouzahs, nor even the sole owners of the 15 or 16 mouzas which go to make up with the shares of the other mouzahs the entire mehal, Touzi No. 3143, therefore they were not sharers who under secs. 10 and 11 of Act XI of 1859 could apply to the Collector to have a separate account opened in their favour. In consequence the Collector had no jurisdiction to open a separate account under secs. 10 and 11 of Act XI of 1859 with them. In

support of this finding he relied on the decision of this Court in the case of *Nanhu Shahu* v. *Ram Prosad* (8). And arriving at these conclusions the Subordinate Judge held that the Plaintiffs not being sharers in whose favour a separate account had been legally opened by the Collector they were not entitled to claim the benefit of the exception in sec. 53 of Act XI of 1859, and that therefore their purchase of the entire estate was not free from encumbrances.

Further he held that even if the separate account opened by the Collector in favour of Ram Anugrah Singh and Rama Kanta Singh could be held to be one opened under sec. 70 of Act VII, B. C., of 1876, the Land Registration Act, they could not claim the benefit of sec. 53 of Act XI of 1859 as that section only included sharers in respect of whom separate share had been entered under secs. 10 and 11 of Act XI of 1859.

Accordingly he held that the Plaintiffs were not entitled to the declaration sought for in the suit, nor to recover from Defendant No. 1 the sum of Rs. 1,454-8 deposited by Defendant No. 7.

The suit was dismissed with costs and Plaintiffs have appealed.

It appears that separate account or khata No. 1 was originally opened on the 6th January 1872 in the name of Kishendeo Singh, who is represented in the present case by Defendants Nos. 2 to 5. This is the share against which Defendant No. 1 has obtained the mortgage-decree.

Separate account or khata No. 4 was opened on the 21st March 1872 in the name of Kalika Prosad Singh. This is the share which defaulted.

Separate account or khata No. 5 was opened on the 16th April 1872 in the names of Ram Anugrah and Rama Kanta Singh. This is the share in which the Plaintiffs claim rights by purchase.

Now rightly or wrongly these separate accounts had been opened for 35 years before the present suit was brought. Revenue had been all along paid in respect of these shares into the separate accounts and it would appear that the shares in respect of which these separate accounts had been opened, had been put up for sale, each separately, in respect of arrears due on its separate account. The proprietors of these shares in respect of which the separate accounts had been opened had dealt with them separately, and there have been transfers and alienations of the shares as shares in respect of which separate accounts have been opened.

It is first argued in support of this appeal that the Subordinate Judge was in error in holding that the order of the Collector opening the separate account No. 5 in respect of the share on which the Plaintiffs are part purchasers could be questioned after the lapse of 35 years. No authority other than the Collector had power under the law to open a separate account and the law gave him full power to open an account. If in ordering that an account be opened he committed an error in law that could not make his order bad for want of jurisdiction. In the case of khata No. 5 the record shows that the provisions of the law were fully complied with before the order was passed directing that the account be opened. The necessary notices were served and no objection was taken by any one who would at the time have been interested in opposing the application. Nor was any appeal preferred against his decision to the higher revenue authorities, as might have been done. His order therefore became final.

(8) 21 W. R. 38 (1869).

Furthermore if the order opening this separate account be now interfered with the orders relating to all the other accounts would be equally open to question with the result of disturbing rights long recognized and of creating uncertainty, confusion and hardship.

Undoubtedly the separate account has been opened and has been in existence for 35 years. It is impossible now to treat it as though it had never had any existence. Indeed the Defendant No. 1's own decree is based on the existence of the separate account No. 1, against the share covered by which he is seeking to enforce his mortgage-decree. That share was in fact sold for its own arrears after the decree had been obtained by Defendant No. 1.

Also it is argued that Defendant No. 1 being the transferee by mortgage of the rights of some co-sharers in the estate, it is not open to him now to question the legality of an order of the Collector which his transferors accepted and have acquiesced in for 35 years. There was a remedy in the superior Revenue Courts when the Collector's order was passed and that remedy never having been sought and on the contrary the order having been acquiesced in for 35 years it cannot now be questioned and declared invalid by a Civil Court.

It is also contended that even accepting, though not admitting, that the separate account could not have been opened under the provisions of secs. 10 and 11 of Act XI of 1859 still any defect would be covered by sec. 70 of Act VII, B. C., of 1876, and sec. 71 of that Act which makes the provisions relating to sale included in secs. 13 and 14 of Act XI of 1859 applicable to accounts opened under sec. 70 of Act VII, B. C., of 1859, would also operate to bring the sharers in respect of whom the separate share had been opened within the exception provided by sec. 53 of Act XI of 1859.

It has also been suggested that Defendant No. 1 is bound by the finding of the Court in the Suit No. 51 of 1904 to which he was a party.

As to this last contention we have only to observe that it has no weight. The suit was dismissed for other grounds and the opinion expressed by the Judge was not necessary for the decision of that suit and so cannot bind the Defendant.

The most important question is certainly whether after the lapse of 35 years a Civil Court can call into question the order of a Revenue Court, which order was originally passed with all the formalities required by the law, which was not appealed against and so became final as regards the parties affected by it, and which has been acquiesced in by the persons through whom the Defendants, who now desire to dispute the order, claim title. In consequence of that order of the Collector and of other similar orders for the opening of separate accounts in respect of other shares in the same estate rights have been lost, sold, or transferred, and to disturb the order after the lapse of so many years would be to render uncertain titles long existing and to create confusion and hardship.

In my opinion the Collector certainly had jurisdiction to open the separate account. If at the time of opening the account he misunderstood the provisions of the law, that would not necessarily make his order void but voidable by the persons affected thereby. In the present instance none of the persons who were affected by the order have ever raised any objection to it, and the question is whether the Defendant No. 1 as mort-

gagee of Defendant No. 2 whose share, in respect of which khata No. 1 was originally opened, has subsequently been sold, can be allowed to raise the objection in this suit.

In my opinion the order of the Collector, acquiesced in and acted on for 35 years, is not now open to question in a Civil Court, and, if it were, the Defendant No. 1 who derives his title through Defendant No. 2 who acquiesced in the order all along, cannot be allowed in this suit to dispute the legality of the order.

The contention that the order is illegal depends entirely on the decision of this Court in the case of *Nanhu Shahu* v. *Ram Prosad* (8). That decision was delivered on the 15th December 1873. The judgment states that Plaintiff comes into Court upon a statutable cause of action and that his suit must be dismissed unless he brings himself either within sec. 10 or sec. 11 of Act XI of 1859. Exactly what the cause of action was is not stated. Apparently he sued to have it declared that he had a right to have a separate account opened in respect of his share in the estate. As however he was only an 8 annas shareholder in 4 mouzahs out of the 6 which constituted the whole estate it was held that he was not "a recorded sharer of a joint estate in common tenancy within sec. 10." It was further held that he could not come under sec. 11 because he was not a recorded sharer of a joint estate whose share consists of a specific portion of the land of the estate because he had only an undivided moiety of 4 mouzahs out of 6. If he had been joined with his co-sharers in the 4 mouzahs he might possibly have come before the Court with them as a party entitled to sue under sec. 11.

(8) 21 W. R. 38 (1869).

In the present case the original petition for opening a separate account was made by Ram Anugrah Singh, Rama Kanta Singh, and Musstt. Sarawan, who together, apparently as members of one family, held shares in all the mouzahs included in the estate. The name of Musstt. Sarawan was withdrawn by order of the Collector on a report from an officer of his Court. In the judgment relied on, it is not stated what would be the effect if in a case like the present the Defendants had shares in 15 out of 17 mouzahs and joined in their application those co-sharers who had shares in the other two mouzahs. Apparently the application would then have fulfilled the requirements of sec. 10 of Act XI of 1859. There is nothing to support the view that shares in a joint estate held in common tenancy must have equal shares in all the mouzahs. Unequal shares in the different mouzahs might be consistent too with definite shares held in common in the whole estate.

There is no provision of the law, that I am aware of, which lays down that the shares of tenants in common must be equal, either in every one of several mouzahs making up the estate, or in the entire estate.

In these circumstances it seems open to doubt whether, on the basis of the decision relied on, the original application for the opening of the separate account did not fulfill the requirements of the law.

I am unable to agree therefore in the view taken by the lower Court that the suit of the Plaintiffs must fail because they could not be regarded as sharers with whom the Collector under secs. 10 and 11 of Act XI of 1859 had opened separate estates.

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The question arises whether they are entitled to claim to come within the exception provided by sec. 53 by reason of the fact that they are only fractional shareholders of the share in respect of which the separate account was opened. There is nothing in the section to restrict the operation of the section to sharers holding the entire interest in the share and in these circumstances I see no reason to hold that they do not come within the exception.

The result of these findings is that I hold that the Plaintiffs are entitled to the relief claimed in this suit, that is to say, to have it declared that they purchased the estate No. 3140 free of all encumbrances. In these circumstances I hold that they as assignees of Defendant No. 7 are also entitled to recover from Defendant No. 1 the sum of Rs. 1,454-8 which had been deposited by Defendant No. 7 in order to obtain the injunction in this suit, with interest at 6 per cent. per annum on that account up to the date of realization.

I would accordingly set aside the judgment and decree of the lower Court and grant the Plaintiffs a decree to the above effect. Plaintiffs are entitled to costs from Defendant No. 1 in both the Courts.

As, however, my learned brother holds a different opinion, the appeal must be referred to the Hon'ble the Chief Justice under the provisions of sec. 98 of the Code of Civil Procedure in order that it may be referred to a Third Judge for hearing.

VINCENT, J.—The facts of the case which has given rise to this appeal are as follows:—Mehal Raiputti is an estate borne on the Revenue Roll of the District of Saran with a revenue of Rs. 7,236 odd. In the year 1899 fifteen separate accounts had been opened by different sharers in that estate under the provisions of secs. 10, 11, Act XI of 1859 and sec. 70 of Act VII, B. C., of 1876. One of these shares, *viz.*, that covered by separate account No. 5 was owned by the Plaintiffs. In January 1899 separate account No. 4 fell into arrears and was put up for sale on 25th March. The highest bid for the share was not sufficient to cover the arrears and therefore the Collector ordered that the sale of the share should be stayed and the whole mehal put up to sale under sec. 14 of the Revenue Sales Act.

On 6th June 1899 the whole estate was sold and bought for Rs. 16,200 in the name of the Defendant No. 7.

The Defendant No. 1 had a mortgage-decree for Rs. 17,281 against 13 villages included in the mehal and in 1899 he advertised the mortgaged property for sale in execution of that decree.

The Defendant No. 7 then sued for a declaration that his purchase at the revenue sale was free of incumbrances and that the property could not be sold in execution of a mortgage-decree and on a deposit of Rs. 1,454 as security against any loss, the Defendant No. 7 on the 14th March 1906 secured from the High Court a temporary injunction staying the sale. That suit was dismissed as it was found that the Defendant No. 7, Gopal Das, was a *pharzidar* for the Plaintiffs, whereupon the mortgagee, Defendant in that suit, withdrew the Rs. 1,454 in deposit. On 2nd March 1907 the Defendant No. 7 executed a conveyance of all his rights in the mehal and the Rs. 1,454 to the Plaintiffs; and the Plaintiffs now sue for a declaration that the Defendant No. 1 has no right to sell the estate in execution of his mortgage-decree and that the purchase at the revenue sale was free of all

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incumbrances. The Plaintiffs further seek to recover from the Defendant No. 1 Rs. 1,454-8 *plus* interest on that sum alleging that the Defendant No. 1 wrongly withdrew that amount from deposit in satisfaction of his decree.

The real contending Defendant is Defendant No. 1. In the Court of first instance he raised a number of objections to the suit, which it is not necessary to set forth at length in this judgment, as only one point has been discussed in the argument before us.

It suffices to say that on the 10th September 1908, the Plaintiffs' suit was dismissed by the Subordinate Judge on the ground that these Plaintiffs, who were the real purchasers at the revenue sale, had bought the property subject to incumbrances.

The learned Subordinate Judge found that the Plaintiffs were co-sharers in the mehal and was therefore of opinion that their purchase was under sec. 53 of Act XI of 1859 subject to incumbrances unless it is shown that they were sharers with whom the Collector had opened separate accounts under secs. 10 and 11 of the Act. He further found that although there was a separate account opened in the name of the predecessors in interest of Plaintiffs in 1872 by the Collector for their share in this mehal, nominally under sec. 10 of Act XI of 1859, yet that account was opened without jurisdiction and that it could not therefore be said that the Plaintiffs were persons with whom separate accounts had been opened under that section.

In this view of the facts the Plaintiffs' suit was dismissed and hence this appeal has been filed.

The only point argued in the appeal is whether the purchase by the Plaintiffs through Defendant No. 7 was a purchase free of incumbrances under sec. 53 of Act XI of 1859.

Now the decision of the learned Subordinate Judge is based on the wording of sec. 10 of Act XI of 1859. That section enacts that a recorded sharer of a joint estate, held in common tenancy, if he desires to pay in his share of the revenue of the estate separately may submit an application to the Collector to that effect: and the Collector may after notifying the facts in a particular manner after a period of six weeks if no objections are made, open a separate account as desired. If any objection of any kind is raised by any other co-sharer the Collector must at once refuse to take further action and refer the matter to the Civil Court under sec. 12.

Under sec. 53 of the same Act if a co-sharer in an estate purchases the estate at a revenue sale, he acquires it subject to encumbrances except in the case of sharers with whom the Collector has opened separate accounts under secs. 10 11 of the Act.

The Subordinate Judge finds that the predecessors-in-interest of the Plaintiffs were not in fact sharers in a joint estate held in common tenancy, because they owned shares in 14 or 15 mouzahs only out of the various villages, 18 in number, comprising the estate and were not interested in every village in the estate. The Subordinate Judge is of opinion in these circumstances that the Collector had no jurisdiction to open a separate account with the predecessor-in-interest of the Plaintiffs under sec. 10, Act XI of 1859 and that the Plaintiffs cannot be accepted as co-sharers with whom the Collector had opened separate accounts under that section there be no jurisdiction under that section and that therefore

their purchase was not free of, but subject to, encumbrances.

On appeal it is argued that the expression "estate held in common tenancy" has been misunderstood by the learned Subordinate Judge, that in any case the Collector had jurisdiction to open a separate account under sec. 10 and has done so and that the order cannot be said to have been made without jurisdiction and further that as all the sharers in the estate including the persons from whom the Defendant derives title made no objection at the time and as the separate account was opened and accepted for 27 years before the sale, the validity of the order cannot now be questioned. It is further urged that in any case the separate account could have been opened under sec. 70, Act VII, B. C., of 1876, and that it should be held to have been opened under that section if necessary and that the effect then would be the same as if it had been opened under sec. 10 of Act XI of 1859.

None of these arguments appears to me to be of very great weight. Sec. 53 of Act XI of 1859 lays down that if a sharer in an estate purchases the estate at a revenue sale, he does so subject to all encumbrances existing at the time of the sale unless the purchasing co-sharer or sharers are persons with whom the Collector has opened separate accounts under secs. 10 and 11 of the Act. Sec. 10 of the Act empowers a Collector to open separate accounts in joint estates held in common tenancy, on the application of a recorded co-sharer. If there is no joint estate held in common tenancy then, in my view of the law, sec. 10 has no application and the Collector has no jurisdiction to open a separate account under that section and if he does open a separate account without jurisdiction then it cannot be said that the separate account is one opened under sec. 10 of the Act. Before that section can apply at all it is necessary that the estate should be one held in common tenancy and if the estate is not so held the section has no application. Now Mehal Raiputti is not an estate of that description. The expression "estate held in common tenancy" is defined in sec. 30 of Reg. XIX of 1814 as meaning an estate where all the sharers have a common right and interest in the whole of the estate. Where, therefore, various co-sharers have certain interests not in the whole estate but only in particular villages in that estate it cannot be said that the estate is held in common tenancy; this view has also been accepted in this Court in the case of *Nanhu Shahu* v. *Ram Prosad Narain Shingh* (8). Mr. Justice Phear in that case says that the Plaintiff confessedly cannot bring himself under sec. 10 of Act XI because by his own representation he is only an 8 annas shareholder in 4 mouzahs out of the six which constitute the whole estate and he is therefore not "a recorded sharer of a joint estate held in common tenancy" within the meaning of sec. 10. The same view has been accepted by the revenue authorities in the Board Mis. Proceeding No. 306, dated 21st September 1876, quoted at page 19 of the Revenue Sale Manual, where Hon'ble Members of the Board of Revenue take the definition of an estate of this character as given in Reg. XIX as applicable to sec. 10 of Act XI of 1859 and state that a separate account cannot be opened under sec. 10 unless there is an estate held in common tenancy as set forth in sec. 30 of Reg. XIX of 1814.

Finally, in 1876 the Legislature recog-

(8) 21 W. R. 38 (1896).

nised the difficulties that existed in regard to separate accounts in estates like the present one and sec. 70 of that Act was enacted apparently to specifically provide for the opening of separate accounts in the case of proprietors who were recorded as owning an undivided interest held in common tenancy in any specific portion of the lands of an estate but not extending over the whole estate. If there previously had been any right to open separate accounts in such cases there would have been no need for this change in the law.

In these circumstances I hold that the separate account in this estate was improperly opened under sec. 10, Act XI of 1859 in 1872 and that the Collector had no jurisdiction under that Act to open any such separate account in this estate and it cannot be said in my opinion that any separate account opened by him was a separate account opened under the provisions of sec. 10 of Act XI of 1859 and the owner of any separate account opened without jurisdiction is not in my opinion entitled to claim the benefit of sec. 53 of Act XI of 1859 which merely relates to the case of co-sharers with whom separate accounts have been opened under secs. 10 and 11.

It is true that a separate account No. 5 was opened 27 years before the sale and that the validity of the order of the Collector was not questioned but this does not in my view of the law affect the case or give validity to an order which was made without jurisdiction. Nor can the Defendants in the suit be prejudiced by any such act of the Collector.

It is then urged that as the account remained open after Act VII of 1876 was passed, it should be held to be a separate account under that section. I do not think however that this contention has any force. The separate account No. 5 was not opened under sec. 70, Act VII, B. C., of 1876 and does not purport to have been opened under that section and further no notices were issued under that section to the sharers interested in the estate after the Act of 1876 was passed. Moreover the privileges given under sec. 53, Act XI of 1859, to the owner of separate account opened under secs. 10 and 11 of that Act are not apparently extended to those who have opened separate accounts under sec. 70 of Act VII of 1876. Sec. 71 of the Act extends the provisions of secs. 13 and 14 of Act XI to separate accounts opened under Act VII of 1876 but it is at least open to doubt how far this section makes sec. 53 of Act XI apply to those who have opened separate accounts under the Land Registration Act.

In this view of the facts and the law the Plaintiffs in this suit who are co-sharers in the estate of Raiputti and bought the estate at a revenue sale not being co-sharers who have opened a separate account under sec. 10 or 11 of Act XI of 1859, purchased the estate subject to any encumbrance that there was on it and they therefore bought the share mortgaged to the Defendant subject to the lien created by that mortgage and are not entitled to any relief in this case. In my opinion therefore the appeal should be dismissed with costs.

It is true that the Defendant No. 7 had no right to withdraw the deposit of Rs. 1,454 before the sale of the mortgaged property was complete and it was found that the sale proceeds were not sufficient to liquidate his claim but this amount would be in any case payable out of the mortgaged property and the amount will no doubt be deducted from the mortgage dues when the decree is executed,

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It seems therefore that it is unnecessary and would be improper for the Court to order a refund of the amount in the present suit.

[Owing to this difference of opinion the case was laid before MOOKERJEE, J., for decision.]

Babu Umakali Mukherjee and *Moulvi Muhamad Mustafa Khan* for the Appellants.

Babu Shoroshi Churn Mitter, *Dr. Sarat Chandra Basak* and *Babu Harendra Krishna Mukherjee* for the Respondents.

HIS LORDSHIP'S JUDGMENT was as follows :—

MOOKERJEE, J.—This is a reference under sec. 98, sub-sec. (2) of the Civil Procedure Code of 1908. The reference is not strictly in form, because the learned Judges have omitted to state specifically the point of law upon which they differed. The difference between sec. 575 of the Code of 1882 and sec. 98 of the Code of 1908 appears to have been overlooked. Under the former Code, it was the appeal that was referred to a Third Judge when the Judges hearing the appeal differed in opinion on a point of law, and on such reference the whole appeal was open for argument and not merely the point of law on which the Judges had differed in opinion. Under the Code of 1908, the proper procedure is to state the point of law upon which the Judges differ; the appeal is then to be heard upon that point only and what is to be decided is not the appeal but the point of law only. In the case before me, this procedure has not been followed, but the parties are agreed that there is only one point of law involved in the appeal, upon which the learned Judges who heard the appeal in the first instance have differed as is manifest from their recorded opinions. That point may be formulated as follows :—

Is a proprietor who is not a recorded sharer of a joint estate held in joint tenancy within the meaning of sec. 10 of Act XI of 1859, nor a recorded sharer whose share consists of a specific portion of the land of the estate within the meaning of sec. 11, but is recorded as proprietor of an undivided interest held in common tenancy of a specific portion of the lands of the estate but not extending over the whole estate within the meaning of sec. 70 of the Bengal Land Registration Act, 1876, entitled to claim the benefit of the exception made in sec. 53 of Act XI of 1859, in favour of sharers with whom the Collector has under sec. 10 or sec. 11 of the Act, opened separate accounts.

My learned brother Brett is of opinion that this question ought to be answered in the affirmative. My learned brother Vincent on the other hand is of opinion that the question ought to be answered in the negative. To determine which of these two conflicting views should prevail, the provisions of the Revenue Sale Law (Act XI of 1859) and of the Land Registration (Act VII of 1876, B. C.) must be examined.

It is necessary to premise at the outset that one of the proprietors of a joint estate may be in enjoyment of his interest therein in one of three ways, namely, *first*, he may be a recorded sharer of the whole joint estate held in common tenancy, *secondly*, he may be a recorded sharer of the joint estate and his share may consist of a specific portion of the land of the estate, or, *thirdly*, he may be recorded as proprietor of an undivided interest held in common tenancy in a specific portion of the land of the estate but not extending over the whole estate. If his interest

is of the first description, he may apply to have his share separated and a separate account opened under sec. 10 of Act XI of 1859. If his interest is of the second description, he may have his share separated and a separate account opened under sec. 11 of Act XI of 1859. If his interest is of the third description, he may have his share separated and a separate account opened under sec. 70 of the Land Registration Act. In this connection, it is important to bear in mind that under sec. 71 of the Land Registration Act, sec. 12 of Act XI of 1859 is made applicable to an application under sec. 70, and it is further provided that the effect and consequences of opening a separate account under sec. 70 shall be such and the same as are described in secs. 13 and 14 of Act XI of 1859. It is manifest therefore that the consequence of the opening of a separate account in cases covered by sec. 70 (that is, where the applicant is proprietor of an undivided interest held in common tenancy in a specific portion of the land of the estate but not extending over the whole estate) are assimilated to the consequences of opening a separate account under sec. 10 or sec. 11 of Act XI of 1859, only in so far as secs. 13 and 14 are concerned, that is, only in respect of the sale of the separated share and of the entire estate under certain specified conditions. Now, when we turn to sec. 53 of Act XI of 1859, we find that it defines the right of a purchaser at a revenue sale who is a recorded or unrecorded proprietor or co-partner. Such person whether he purchases the property at a revenue sale or acquires it by re-purchase from the purchaser, acquires the estate, to put the matter briefly, subject to all its encrumbrances existing at the time of the sale. An exception however is made in favour of sharers with whom the Collector has opened separate accounts under secs. 10 and 11 of the Statute; they stand in a position of advantage which is denied to the purchaser co-partner who has not opened a separate account under either of these sections. I am not concerned with the policy of the Legislature in this respect, but it is remarkable that the privilege is not extended to persons who have opened separate accounts under sec. 70 of the Land Registration Act. Sec. 71, as I have just observed, makes secs. 13 and 14 but not sec. 53 of Act XI of 1859 applicable to the proprietor who has obtained a separate account opened under sec. 70. The inference is irresistible that the co-partner whose interest is of the description mentioned in sec. 70 and whose separate account has been opened under that section can purchase the estate at a revenue sale, only as subject to encumbrances. The question then arises, does it make any real difference if a separate account which could not be opened under sec. 10 or sec. 11 of Act XI of 1839, because the interest of the proprietor was not of either of the two descriptions mentioned in these sections, has been opened by the Collector without any jurisdiction. In my opinion it makes no difference whatsoever. The position of the proprietor who has obtained a separate account so opened in contravention of sec. 10 or sec. 11 is not identical for purposes of sec. 53 with the position of the proprietor whose separate account has been properly opened. The expression "sharers with whom the Collector has opened separate account under secs. 10 and 11" plainly means "sharers with whom the Collector has opened separate accounts acting in conformity with secs. 10 and 11." To accept any other inter-

pretation would be to acquiesce in a fraud on the Statute. The Collector when he opens a separate account under sec. 10 or 11 performs a statutory duty; his act must be in strict conformity with the legislative provisions on the subject. If the Collector opens a separate account in clear contravention of the provisions of sec. 10 and sec. 11, in fact, if the Collector applies the provisions to cases to which the Legislature never intended that they should be applied, his act is without jurisdiction and cannot confer upon the person who obtains a separate account opened under such circumstances the statutory privilege created by sec. 53. If any authority is needed in support of the proposition that where jurisdiction is usurped in contravention of statutory provisions the act performed is a nullity, reference may be made to the decisions of the Judicial Committee in *Ledgard* v. *Bull* (1), *Minakshi* v. *Subramania* (2), *Fischer* v. *Secretary of State* (3), and of this Court in *Achha Mian* v. *Durga Charan* (4), *Golab Sao* v. *Choudhury Madho Lal* (5), *Gurdeo Singh* v *Chandrikah Singh* (6) and *Ananda Kishore* v. *Daijie Thakurain* (7). In my opinion, the view adopted by Mr. Justice Vincent is correct, and I entirely agree in his conclusion that the question of law formulated above must be answered in the negative. This view is in accordance with that taken in the case of *Nanhu Shahu* v. *Ram Prosad* (8), which so far as I have been able to discover has never been doubted in this Court. I observe that with reference to this decision, my learned brother Brett remarks that the judgment does not state what the cause of action was. I have accordingly examined the records of that case. It appears that an estate Chilowley consisted of six villages. The Plaintiffs were interested in an one half-share of four only of the six villages. They applied to the Collector to open a separate account for the half share of the four villages. Upon objection of the Defendants co-proprietors, the application was refused by the Collector on the 17th April 1871. On the 15th May following, the Plaintiffs sued for declaration of title and for separation of the Government Revenue of their share of the four villages. The first Court held that the suit was maintainable under sec. 12 of Act XI of 1859 and made a decree in favour of the Plaintiffs, though the revenue assigned was calculated on a basis other than that suggested by the Plaintiffs. Upon appeal by the Plaintiffs, the decree of the Subordinate Judge was affirmed by the District Judge. Upon second appeal to this Court by the Plaintiffs (which related to the amount of revenue assignable in respect of the half share of the four villages), it appears to have been argued by the Defendants-Respondents (by way of cross-objection, though a Memorandum of Cross-objection is not to be traced in the part of the record still in existence), that the suit was not maintainable under sec. 12 of Act XI of 1851, as the Plaintiffs were not entitled to have a separate account opened under either sec. 10 or sec. 11. Phear and Morris, JJ., gave effect to this

(1) L. R. 13 I. A. 134: s. c. I. L. R 9 All. 191 (1886).

(2) L. R 14 I. A. 160: s. c. I. L. R. 11 Mad. 26 (1887).

(3) L. R. 26 I. A. 16: s. c. 3 C. W. N. 161; I. L. R. 22 Mad. 270 (1898).

(4) I. L. R. 25 Cal. 146 (1897).

(5) 9 C. W. N. 956: s. c. 2 C. L. J. 384 (1905).

(6) I. L. R. 36 Cal. 193: s. c. 5 C. L. J. 611 (1907).

(7) I. L. R. 36 Cal. 726: s. c. 10 C. L. J. 189 (1909).

(8) 21 W. R. 38 (1869).

contention and dismissed the suit. The learned Judges held that as the Plaintiffs were shareholders in some only of the villages constituting the estate, they could not claim to have a separate account opened under either sec. 10 or sec. 11. It is superfluous to add that upon a plain reading of the sections no other conclusion was possible.

Let me now consider the effect of this view of the law upon the present question. The records of the Collector, which have been called for, upon the joint application of both the parties, shew conclusively that not merely the fifth separate account, the proprietor of which purchased this estate at the revenue sale held on the 6th June 1899, but all the fifteen separate accounts had been opened during the years 1871-1874 in contravention of the provisions of secs. 10 and 11 of Act XI of 1859: the applicants were neither sharers in the whole estate nor proprietors of specific lands, but they were shareholders in some only of the many villages comprised in the entire estate, as is clearly shewn by the details of the shares and villages in respect of which the separate accounts were opened. This state of things has continued for many years, and has not been questioned by the various proprietors. The reason is obvious. When the Land Registration Act of 1876 came into force it became clear that what had been done before irregularly, because not falling within the scope of secs. 10 and 11 of 1859, might be validly done under sec. 70 of the Land Registration Act. It would have been idle, therefore, for the parties to challenge the validity of the separate accounts at any time after 1875. If objection had been taken by any of the proprietors, the then existing arrangement might have been validated by the presentation of applications under sec. 70 of the Land Registration Act. It is not right to say that the parties now attempt to invalidate what had been done at their instance during the years 1872-74, and no such question arises as was considered by this Court in *Rai Mohan* v. *Sashanku Mohan* (9), namely, the right of a proprietor to question the validity of a settlement of an estate irregularly made. If we look at the substance of the matter, the position of the parties is identical with what would have been their position if the separate accounts had been, as they could have been, opened under sec. 70 of the Land Registration Act. There is no controversy that if they be deemed to have been opened under sec. 70 of the Land Registration Act, the purchaser at the revenue sale is not entitled to claim the benefit of the exception in sec. 53 of Act XI of 1859. The conclusion follows that the view adopted by Mr. Justice Vincent in concurrence with the Court of first instance that the purchaser has acquired the property subject to encumbrances, is correct, and must be upheld.

It is satisfactory to find that this view of the law is manifestly in accord with the justice of the case. We have some indication of the value of the property, when we remember that the mortgagees advanced more than Rs. 13,000 on security of the share of the villages comprised in the first separate account which may be assumed to be worth at least that sum. The value of that share as shown by the proportion of the total Government Revenue assigned to it, is about one-sixth of the value of the entire estate. The whole estate, therefore, is worth at a very moderate estimate at least

(9) 12 C. L. J. 407 (1899)

SYED MAHAMAD MEHDI HUSAIN KHAN *v.* SHEO SHANKAR PERSAD SINGH.

Rs. 78,000. The purchaser has acquired it for Rs. 16,200: the charge claimed by the mortgagee amounts approximately to Rs. 20,000; even if the purchaser has to pay this charge, as in concurrence with Mr. Justice Vincent, I hold that he is bound to do, he has made an excellent bargain. In fact, the very small price paid by the purchaser indicates plainly that he, at any rate, must have thought that he was acquiring the property subject to encumbrances.

The result, therefore, is that in concurrence with Mr. Justice Vincent I hold that the decree of the Subordinate Judge must be affirmed and this appeal dismissed with costs. The hearing-fee of the two hearings is assessed at Rs. 1,000.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO. 339 OF 1910.

D. CHATTERJEE, J.
N. R. CHATTERJEA, J.
1912.
Heard, 4 & 8, March.
Judgment, 2, April.

MUNSAB ALI, Plaintiff, Appellant,
v.
ARSADULLA and ors., Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), Chap. XIV, secs. 3, cl. (9), 161, 167—'Incumbrance,' title by adverse possession if—'Holding,' if includes under-raiyati—Under-raiyati, if may be sold under Chap. XIV, Bengal Tenancy Act—Sale of under-raiyati for arrears of rent, purchaser if can annul incumbrances.

Title acquired by adverse possession for the statutory period by a trespasser in the lands of a defaulting tenant is an incumbrance within the meaning of sec. 161 of the Bengal Tenancy Act.

GOCOOL BAGDI *v.* DEBENDRA NATH SEN (1) *followed.*

An under-raiyat's interest cannot be sold for arrears of rent under Chap. XIV of the Bengal Tenancy Act so as to attract to the sale the special consequences attached to such sales; a purchaser of an under-raiyat's interest has therefore no right to annul incumbrances under sec. 167 of the Bengal Tenancy Act, which applies only in cases of sales under Chap. XIV.

The word 'holding' except where it has been used in the Act expressly to include lands held by an under-raiyat has the meaning given to it in sec. 3, cl. (9) and does not include lands held by an under-raiyat. The word as used in Chap. XIV does not include such lands.

This was an Appeal preferred on the 14th of July 1910 against an order of W. S. Coutts, Esq., District Judge of Chittagong, dated the 29th of March 1910, reversing that of Babu Bissessur Majumdar, Munsif, Sadar, 1st Court, dated the 26th of June 1909.

The facts of the case were as follows:—

Somser Serang gave a *dar-raiyati* to Ramjan Ali, father of Defendants Nos. 3 and 4. In execution of a rent-decree against Defendants Nos. 3 and 4 the Plaintiff purchased the land. The Defendants Nos. 1 and 2 were in possession of the land. The Plaintiff, though denying any right whatever in the Defendants Nos. 1 and 2, had a notice served on them under sec. 167 of the Bengal Tenancy Act for annulling all incumbrances and subsequently brought this suit, praying *inter alia* for *khas* possession on a declaration of his right after annulling all incumbrances and further prayed that if "the Court finds any obstacle in awarding *khas* possession, or if it holds that the Defendants Nos. 1 and 2 have any protected interest a decree may be passed for the proper *jama* at the rate mentioned in the notice.

(1) 14 C. L. J. 186 (1911).

MUNSAB ALI *v.* ARSADULLA.

The Defendants Nos. 1 and 2, who contested the sum, denied the Plaintiff's title as well as the *dar-raiyati* title of Defendants Nos. 3 and 4, alleged that the Plaintiff was a *benamdar* and claimed the land as their mourasi raiyati under the zemindar, they further pleaded general and special limitation.

The following issues were framed at the trial :—

First.—Is the Plaintiff a *benamdar* for Rahaman Ali ?

Second.—Have the Defendants Nos. 3 and 4 *dar-raiyati* interest in the land in suit ?

Third.—Is the suit barred by general and special law of limitation ?

Fourth.—Was the Plaintiff's alleged notice duly served ?

Fifth.—Has the Plaintiff any alleged title to the land in suit ?

Sixth.—Is the Plaintiff entitled to *khas* possession and mesne profits ?

Seventh.—What relief, if any, is the Plaintiff entitled to ?

The first Court found issues Nos. 1 and 4 in favour of the Plaintiff but held on issues Nos. 3 and 5 that Plaintiff's title was not proved and that his suit was barred by general limitation, the Defendants having been in adverse possession for more than twelve years.

On appeal the District Judge held in favour of the Plaintiff both on the question of title and of limitation. After referring to the title-deeds of the Plaintiff the learned District Judge recorded his findings as follows :—

"The grounds on which these have been considered to be forgeries appear to me to be most inadequate and in view of the fact that there was no necessity for their fabrication, I find that they are perfectly genuine.

"A curious point in the case of the Defendants is that they file no *dakhilas* to show that they paid rent or in what capacity they paid. Defendant No. 1 says the *dakhilas* have been burnt, but there is an admission that no rent has been paid by them to anyone for 10 years. No explanation of this is forthcoming. How or when they came on to the land is not clear and it is evident that they are trespassers.

"I find then that Plaintiff has his alleged title."

On the question of limitation the lower Appellate Court observed :—

"As to limitation the lower Court has, I think, taken a wrong view. Even if the Defendants had acquired a right by adverse possession the Plaintiff would not, I think, be barred, for "adverse possession" must be held to be an incumbrance which can be avoided by the auction-purchaser. There is no doubt about the matter in a case of a revenue sale, and the same principle must be held to apply in a case of this kind. I find then that there is no bar on account of limitation."

In this view the Court below set aside the decree of the first Court and remanded the case for decision on the other issues.

The Defendants preferred this appeal to the High Court.

Babu Dhirendra Lal Kastagir for the Appellant.

Babu Girija Prosunno Roy Chowdhury for *Moulvi Syed Shamsul Huda* and *Babu Rajendra Proshad* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff-Respondent sued for *khas* possession of the lands in dispute which he had purchased at a sale held in execution of a decree for arrears of rent.

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The decree for rent was obtained by Ali Meah and others (the heirs of one Shamser Ali), who are said to have a raiyati interest in the lands, against the Defendants Nos. 3 and 4 who it is alleged were under-raiyats under them. Plaintiff after his purchase served a notice under sec. 167 of the Bengal Tenancy Act for annulling the incumbrance of Defendants Nos. 1 and 2.

The Defendants Nos. 1 and 2 denied both the raiyati title of Ali Meah and others, and the under-raiyati title of Defendants Nos. 3 and 4 and set up their own raiyati right to the land.

The Court of first instance disbelieved the evidence on behalf of the Plaintiff and held that Ali Meah and others had no raiyati right and Defendants Nos. 3 and 4 had no under-raiyati right and that their title, if any, had been extinguished by adverse possession for 12 years on the part of the Defendants Nos. 1 and 2.

On appeal the learned District Judge thought—he does not say in so many words—that the raiyati right of Ali Meah and others had been proved, believed the evidence adduced on behalf of the Plaintiff to show the under-raiyati title of Defendants Nos. 3 and 4 derived from Shamser Ali, and he must be taken to have found that Ali Meah and others had a raiyati title, and the Defendants Nos. 3 and 4 had an under-raiyati title. He also found that Defendants Nos. 1 and 2 were trespassers and that adverse possession must be held to be an incumbrance which can be avoided by an auction-purchaser and in the result set aside the decree of the Munsif and remanded the case for decision on the remaining issues.

Defendants Nos. 1 and 2 have appealed to this Court against the order of the District Judge and it has been contended on their behalf that adverse possession is not an incumbrance within the meaning of sec. 161 of the Bengal Tenancy Act. We agree however with the decision of Mookerjee and Carnduff, JJ., in the case of *Gocool Bagdi* v. *Debendra Nath Sen* (1), (where the question has been fully discussed) in holding that the word "incumbrance" as used in secs. 159 and 161 of the Bengal Tenancy Act includes a statutory title acquired by a trespasser by adverse possession of the land of a defaulting tenant. But although adverse possession is an incumbrance within the meaning of sec. 161 of the Bengal Tenancy Act, a question arises as to whether land held by an under-raiyat can be sold in execution of a decree for arrears of rent under the special procedure prescribed in Chapter XIV of the Bengal Tenancy Act, so that the purchaser can annul incumbrances created by the under-raiyat.

The rights of an under-raiyat may be sold by the landlord under the Civil Procedure Code, but the question is whether such lands can be sold under the special procedure prescribed in the Bengal Tenancy Act with the consequences attached to sales held under that procedure. Sec. 65 of the Bengal Tenancy Act provides that where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof and the rent shall be a first charge thereon. That section therefore does not provide for a sale of land held by an under-raiyat in execution of a decree for arrears of rent thereof.

In the present case the Plaintiff wants to take possession on the ground that he

(1) 14 C. L. J. 136 (1911).

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has complied with the provisions of sec. 167 of the Bengal Tenancy Act. Sec. 167 however applies only when a sale takes place under Chapter XIV of the Act.

Now Chapter XIV of the Bengal Tenancy Act makes provision only for the sale of a tenure or holding. Under sec. 3 (9) 'holding' means a parcel or parcels of land held by a *raiyat.* The Act makes a clear distinction between a raiyat and an under-raiyat and it would appear therefore that land held by an under-raiyat is not a 'holding' within the meaning of the Act. The word 'holding' however has been used with reference both to a raiyat and an under-raiyat in secs. 121 and 122 relating to distraint and also in sec. 113 in the amended Chap. X of the Act. In order to reconcile the use of the word 'holding' in secs. 113, 121 and 122 with the meaning assigned to it in sec. 3 (9) of the Act, and having regard to the provision contained in sec. 3 that unless there is something repugnant in the subject or context the word 'holding' is to have the meaning assigned to it in sub-sec. (9), we must hold that except where the Legislature has used the word 'holding' expressly with reference to lands held by an under-raiyat, that word must be taken to have in other sections of the Act, the meaning assigned to it in sec. 3 (9) and in that view the word 'holding' in Chap. XIV of the Act does not include lands held by an under-raiyat. That being so, the provisions of Chap. XIV of that Act do not apply to a sale of lands held by an under-raiyat.

There is no provision in Chap. XIV for the sale of lands held by an under-raiyat nor for annulment of incumbrances created by an under-raiyat. The reason probably is that an under-raiyat cannot only be ejected for non-payment of arrears of rent as provided in sec. 66, but can be ejected on the expiration of the term of a written lease, and at the pleasure of the landlord when holding otherwise than under a written lease, after service of a notice to quit. The incumbrance of the Defendants Nos. 1 and 2 therefore cannot be annulled by the Plaintiff, and the claim for *khas* possession must be disallowed. The Plaintiff, however, prayed in the alternative that a decree for proper rent might be passed and the 7th issue raised the question 'what relief, if any, is Plaintiff entitled to.' We think that issue ought to be decided.

It is accordingly ordered that the case be sent back to the Court of first instance for disposal after deciding the issue indicated above. As the ground upon which our decision is based was not raised by the Appellants in any Court we direct that each party will bear his own costs up to this stage. Future costs to abide the result.

Appeal allowed;
Case remanded.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO. 569 OF 1909.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard, 23 and 24, August.
Judgment, 24, August.

BHAGABATI KOER, Judgment-debtor, Appellant,
v.
SAHUDRA KOER, Decree-holder, Respondent.

Hindu Law—Migration—Mitakshara or Mithila law, presumption as to applicability of—Widow's estate—Accumulations, rights of a Hindu widow to—Husband's property re-purchased out of income, if absolute property of widow—Unrealised rents, if absolute estate of the widow and assets liable for her personal debts.

Where a person governed by the Mitakshara law removed to a district governed

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by the Mithila law the presumption was that he took his personal law with him, and where he inherited property from his maternal grandfather who was governed by the Mithila law, this property equally with his paternal property would be governed by the Mitakshara law and not by Mithila law.

The true test to determine whether accumulations in the hands of a Hindu widow were her absolute property or an accretion to the husband's estate is the intention of the widow, i.e., *whether she intended to treat them as part of her husband's estate or as temporary savings to be spent by her subsequently.*

Where a howda *which was part of the husband's estate had passed into the hands of a stranger and had been recovered by the widow out of the savings of the estate, the inference was that she intended to treat it as part of her husband's estate.*

Unrealised rents in the hands of tenants cannot be treated as temporary savings by the widow on her own account but should be looked upon as an accretion to her husband's estate.

RIVETT CARNAC *v.* JIVIBAI (15) *distinguished.*

They were not assets in the hands of her daughter liable for the widow's personal debts.

This was an Appeal preferred on the 6th of December 1909 against an order of Mr. F. W. Ward, District Judge of Zillah Mozufferpur, dated the 28th of August 1909, affirming an order of Babu Purna Chandra Choudhury, Subordinate Judge at Mozufferpur, dated the 14th of September 1908.

The facts of the case will sufficiently appear from the judgment.

(15) I. L. R. 10 Bom. 478 (1886).

Babu Shoroshi Churn Mitter for the Appellant.

Babu Dwarka Nath Mitter for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This Appeal is directed against an order by which the Court of Appeal below in concurrence with the Court of first instance has allowed execution to proceed on the basis of a decree for money obtained by one Sahudra Koer, now Respondent before us, against Bhagabati Koer, on the 22nd December 1906. Bhagabati Koer was sued as the legal representative of her mother Bechu Koer and the decree directed that the judgment-debt be recovered from the assets of Bechu Koer in the hands of Bhagabati Koer. In execution of this decree, two properties have been attached, namely, *first*, a *howdah* or a seat on an elephant, and, *secondly*, rent due to Bechu Koer from the tenants of properties which she took by inheritance from her husband Gudar Sahai. Bhagabati Koer contends that these properties are not the assets of the estate of her mother in her hands and are not liable to be attached in execution of the decree. The Courts below have overruled this contention and allowed execution to proceed. The case has been tried on the assumption that the parties are governed by the Mitakshara Law, although they are residents of Mithila. It has been stated to us that Gudar Sahai had his ancestral home in the District of Gaya and when he succeeded by right of inheritance to the estate of his maternal grandfather in Mithila, he came to Mozufferpur and settled there. There can be no doubt that till the contrary is established, the presumption is

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that Gudar Sahai carried his personal law with him. [*Parbati* v. *Jagadis* (1), *Ambabai* v. *Govind* (2), *Mailathi* v. *Subbaraya* (3)]. It cannot be suggested that in respect of properties which he took by right of inheritance from his maternal grandfather, the Mithila Law is applicable, while in respect of his paternal properties the Mitakshara Law has operation. The view cannot be maintained that a person may simultaneously have two distinct and inconsistent personal laws, one governing his rights in respect of property taken by him from paternal ancestors and the other in respect of properties received by him from maternal ancestors. We must therefore decide this case on the assumption that the parties are governed by the Mitakshara Law.

On behalf of the Appellant, it has been contended that although it is established that the *howdah* was purchased by Bechu Koer from the income of the estate of her husband in her hands, and although the unrealised rent was the profit of the estate which she inherited from her husband, they are not assets in the hands of her daughter liable to be seized in execution at the instance of a creditor who holds a personal decree against her. In support of this proposition, reliance has been placed upon the cases of *Isri Dutt* v. *Hansbutti Koerain* (4), *Sheo Lochun* v. *Saheb Singh* (5), *Bhola Nath* v. *Bhagabati Deyi* (6) and *Anunda Chandra* v. *Nilmony* (7). In answer to this contention, it has been argued on behalf of the decree-holder Respondent that the properties in question were absolutely at the disposal of Bechu Koer and that consequently after her death they were liable to be seized in satisfaction of her personal debts precisely in the same manner as they might have been applied by Bechu Koer herself during her life-time for payment of the dues of her creditors. In support of this proposition reliance has been placed upon the cases, *Brij Indar Bahadur* v. *Janki Koer* (8), *Saodamini* v. *The Administrator-General of Bengal* (9), *Akkanna* v. *Venkayya* (10) and *Subramanian Chetti* v. *Arunachellam Chetti* (11).

It may be conceded at once that the question of the right of a Hindu widow to accumulations from the income of the estate of her husband which she has taken by right of inheritance is not altogether free from difficulty. In one of the earliest cases on the subject, *Soorjeemoney* v. *Denobundoo* (12), their Lordships of the Judicial Committee appear to have laid down that all the accumulations of a fund which had descended to a widow, from the time the estate vested in her, were absolutely her own; *i.e.*, in her own right as distinct from the fund itself which she was entitled to hold and appropriate as a widow. In a later decision, however, *Mitta Kunth Audhicary* v. *Neeranjun Audhicary* (13), their Lordships pointed out that the previous decision was not to be regarded as conclusive or even as a direct authority upon the question. The most important decision of the Judicial Committee upon the matter is that of *Isri*

(1) L. R. 29 I. A. 82 : s. c. I. L. R. 29 Cal. 433 (1902)
(2) I. L. R. 23 Bom. 257 (1898).
(3) I. L. R. 21 Mad. 650 (1901).
(4) L. R. 10 I. A. 150 (1883).
(5) L. R. 14 I. A. 63 (1887).
(6) 7 B. L. R. 93 (1871).
(7) I. L. R. 9 Cal. 758 (1883).
(8) L. R. 5 I. A. 1 (1877).
(9) L. R. 20 I. A. 12 (1892).
(10) I. L. R. 25 Mad. 351 (1901).
(11) I. L. R. 28 Mad. 1 (1904).
(12) 9 M. I. A. 123 (1862).
(13) 14 B. L. R. 166 (1874).

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Dutt v. *Hansbutti Koerain* (4). In that case their Lordships observed that if the widow had made no attempt to dispose of the savings from her husband's estate, there was no dispute that they followed the estate from which they arose. This view had in substance been taken by this Court in the case of *Bhola Nath* v. *Bhagabati* (6), the decision wherein was subsequently reversed by their Lordships of the Judicial Committee upon another point [*Bhagabutee* v. *Bhola Nath* (14)]. It has been suggested by the learned Vakil for the Respondent that the decision of the Judicial Committee in *Isri Dutt* v. *Hansbutti* (4) cannot be reconciled with the subsequent pronouncements in *Sheo Lochan* v. *Saheb Singh* (5) and *Saodamini* v. *The Administrator-General of Bengal* (9). In our opinion, there is no conflict between the principles recognised in the cases mentioned. But it may be a question of some nicety to determine in each individual case whether the property in dispute is in the nature of accumulation or is merely a saving held in suspense by the widow with intent to be appropriated for her personal use later on. In two of the cases cited at the Bar, namely, *Saodamini* v. *The Administrator-General* (9) and *Subramanian Chetti* v. *Arunachellam Chetti* (11), the widow was not in possession of the estate of her husband. That circumstance by itself was sufficient to negative any possible intention on her part to annex what was called the accumulation to the estate she had taken from her husband. The true test to be applied to cases of this description is to determine from the surrounding circumstances the intention of the widow. Did she intend to treat the disputed property as part and parcel of the estate of her husband or did she treat it as a temporary saving liable to be applied by her subsequently for her own purposes. If that test is applied to the case before us, it is obvious that the claim of the decree-holder cannot be sustained.

In so far as the first item of the attached properties is concerned, there is no doubt that it was originally a part of the estate of the husband of Bechu Koer. It had been sold and had passed into the hands of a stranger to the family. When the widow subsequently re-purchased the family *howdah*, the inference is irresistible that she intended to treat it as a part of her husband's estate.

In so far as the rents not realised from tenants are concerned, it has not been seriously disputed that they cannot be treated as temporary savings liable to be applied in satisfaction of any personal debts of the widow. This view may at first sight seem to militate against that adopted by Sir Charles Sargent, C. J., in *Rivett Carnac* v. *Jivibai* (15). That case, however, is distinguishable on two grounds. In the first place, the powers of a widow to deal with moveables under the Mayukha Law are not precisely on the same footing as the powers of a widow under the Mitakshara Law. In the second place, in the case before Sir Charles Sargent the rent has actually been collected on behalf of the widow by her agent ; at the time of her death, it was consequently her money in the hands of her agent ; no distinction could thus be drawn between the sums already expended and the balance at the hands of her agent. Under these circum-

(4) L. R. 10 I. A. 150 (1883).
(5) L. R. 14 I. A. 63 (1887).
(6) 7 B. L. L. 93 (1871).
(9) L. R. 20 I. A. 12 (1892).
(11) I. L. R. 28 Mad. 1 (1904)
(14) L. R. 2 I. A. 256 (1875).

(15) I. L. R. 10 Bom. 478 (1886).

stances, it was ruled that the property could be claimed by the heirs of the widow and not by the heirs of her husband.

Much reliance was placed by the learned Vakil for the Respondent upon the class of cases of which the decisions of the Judicial Committee in *Beer Pertab* v. *Rajender Pertab* (16), *Brij Indar* v. *Janki Koer* (8) and *Ram Nundan* v. *Janki Koer* (17) may be taken as the type. In this class of cases, the question for consideration related to property which had been confiscated by the Government and re-granted to one or other member of the family. The learned Vakil for the Respondent contended that as the grantee in a case of this description acquires an absolute estate, in so far as the *howdah* was concerned, it ought to be assumed that the widow upon re-purchase acquired an absolute interest therein. It is obvious however that there is no analogy between the two classes of cases. In the case of confiscation and re-grant by the Sovereign power, the position of the grantee depends upon the intention of the grantor as evidenced by the deed of grant. In the case before us the right of the widow must be determined from the surrounding circumstances as indicative of her true intention. We hold therefore that neither of the two properties sought to be attached by the decree-holder is liable to be attached in execution of the decree obtained by her against Bhagabati Koer to be satisfied out of the assets of Bechu Koer in her hands.

The result is that this appeal must be allowed and the orders of the Courts below discharged. The Appellant is entitled to her costs throughout these proceedings.

(8) L. R. 5 I. A. 1 (1877).
(16) 12 M. I. A. 1 (1867).
(17) I. L. R. 29 Cal. 828 (1902).

We assess the hearing-fee in this Court at one gold mohur.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 202 OF 1911.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
Heard, 13 & 14, June.
Judgment, 19, June.

MUSSTT. DEOKALI KOER, Plaintiff, Appellant,
v.
BABU KEDAR NATH & ors., Defendants, Respondents.

Specific Relief Act (I of 1877), sec. 42—Declaratory decree, when should be made and when refused—Consequential relief, injunction if.

Sec. 42 of the Specific Relief Act does not sanction every form of declaration but only a declaration that the Plaintiff is entitled to any legal character or to any right as to any property.

Courts in this country should see that plaints which pray for declaratory decrees only, conform to the terms of sec. 42, Specific Relief Act.

An injunction is a consequential relief.

The limit imposed by sec. 42 of the Specific Relief Act is on decrees which are merely declaratory and does not expressly extend to decrees in which relief is administered and declarations are embodied as introductory to that relief. For such declarations legislative sanction is not required as they rest on long established practice. But for all that the Court should be circumspect and even chary as to the declarations it makes; it is ordinarily enough that relief should be granted without the declaration.

This was an Appeal against the decree of Babu Raj Narain Mukerjee, Subordinate Judge of Shahabad, dated the 21st of February 1911.

MUSSTT. DEOKALI KOER *v.* BABU KEDAR NATH.

The Plaintiff-Appellant instituted the present suit on the allegation that the Defendant No. 9 was the proprietor of khata No. 1 of estate Amao in the Perganah Chainpur, that he was heavily in debt and his estate in consequence frequently fell into arrears, that with a view to protect his property the said Defendant No. 9 executed a mortgage for Rs. 14,000 in favour of his relatives Joynarain and Sunder Das, ancestors of Defendants Nos. 1 to 8, without receiving any consideration and that he allowed the said Defendants Nos. 1 to 8 to obtain a fraudulent and collusive decree, that the decree was partly executed at Benares and was then transferred for execution to the first Subordinate Judge's Court at Arrah and the Mehal Amao aforesaid which the Plaintiff had purchased was attached and was advertised for sale. The Plaintiff alleged further acts of fraud and prayed :

(1) That it might be declared that the mortgage deed executed by Defendant No. 9 in favour of the ancestors of Defendants Nos. 1 to 8 was collusive, nominal, invalid, fraudulent and without consideration, that the decree passed thereon had been collusively and fraudulently obtained and was ineffectual, inoperative and invalid and that for the satisfaction of the decree the mortgaged property in question mentioned in the said decree could not be sold.

(2) That if the Court found any obstacle in granting the above relief then it might be adjudicated and declared that without the deduction of the fair value of a 3 as. shares of each of certain mouzahs which the Plaintiff alleged had been fraudulently released by accepting a deduction of Rs. 2,900 only (the value of the properties being Rs. 16,000) and excluding the same, the Defendants Nos. 1 to 8 had no right to throw the whole charge on the remaining property and to bring to sale the whole of the remaining property ; and that the decree was in consequence not fit for execution and was invalid, ineffectual and inoperative.

(3) That any other relief which the Court might find the Plaintiff entitled to be granted to her against the Defendants and that the costs of the suit with interest till realisation might be awarded against Defendants Nos. 1 to 9.

The Plaintiff treated the suit as for a declaratory decree only and paid a court-fee of Rs. 10 only on the plaint.

The Subordinate Judge upheld the Defendants' objection that the suit was barred by sec. 42 of the Specific Relief Act and that the court-fee of Rs. 10 only was insufficient, inasmuch as the plaint though in form only praying for a declaration really asked for consequential relief.

The Plaintiff thereupon preferred this appeal.

Dr. Sarat Chandra Basak (with him *Babu Chandra Shekhar Banerjee*) for the Respondents raised a preliminary objection that the court-fee of Rs. 10 paid upon the memorandum of appeal was insufficient as the suit was not of a declaratory character ; moreover, consequential relief had been prayed. Referred to the prayers in the plaint. Court-fees Act, sec. 7, cl. iv (*c*) and Sch. II, No 17 (*iii*). *Thakur Prosad* v. *Punkal Singh* (2).

Babu Lachmi Narayan Singh (with him *Babu Raghu Nath Singh*) for the Appellant.—The suit is a declaratory suit without consequential relief claimed, and only court-fee of Rs. 10 is payable. See *Zinnatunnessa* v. *Girindra Nath* (3), *Umatul Butul* v. *Nanji Koer* (4), *Gour Mohun* v. *Dino*

(2) 8 C. L. J. 485 (1907).
(3) I. L. R. 30 Cal. 788 (1903).
(4) 11 C. W. N. 705 (1907).

MUSSTT. DEOKALI KOER v. BABU KEDAR NATH.

Nath (5), *Shrimant* v. *Smith* (6), *Karam Khan* v. *Daryai Sing* (7); unreported judgment in S. A. 1785 of 1909, decided on 24th April 1912.

Dr. Sarat Chandra Basak in reply.—The cases cited by the Appellant were not applicable.

[JENKINS, C. J.—We think so and you need not go into them.]

Sec. 42, Specific Relief Act, was the only section under which declaratory decrees could be made and the present suit did not come within that section. [JENKINS, C. J., referred to Annual Practice (1912), pp. 403-4]. The temporary injunction issued at the instance of the Plaintiff also indicated the true character of the suit.

C. A. V.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This Appeal raises the question whether the lower Court has rightly held that sufficient court-fee has not been paid on the plaint. Holding that it has not, the Subordinate Judge has dismissed the suit. On the appeal being opened a preliminary objection has been raised that the memorandum of appeal is insufficiently stamped. The considerations involved in this objection are substantially those which govern the appeal.

The suit has been treated by the Plaintiff as one to obtain a declaratory decree where no consequential relief is prayed; and so, she contends, the proper fee both on the plaint and the memorandum of appeal is ten rupees.

The prayers to her plaint are framed in these terms :

" Reliefs sought for.

" (1) That it may be declared that the registered deed, dated 1st June 1896, for Rs. 14,000 executed by Defendant No. 9 in favour of the father and ancestors of Defendants Nos. 1 to 8 is collusive, nominal, invalid, fraudulent and without consideration; that the decree passed on the basis thereof which is pending execution in No. 83 of 1909 in the 1st Court of Subordinate Judge at Arrah has been collusively and fraudulently obtained and it is ineffectual, inoperative and invalid and that for the satisfaction of the said decree, the mortgaged property in question mentioned in the said decree cannot be sold.

" (2) That if the Court finds any obstacle in granting the above relief then it may be adjudicated and declared that without the deduction of the fair value of 3 annas shares of each of the Mouzahs Sudhia, Baradhi, Sirihira, Aailasi Khurd, Pakdihar, Pipra Shankarwar, Amarha, Dadwa and Bhadawra and excluding the same the Defendants Nos. 1 to 8 have no right to lay the whole charge on the remaining property in claim and to bring about the sale of the said property and such decree is not fit for execution and it is invalid, ineffectual and inoperative."

(3) That any other relief which the Court may find the Plaintiff entitled to, be granted to her against the Defendants and that the costs of this suit with interest till realisation may be awarded against Defendants Nos. 1 to 9."

In the view of the Subordinate Judge the prayer in the plaint, though it is in form a mere declaration, practically asks for consequential relief, and it is as a result of this view that he arrived at the decision that is now impugned.

It is a common fashion to attempt an evasion of court-fees by casting the prayers of the plaint into a declaratory shape.

(5) I. L. R. 25 Cal. 49 (1897).
(6) I. L. R. 20 Bom. 736 at p. 741 (1895).
(7) I. L. R. 5 All. 331 (1883).

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Contents.

NOTES.

WE MAY HAVE HAD OCCASION BEFORE THIS TO criticise some Privy Council decisions and take exception to them. But so far as we recollect we have never, except on a very recent occasion, had to speak of Lord Macnaghten's judgments but in terms of the highest praise. We are therefore greatly grieved to miss in His Lordship's judgment in the appeal of *Clarke* v. *Brojendra Kishore*, that remarkable mastery of the facts, that broad and equitable view of the law, that high regard for the liberty of the subject and that supreme indifference to considerations of statecraft or executive exigencies that have characterized his judgments and have secured for them the highest reputation amongst the pronouncements of the final Court of Appeal. In the judgment which it is our painful duty to criticise, we find such gross errors in the statement of facts and such questionable interpretations of the law, that had we not been assured that it was Lord Macnaghten who delivered the judgment of the Judicial Committee in this appeal, we would have been loth to believe that His Lordship could have been an assenting party to such a careless and unconvincing judgment.

AT THE VERY OUTSET OF THE JUDGMENT THEIR Lordships say that Mr. Justice Fletcher gave a decree but without costs, although reference to the first Court's judgment and decree would show that Fletcher, J., did award costs. Their Lordships then pass off some observations made by Maclean, C. J., and Harington, J., in connection with the disallowance of costs as those of Fletcher, J., quite overlooking the fact that costs were disallowed on appeal and not in the first Court. In this connection we may further mention that in expressing their "strongest reprobation" regarding "charges of personal misconduct" against Mr. Clarke, alleged to have been reiterated by the Plaintiff, their Lordships do not seem to have had due regard to the facts of the case. For, it is to be noticed that the case of the Defendant's malice was made only in the first Court. In the Appeal Court the Plaintiff no doubt filed a cross-objection questioning the findings of the first Court that the Defendant had acted in good faith and without malice. But Maclean, C. J., expressly says at the close of his judgment that this *cross-objection was not pressed* by the Plaintiff before them. Their Lordships Maclean, C. J, and Harington, J., in dismissing the Defendant's appeal, deprived the Plaintiff of the costs for having filed the cross-objection. The appeal to the Judicial Committee was preferred by the Defendant by special leave and the Plaintiff could not and did not file any cross appeal or cross-objection before them. Yet their Lordships of the Judicial Committee have thought fit to express the "strongest reprobation" of the Plaintiff's conduct in reiterating charges which he did not repeat before their Lordships and which he in fact abandoned at hearing of the Appeal before the High Court of Calcutta.

THEN THEIR LORDSHIPS PROCEED TO JUDGMENT on an assumption of a state of facts which we regret to find is not at all warranted by the record of the case. It is to be noted that the facts upon which their Lordships lay so much stress were considered by the Courts below as not material to the case before them. Mr. Justice Fletcher in the first Court as well as Maclean, C. J., and Harington, J., in the Appeal Court, considered it unnecessary to discuss the facts of the case prior to the shooting incident. Mr. Justice Brett alone gave a narrative of those events, according to his view of the facts. Their Lordships of the Judicial Committee take their facts from Brett, J.'s dissenting judgment, and what is more, put them forward as matters which were not disputed, although Brett, J, did not himself state them as such. This mode of statement of facts in the judgment of an Appeal Court is wholly

unprecedented. More extraordinary still, we find that their Lordships of the Judicial Committee, while reproducing almost in his very words Mr. Justice Brett's statement of facts, have actually left out the very expressions that would go to show that they were mere allegations and not findings. Mr. Justice Brett says "Certain Hindus, at the instigation, *it is stated*, of the Hindu servants of the Plaintiff and other zemindars, his cosharers in the village, tried to prevent the sale of bideshi or foreign goods at this fair." The Judicial Committee in their judgment reproduce this sentence with the following important change. "Some Hindus, *apparently* at the instance of the servants and agents of the Plaintiff and his cosharers, &c., &c." The result is that what Mr. Justice Brett had stated as a mere allegation of the defence, the Judicial Committee have put down as a judicial inference based upon undisputed facts.

AGAIN, WHILE THEIR LORDSHIPS NOTICE THE allegations of the defence as to the cause of the disturbances, they at the same time ignore the allegations of the Plaintiff, noticed in Fletcher, J.'s judgment, that "as the Defendant when he arrived at Jamalpore on the morning of April of 28th was aware that the Mahomedans had previously announced by beat of drum that the Government had given them permission to loot the Hindu's property and to marry their widows in *nika* form and that a large number of the Hindus were fleeing from the place in a state of panic, if the Defendant had honestly done his duty he would in the first place have tried to restore confidence to the Hindus by assuring them of the impartiality of the Government." It should be noted that the first Court did not dismiss these allegations as unfounded but on the contrary had observed that "it may be that a man of wider experience or deeper judgment would have done so. But even if I were to assume that this was the primary duty of the Defendant, this allegation against the Defendant only comes to this, *viz.*, that he committed an error of judgment." That his Lordship did not go more fully into the allegations of the Defendant as also of the Plaintiffs with regard to the causes of the ill-feeling between the Hindus and Mahomedans at Jamalpore was because his Lordship had held in an earlier part of the judgment that "the reasons for the origin of that state (of feeling) were not material to be considered in the case." In this view the majority of the Appeal Court also agreed. From this it is clear that the narrative of facts as to the cause of the disturbance as given by their Lordships of the Judicial Committee was not undisputed, as stated by their Lordships and that, as it stands, it is a wholly one-sided statement.

BESIDES THESE MATERIAL ERRORS IN THE STATEment of facts there are others which, though not very material to the case, are deserving of notice. For instance, their Lordships say "zemindars in that part of the country are Hindus, most of them, apparently, absentees living in Calcutta." This is neither in accordance with facts nor borne out by any evidence on the record. We are, therefore, at a loss to understand how and where their Lordships came to to find the materials upon which to base such a sweeping statement.

THE ONLY FACTS THAT WERE NOT DISPUTED either before the first Court or before the Court of Appeal were stated by Maclean, C. J., in the following terms :—

For some time previous to the 28th of April 1907, the state of feeling between the Hindus and Mahomedans at Jamalpur ran very high; and there can be no doubt but that, for some days, the town had been in a condition of very great excitement. On the 28th of April 1907, the date of the search, which undoubtedly took place on the afternoon of that day, the Defendant was at Mymensingh; and in consequence of a telegram which he received from Mr. Barniville, the Sub-divisional Officer, and Mr. Luffman, the head of the police at Jamalpur, he left for Jamalpur and arrived there at about ten o'clock in the morning. He was then informed by Mr Luffman that, on the previous evening a man, named Gendu Sheikh, had been wounded by a revolver shot; and he was also informed that the police had reason to believe that firearms were stored in the cutcheries of the zemindars. In consequence of this information the Defendant determined to search, amongst others, the Plaintiff's cutchery: and in the presence of certain gentlemen as witnesses of the search, and accompanied by Mr Barniville, Mr. Luffman and several police, he searched the Plaintiff's cutchery in the afternoon. This is the trespass complained of. It is unnecessary to go more in detail into the facts of this part of the case, because there is no dispute as to the facts stated above. The fact of the search and that it was conducted by the order and under the directions of the Defendant is not denied It seems, therefore, unnecessary to discuss what took place on the evening of the 27th of April or to go more minutely into the question of the excitement or the cause of the excitement and the state of feeling between the Hindus and Mahomedans at that time.

IT HAS INVARIABLY BEEN THE PRACTICE OF THEIR Lordships of the Judicial Committee not to interfere with the concurrent findings of fact of the Courts below. It is also an established practice not to allow an Appellant to make a new case in the Court of Appeal. Their Lordships of the Judicial Committee have in the present appeal disregarded both these rules and decided the case on a view of facts different from those concurrently found by the Courts below. The Courts below found that Mr. Clarke had made a *general search for arms* in the Plaintiff's cutchery. We shall show by reference to his own evidence that he himself also said that this was what he had done and intended to do. The argument on his behalf in the first Court was chiefly directed towards showing that in making this *general search for arms* he was

justified under the Arms Act and that even without recording his reasons as required by the Act. The defence under the Criminal Procedure was treated by his counsel as of secondary importance. We shall first point out the findings of the Courts below in this respect and then examine whether the Judicial Committee was in any way justified in departing from these findings of fact and basing their judgment on an assumption of facts which, we shall show, is not supported even by Mr. Clarke's own evidence.

THE LEARNED JUDGES HERE HAD TO DEAL WITH the case which was set up by the defence and made out by evidence. As to the case made before him Mr. Justice Fletcher finds. "I am satisfied on the evidence that the search *was not intended to be made* under the provisions of sec. 165 of the Criminal Procedure Code. The search of the Plaintiff's and the other cutcheries *was for the purpose of discovering arms generally*, which sec. 105 does not authorise.

"In my opinion, the search made by the Defendant was not, nor was it ever intended that it should be, made under sec. 165 of the Criminal Procedure Code."

ON APPEAL, THE CASE WAS PUT FORWARD FOR the first time that it was not a general search for arms, but for the weapon with which Gendu was shot. On this Maclean, C. J., observed :—

"The search were undoubtedly a general search for arms, not, *as is now suggested at the Bar*, for the revolver with which Gendu Sheikh had been wounded." His Lordship Mr. Justice Harington also upheld the findings of fact of the Court below on this point, in the following terms :—

"Moreover, the Magistrate appears to have been searching for arms generally and not for some particular weapon."

Later on his Lordship records a still more definite finding that "it has not been shown that the search was directed for the purpose of any proceeding under the Code" (Code of Criminal Procedure).

ALTHOUGH MR. CLARKE HAD SAID, AS MENTIONED by Brett, J., in his judgment, that a search for the arms in connection with that case (Gendu Sheikh's) was equally in his mind and that he made up his mind to make the search after hearing the police officers' and the other persons' reports, yet he also said in the course of cross-examination, "there was nothing formal in my enquiry. No, I was not holding an enquiry as a Magistrate;" and when he was specifically asked with regard to Gendu Sheikh's case, he said he did not take any notice of the matter. This will appear from the following extracts from his deposition :—

Q.—The search was purely for the fire-arms ?

A.—What I chiefly wanted was fire-arms and sword-sticks. By fire-arms I mean revolver and guns. I was looking for them.

Q.—The revolver was in respect of the wound on Gendu ?

A.—The fire on Barniville and Superintendent of Police.

Q.—There was no investigation as regards that ?

A.—No. I don't think any investigation was made.

Q.—As regards Sheikh you had not taken cognizance of the matter—you know its meaning.

A.—I did not take any notice of the matter. I had not the case on my file.

In answer to a question from the Court he also said : "I was anxious to ascertain if there was a considerable store of arms there, and I was anxious to seize them if there were."

YET THEIR LORDSHIPS OF THE JUDICIAL COMMITTEE find fault with the "Trial Judge and the learned Judges of Appeal" for directing their attention chiefly to what clearly appears from the foregoing extracts to have been the principal defence taken before them. The plea under the Criminal Procedure Code although taken in the written statement was, as Maclean, C. J., observes, seriously suggested as an alternative defence for the first time before the Appeal Court. So it is obviously their Lordships of the Judicial Committee who are in error in describing the alternative defence made before the Courts here as the "real defence" and basing on this view of the defence unmerited reflections on the High Court. The injustice of the remark becomes all the more glaring when we find that at the end of their judgment, their Lordships accept the decision of the First Court and the Appeal Court on the principal question that was before them as a correct interpretation of the law. With regard to Mr. Clarke's defence under sec. 25 of the Arms Act, Lord Macnaghten observes that "Their Lordships are disposed to agree with the majority of the Court of Appeal that Mr. Clarke not having complied with the preliminary condition prescribed by the Arms Act cannot defend his action under the Statute." In this matter the Judicial Committee have gone against the view of the dissenting Judge, Brett, J., and has as a matter of fact upheld that taken by the Trial Judge and the majority of the Court of Appeal. When we remember that this was the real issue over which the whole suit was fought out here, all the criticism to which the majority of the Judges of the Calcutta High Court have been subjected in connection with this case falls to the ground as utterly unfounded. No fair-minded man who would care to acquaint himself with the proceedings before them can question that in dealing with Mr. Clarke's defence they acted otherwise than with the utmost consideration and fairness.

It would thus appear that their Lordships of the Judicial Committee have not only not shown the same regard for the facts and the evidence on the record and the real issues at the trial, as is their wont, but have also gone out of their way in the opening portion of their judgment to pass reflections on the Calcutta High Court which the closing portion of their own judgment would show to be quite unmerited. Their Lordships at the very outset say that "there has been a serious miscarriage of justice in both the Courts which dealt with the matter in India." They make these observations simply because they consider that the real defence of Mr. Clarke depended on the provisions of the Code of Criminal Procedure. Even if this were so, we fail to follow how the Judges of the Calcutta High Court are to blame if Mr. Clarke or his legal advisers did not make that case before the Trial Judge and only seriously put it forward for the first time before the Court of Appeal. We have shown by extracts from the judgments of these Courts what Mr. Clarke's real defence before them was. In the first Court he principally relied on sec. 25 of the Arms Act, and both there and in the Appeal Court it was contended on his behalf that he could under this section make a *general search for arms* without recording his reasons previous to the search, and that the recording of reasons was a matter of pure formality, and that acts done in pursuance of the above section were also judicial acts and were covered by the protection afforded by the "Act for the Protection of Judicial officers."

The eminent fairness with which the alternative defence of Mr. Clarke under the Code of Criminal Procedure was dealt with by the High Court on appeal will also appear from the judgment of Harington, J. His Lordship notices that "in the course of the argument there was some discussion as to which of these Acts the Defendant purported to act under." On this his Lordship observes, "That, to my mind, is of very little importance. The Defendant is entitled to call in aid any Statute which justifies his action quite irrespective of whether it was present or not to his mind when he made the search." His Lordship therefore fully considered the defence set up for Mr. Clarke under the Criminal Procedure Code.

We very much regret to have to say that their Lordships' decision even on the points of law is based on a misapprehension of the scheme of the Criminal Procedure Code as a whole and of the effects of its provisions. Now a crucial question in this case was whether Mr. Clarke was acting as a Court, for if he was not he would not be authorised to conduct a search. Their Lordships proceed on the assumption that there is no statutory definition of the word "Court" applicable to the facts of the case. In this, we venture to think their Lordships are clearly in error.

In the Criminal Procedure Code of 1872, there was a definition of "Criminal Court" and it was stated to mean and include "every Judge or Magistrate or body of Judges or Magistrates enquiring into or trying any criminal case or engaged in any judicial proceeding." In the present Code this definition has been omitted, but sub-sec. (2) of sec 4 has been added, to the following effect: "All words and expressions used herein and defined in the Penal Code and not hereinbefore defined shall be deemed to have the meanings respectively attributed by that Code." The Penal Code in sec. 20 defines a "Court of Justice" as "a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body of when such Judge or body of Judges is acting judicially."

If the word "Court" in sec. 96 means a "Court of Justice" as it must mean, it is perfectly clear that the definition in the Penal Code will apply to this section Mr. Clarke then in doing what he did was not acting as a Court. If that is so, he could not conduct a search in person under sec. 105. Against this clear definition in the Penal Code the implication sought to be brought out of the naming of Magistrates under classes of Courts in sec. 6 is unavailing. Although it must be admitted that the language of the Code of Criminal Procedure is not always as clear as it might have been on this point, it is clear that the words "Court" and "Magistrate" are not used in the Code as interchangeable or synonymous. The word "Magistrate" has often been used to signify a Magistrate acting in his judicial capacity, but the word "Court" has never been used to signify a Magistrate acting otherwise than judicially. The effect of their Lordships' decision seems to be that the word 'Court' in sec. 96 as well as elsewhere may refer to Magistrates even when they are not acting judicially. That would be so if the words were synonymous or interchangeable. But that they are not so is abundantly clear. An indication of this is furnished by secs. 32, 33, 34, where mention is made of "Courts of Magistrates," where the expression is not surely a mere tautology.

It is quite clear, moreover, that the Magistrate has functions to perform under the Criminal Procedure Code which can in no way be described

as judicial functions and in respect of which the Magistrate cannot surely be called a "Court" in any sense of the term. For instance, under sec. 45, cl. 3, the Magistrate is authorised to appoint village headmen. Under Chapter IX of the Code powers are given to the Magistrate to use civil force to disperse unlawful assemblies or if necessary cause such assemblies to be dispersed by military force. Surely these powers are not judicial powers and the Magistrate in exercising these powers does not act as a Court. Overlooking these and other provisions of the Code, Brett, J., in his dissenting judgment observed "that the terms 'Court' and 'Magistrate' are in fact synonymous" and their Lordships of the Judicial Committee have accepted that statement without question. But we have shown that the definition of "Court of Justice" in sec. 20 of the Indian Penal Code has to be read into the Criminal Procedure Code under sec. 4, cl. 2 of the latter. Thus it is clear that it is not the majority of the Judges here who were misled with regard to the definition of "Court" but it was their Lordships of the Judicial Committee who were.

REGARDING THE INTERPRETATION OF SECS. 96 and 105 of the Criminal Procedure Code with reference to Form VIII of Sch. V of the Code we are also not convinced that their Lordships of the Privy Council have been able to meet the very able arguments set forth in the judgment of Harington, J., in its most material particulars, although their Lordships have attempted to answer it generally. The plea of Mr. Clarke under the Criminal Procedure Code, on which the Judicial Committee has allowed his appeal, was that he was competent to direct the search in his presence under sec. 105 of the Code. Under that section he could do so only in cases where he could issue a search warrant. This brings us back to sec. 96, which provides as follows :—

"Where the Court considers that the purpose of an enquiry, trial or other proceeding under this Code will be served by a general search or inspection it may issue a search warrant."

THE FIRST COURT AND THE MAJORITY OF THE Court of Appeal here held that under sec. 96 the Magistrate could issue a search warrant only in connection with a judicial proceeding. Harington, J., referring to Sch. V, Form VIII, which is the only Form provided in the Code for search warrants under sec. 96, points out that the expression, "information has been laid (or complaint has been made)" in that Form as also the use of the expression "Court" in the section clearly presupposes initiation of judicial proceedings. And his Lordship finds in this case that there was no evidence of initiation of any proceeding before Mr. Clarke. His Lordship further observed that the only sections under which the Magistrate is authorised under the Code to issue search warrants in the absence of any pending judicial proceeding are secs. 98 and 100 of the Code, and that the difference in language between these sections and sec. 96 clearly indicates that sec. 96 contemplates a judicial proceeding.

WITH REGARD TO THIS ARGUMENT THE JUDICIAL Committee refers to the expression "enquiry about to be made" in the Form VIII of Sch. V, and holds that "the form contemplates the issue of a search warrant before any proceedings of any kind are initiated and in view of an enquiry about to be made." Their Lordships consider that this disposes of Mr. Justice Harington's argument. It is remarkable, however, that in saying this their Lordships altogether lose sight of the opening words of the Form "Whereas information has been laid (or complaint has been made)," which evidently refers to sec. 190 of the Code. Any one familiar with the Code and the proceedings of Criminal Courts in this country knows that enquiries do not always commence immediately after the initiation of judicial proceedings and the necessity for the issue of a search warrant under sec. 96 may arise in the interval. The expression "about to be made" in the Form VIII, which their Lordships refer to, is obviously meant to provide for such contingencies, and there is nothing in it to justify the conclusion drawn by the Judicial Committee from this isolated expression. Taking the Form as a whole the only correct interpretation of the section and the Form seems to be that given by Mr. Justice Harington and the suggestion in their Lordships' judgment that he had not read to the end of the Form seems to be wholly unwarranted.

THEIR LORDSHIPS REFER TO THE ORDINARY POWER of Magistrates in Sch. III of the Criminal Procedure Code in support of their position that a search warrant under sec. 96 can be issued even by a third class Magistrate although no judicial enquiry may be pending before him. But if their Lordships had read up to the Part III entitled *Powers of First Class Magistrates* in this Schedule, their Lordships would have found that Item No. 2 under that heading authorises only first class Magistrates "to issue a search warrant *otherwise than in the course of an enquiry*," and that only under sec. 98. The words we have italicised show clearly that even a first class Magistrate is not authorised to issue a search warrant otherwise than in the course of judicial enquiry under sec. 96. Taking the Schedule as a whole, therefore, Item 8 of Part I of the Schedule must be read as limited to the issue

of search warrants in the course of pending judicial proceedings. Otherwise, special powers of issuing search warrants conferred on higher class Magistrates by secs. 98 and 100 would be unmeaning and items Nos. 2 and 3 in Sch. III, Part III, would be superfluous.

THEIR LORDSHIPS IN INTERPRETING SEC. 96 also overlooked the provision in Sch. V, Form VIII, which requires that a Magistrate issuing a search warrant under that section must specify clearly the thing for which the search is to be made. Sec. 96 therefore cannot authorise a search for arms generally, not with reference to any particular offence, but with a view to prevent future offence or any apprehended breach of the peace. If such a search has to be made it can only be made under the provisions of the Arms Act. The majority of the Judges here were therefore entirely in the right in holding that Mr. Clarke had no valid defence under the Criminal Procedure Code and his only possible defence was under sec. 25 of the Arms Act, and that too, as the Judicial Committee agree with them in holding, was untenable.

HARINGTON, J.'S INTERPRETATION OF SECS. 96, 98 and 100 of the Code finds additional support from the language of sec 105 itself. The use of the expression "Magistrate" in sec. 105 instead of "Court" as in sec. 96 is accounted for by the fact that it comprises within its scope not merely searches which may be directed in the course of a judicial inquiry by a Magistrate acting as a "Court" but also searches under secs. 98 and 100, which may be held by the Magistrate otherwise than in the course of a judicial inquiry, that is to say when acting in his executive capacity.

THERE IS ONE MATTER IN CONNECTION WITH THIS interpretation of the provisions of sec. 96 of the Criminal Procedure Code to which we wish to invite pointed attention. The Code which confers very limited powers on third class Magistrates could never have contemplated arming such Magistrates with the power of issuing search warrants and holding searches at pleasure, without reference to any judicial proceedings pending before them. This power they would now have under the decision of the Judicial Committee. We feel, therefore, that legislation is urgently called for to avoid the serious consequences that may not unlikely follow from their Lordships' decision.

LASTLY, WE MAY BE PERMITTED TO POINT OUT one important aspect of the case which demanded decision before the Plaintiff's case could be dismissed and this their Lordships have neither considered nor even noticed in their judgment. Assuming that Mr. Clarke had entered on the premises under the power conferred on him by law, it was found by both the Courts here that he was responsible for the use of undue violence while on the premises under the authority of law. The finding of Fletcher, J., on this point is perfectly clear. "That the search was conducted," says his Lordship, "with unnecessary damage to the property of the Plaintiff cannot to my mind be doubted for an instant." Mr. Horniman to whom his Lordship refers for a description of the damage says as follows :—

> "In that building I saw a large number of chests which had been broken open evidently with great violence, unnecessary violence, I should say, most of them contained documents having the appearance of estate records, quantities of which had been tumbled out on the floor, in many cases where they had been tied up in packets, docketed, either by careless rough treatment or deliberately—I can't say, the packets had been torn open, papers mutilated, strewn about the floor. . . . hinges of the boxes had been broken where it would have been sufficient to pick or force the locks. There was a general appearance in the building of violent treatment of all its contents."

Harington, J., also finds that there was unrebutted evidence of undue violence. Having regard to these findings it seems clear that even if Mr. Clarke went on the premises under authority given by law, by the doing of this "unnecessary damage" by undue violence he became liable for trespass *ab initio*. But even leaving alone the question of trespass *ab initio* there remains the further point that the Plaintiff was at least entitled to damages for the unnecessary injury actually done.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION.—*Clinton* v. *J. Lyons & Co., Ld.* Before RIDLEY AND BRAY, JJ. 23rd May 1912.

Cat, injuries caused by a, principles regulating owner's responsibility discussed.—Is a cat while rearing kittens an animal feræ naturæ?

This was an action in which the Plaintiff claimed damages for injuries caused to herself and to her dog by the Defendants' cat. The Plaintiff went into the Defendants' tea shop for refreshments with her dog. There was a cat on the premises which was rearing kittens. The cat attacked the dog and also injured the Plaintiff who interfered.

The following questions were left to the jury :—(1) Did the Plaintiff take her dog on the premises by the permission of the Defendants?—Yes. (2) Or with acquiescence of the Defendants?—Yes. (3) Had the cat (to the knowledge of the Defendants), while rearing kittens, a disposition to

attack a dog in her neighbourhood and a person holding a dog ?—Yes. (4) Did the cat attack the dog unprovoked ?—Yes. (5) Were the Plaintiff's injuries the result of the cat attacking her dog ?—Yes. (6) Did the Defendants take reasonable precautions (under the circumstances) for the safety of their customers ?—No. (7) Damages ?—£100.

The Defendants contended that they were not liable. They pleaded that the cat was not an animal *feræ naturæ* and that they were not responsible for the accident which was extraordinary and could not possibly have been provided against. The learned Judges found for the Defendants. In the course of his judgment MR. JUSTICE RIDLEY said :—

It may be observed that if the cat was to be classed as *feræ naturæ*, the sixth question left to the jury was not relevant, because according to *Nicols* v. *Marsland* (L. R., 10 Ex., 255) and *Baker* v. *Snell* (1908, 2 K. B., 352) a person keeping such an animal is liable for the consequences, however arising; and the case must have been put on two grounds, as it was before us—namely, *first*, that this cat must be classed as an animal *feræ naturæ*, and, *secondly*, that if not, still it constituted a danger against which it was the Defendants' duty to take reasonable care to protect their customers, which they had not done. As to the first point, the facts appear to me to show that the cat was not dangerous to human beings but to dogs, and that nothing would have happened had not the Plaintiff taken the dog with her into the room. It would be a strong thing to hold that a cat when vicious with dogs (because she has kittens) ceases to be a domestic animal and becomes *feræ naturæ* so that her owner is responsible for all eventualities, as in *Baker* v. *Snell*.

An animal may, indeed, be dangerous from a temporary cause, as was the case in *Barnes* v. *Lucille* (96 L. T., 680), but there it was shown that while with puppies that dog was dangerous to mankind, so that it was *feræ naturæ*. But this cat was not dangerous to mankind, nor would any mischief have happened but for the presence of the dog brought by Mrs. Clinton. Mr. McCall, however, contended that such a cat must nevertheless be accounted *feræ naturæ* because it is vicious towards such of mankind as are carrying dogs and must be likened to the bull which attacked a person wearing a red handkerchief—*Hardson* v. *Roberts* (6 Exch., 697). In that case the Defendant said after the accident that he knew that the bull (or a bull) would run at anything red, and that was left to the jury as knowledge of the *scienter*. The Court refused to interfere, saying that there was evidence for the jury, and I am much disposed to agree; for I think that a bull which is vicious to persons wearing a red tie may well attack a person without one. But the hostility of cat and dog, on the other hand, has passed into a proverb and I am not disposed to say that if a cat attacks a dog, and by accident a person who happens to be there, the cat is therefore dangerous to mankind. I think the cat is not to be classed as dangerous to mankind, but that the bull is.

Giving the best consideration to the matter that I can, I have come to the conclusion that the Defendants are not answerable for what happened, because it was not an ordinary consequence of their act, there being no evidence that they had any reason to expect it.

Messrs. McCall, K. C., and O'Connor for the Plaintiff.

Mr. Shakespeare for the Defendants.

B. D. *Claim dismissed.*

CHANCERY DIVISION.—*Upton* v. *Henderson*. Before MR. JUSTICE EVE. 26th April 1912.

Covenant executed by a co-Respondent not to go during a period of 15 years within a radius of 10 miles of the Plaintiff's house.—Is it against public policy or in restraint of trade or personal liberty ?—Is it a penalty ?

This was an action for an injunction to restrain the Defendant from breaking a covenant and for carrying it out. The Plaintiff presented a petition for divorce from his wife, to which the Defendant was a co-Respondent. The Petitioner was desirous of reclaiming his wife and of putting her beyond temptation, and the Defendant was not averse to entering into some arrangement with that object in view. The Plaintiff, with a view to protecting his wife in the future, made a stipulation that the Defendant should covenant that he would not during a period of 15 years come within a radius of ten miles of the Plaintiff's mansion-house upon any pretext whatever without the consent of the Plaintiff. In order to secure the performance of the covenant the Plaintiff insisted on security being given, and £3,000 was paid to the trustees, which, on breach of the covenant, was to be held by them upon trust for the Plaintiff.

The Defendant raised several pleas but the learned Judge found against him. In the course of his judgment MR. JUSTICE EVE said :—

The first defence, which went to the whole cause of action, was that the covenant was void as being against public policy. It was said that the sum of £3,000 was damages for a wrong, but the facts as stated clearly disposed of that contention. If the Defendant abided by his covenant, not a penny-piece would he have to pay. So far from being damages for a past wrong, the payment of the £3,000 depended entirely on the conduct of the Defendant. Then it was said that the covenant was contrary to public

policy, because the effect of it was to exclude the Defendant from a certain area, and that was a restraint of any trade which he might wish to follow. As a rule covenants in restaint of trade were contrary to public policy, but there were numerous exceptions to the rule. No doubt a covenant which contained no reference to trade might be a colourable device and void as being in restraint of trade. But there was no such case here. The deed contained a stipulation to be found in many separation deeds, and if the Defendant's contention was right, all those stipulations were void as being in restraint of trade. It was impossible to apply the rule to a covenant of this nature. In the present case, where the honour of the wife was to be protected, it seemed highly desirable to exclude the Defendant from the area.

Then it was said that the covenant was void as infringing the liberty of the subject. The liberty of this particular subject seemed to be something like license. There were numerous cases in which persons bound themselves to remain in particular places, but it could not be said that such contracts were against public policy. The defence therefore on the ground of public policy failed.

That being so, and the breach of the covenant being admitted, was the Plaintiff entitled to an injunction? It was said that he was not entitled to both an injunction and the £3,000, and the case of *General Accident Assurance Corporation* v. *Noel* (1902, 1 K.B., 376) was cited in support of that contention. But that case was not *in pari materia* with the present case. Some people were apt to disregard injunctions, and to make an injunction effective against such persons it was advisible to obtain security. Here the parties clearly intended that if there should be a breach of the covenant, all interest of the Defendant in the £3,000 should cease. The Plaintiff therefore was not put to an election, and was entitled, subject to the third point, to an injunction and the £3,000.

Thirdly and lastly, it was said that the £3,000 was a penalty, and that inasmuch as it would become payable if the Defendant went a few yards inside the area, it was one which the Court would not enforce, because no real damage could be done by such a breach. There was no substance in that contention. All the Court had to do was to direct execution of the trust, and it was not for the Court to vary the trust. That defence therefore failed. The result was that the Plaintiff was entitled to an injunction and an order on the trustees to pay the fund to the Plaintiff.

Messrs. Lawrence, K. C., and Maugham for the Plaintiff.

Messrs. Clayton, K. C., and Young for the Defendant.

B. D. *Claim allowed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before BRETT, and SHARFUDDIN, JJ. APPEAL FROM APPELLATE DECREE No. 1243 OF 1909. YUSUF GAZI, Plaintiff, Appellant *v.* ASMAT MOLLAH AND OTHERS, Respondents. 13th June, 1912.

Bengal Tenancy Act (VIII of 1885), sec. 167—"Date of sale"—"Has notice."

The suit was for declaration of the Plaintiff's right by purchase to, and the recovery of possession of, 13 plots of land.

The Plaintiff's case was that the lands in suit were held by Defendant No. 26, under Defendant No. 27 at a yearly rental of Rs. 184, that in execution of a rent-decree against the said *jama*, it was sold off and purchased by the Plaintiff on 15th May, 1905, free from all registered and notified incumbrances, that the Plaintiff got symbolical possession of the same through the Court, on 20th May 1906, that when on 25th June 1906 the Plaintiff went to take possession of the lands he was resisted by the principal Defendants Nos. 1 to 25 who claimed the lands under a *jama* under Defendant No. 26, that thereupon the Plaintiff served a notice under sec. 167 of the Bengal Tenancy Act through the Collector to cancel the said Defendant's incumbrance, if any, which was duly served, on 9th December 1906, and that therefore the Plaintiff was entitled to *khas* possession of the same ousting the Defendants.

The Defendants Nos. 1 to 3 only contested the suit, pleading *inter alia* that the Plaintiff had no right or cause of action; that limitation barred the suit as brought by the Plaintiff; that the notice under sec. 167 of the Bengal Tenancy Act was not legal and valid and was not legally and properly served.

The Court of first instance disallowed all the objections of the contesting Defendants and decreed the suit. That decree was set aside on appeal. The Plaintiff therefore appealed to the High Court.

Held—That the words "date of the sale" in sec. 167 of the Bengal Tenancy Act meant the "actual date of the sale" and "not the date of the confirmation of the sale."

That the words "has notice" in sec. 167 of the Bengal Tenancy Act meant "has knowledge or information."

Mr. Z. R. Zahed and *Moulvi Nuruddin Ahmed* for the Appellant.

Babus Narendra Coomar Bose and *Biraj Mohun Mojumdar* for the Respondents.

A. T. M.

MUSSTT. DEOKALI KOER *v.* BABU KEDAR NATH.

Where the evasion is successful, it cannot be touched, but the device does not merit encouragement or favour.

The history of decrees merely declaratory is interesting, and a consideration of it may help to a solution of the question involved in this appeal. Such decrees are an innovation, and they first obtained authoritative sanction in England by sec. 50 of the Chancery Procedure Act, 1852. Before this it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer (Seton on Decrees).

Seven years later, India followed suit with sec. 15 of the Civil Procedure Code, 1859, where it was enacted that no suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief. By Act X of 1877, the Civil Procedure Code of that year, this section was repealed, but its place had been already taken in anticipation by sec. 42 of Act I of the same year, the Specific Relief Act. That section provides as follows :—" Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the Plaintiff need not in such suit ask for any further relief :

" Provided that no Court shall make any such declaration where the Plaintiff being able to seek further relief than a mere declaration of title, omits to do so."

It is in this section (apart from particular legislative sanction) that the law as to merely declaratory decrees, applicable in the circumstances of this case, is now to be found.

The terms of the section are not a precise reproduction of the provision contained in the Act of 1859 and the English law : in one direction they are more comprehensive, in another more limited. It is common tradition that the section was designed to be a substantial reproduction of the Scotch action of declaration ; but whether this be so or not is of no great moment. We have to be guided by its provisions as they are expressed. The section does not sanction every form of declaration, but only a declaration that the Plaintiff is entitled to " any legal character or to any right as to any property : " it is the disregard of this that accounts for the multiform and at times eccentric declarations which find a place in Indian plaints.

If the Courts were astute—as I think they should be—to see that the plaints presented, conformed to the terms of sec. 42, the difficulties that are to be found in this class of cases, would no longer arise. Nor would Plaintiffs be unduly hampered if the provisions of sec. 42 were enforced, for it would be easy to frame a declaration in such terms as would comply with the provisions of the section where the claim was one within its policy.

Now what are the declarations that are sought in this case ? None relate to the Plaintiff's legal character, so only those are permissible which relate to " any right as to any property." Of the declaration in the first prayer of the plaint, none as expressed is a declaration of this character : it may be that the proposition at which the Plaintiff aims is in some measure involved in those declarations, but that is not what is sanctioned by sec. 42.

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The second prayer is open to the same comment. The third prayer expressly seeks relief, though it is general in its terms. I fail then to see how this is such a suit as sec. 42 of the Specific Relief Act contemplates, and if it is not, then it is not "a suit to obtain a declaratory decree where no consequential relief is prayed," as sanctioned by law.

The proceedings of this suit confirm this view, for the Plaintiff has successfully sought an interim injunction restraining the Defendants, and at this moment the Defendants are restrained by an injunction from pursuing the rights they assert to be theirs.

That an injunction is consequential relief is, I think, clear; the language of the Specific Relief Act favours that view, and it is one that has the sanction of Indian decisions and also of the Court of Chancery in *Marsh* v. *Keith* (1).

I would only add this, that the limit imposed by sec. 42 is on decrees which are merely declaratory, and does not expressly extend to decrees in which relief is administered, and declarations are embodied as introductory to that relief. For such declarations legislative sanction is not required: they rest on long established practice. But for all that the Court should be circumspect and even chary as to the declarations it makes: it is ordinarily enough that relief should be granted without the declaration.

The result then is that the preliminary objection to this appeal must prevail. But we will give the Appellant an opportunity of making up the deficiency of court-fees, provided she pays the required balance within one month from this date. If that be done, then it will be open to the Appellant to ask us to make a similar order in reference to the plaint.

N. R. CHATTERJEA, J.—I agree.

(1) 1 Drewery and Smale 342 (1806).

fendan.
B. D.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1912,
Heard, 10 and 14, May.
Judgment, 13, June.

HAJI BUKSH ELAHI, Appellant,
v.
DURLAV CHANDRA KAR, Respondent.

Revenue Sale Law (Act XI of 1859), secs. 2, 3—Act VII (B. C.) of 1868, sec. 30—Panchannagram, tenure in, if may be sold for arrears of revenue—"Default," date of, fixed by statute or notification thereunder, if may be varied by administrative Rules—Rent when becomes "arrears" and when "default" in payment takes place.

Tenures held under Government in Dihi Panchannagram in the District of 24-Pergunnahs are saleable under Act XI of 1859 by virtue of the provisions of Act VII (B. C.) of 1868.

No distinction can be drawn between the provisions of Act XI of 1859 and those of Act VII (B. C.) of 1868 with reference to the procedure for sale and with reference to what constitutes arrears.

Where the kabuliyat executed by the original holder of the tenure provided that the jama, an annual one, would be paid in the Collectorate within the 28th June of every year, the rent payable under the terms of the kabuliyat on the 28th June 1902 was not in arrear according to the provisions of sec. 2 of Act XI of 1859 till the 1st of July 1902.

Where further a Notification issued by the Board of Revenue under sec. 3 of Act XI of 1859 "determined and fixed the 28th

HAJI BUKSH ELAHI *v.* DURBAV CHANDRA KAR.

June of each respective year as the latest day of the payment of rents of all descriptions of tenures in Khas Mehal Panchannagram, in default of which payment on or previous to that date tenures in arrears in that mehal will be sold at public auction to the highest bidder" :

Held—*That the 28th June 1903 was the first date under the Notification and the Statute when the default, such as would enable the "tenure in arrears" to be sold, arose in respect of the amount payable under the kabuliyat on the 28th June 1902.*

The sale in this case which took place in March 1903 was therefore illegal and liable to be set aside.

General considerations or administrative rules not having the sanction of the Statute, such as Rule 7 of Part III, c. 16, of the Survey and Settlement Manual, could not operate to vary the contract of the parties and the statutory provisions applicable thereto.

DURLABH CHANDRA KAR *v.* HAJEE BUX ELLAHI (2) *reversed.*

These were two consolidated Appeals from two judgments* and two decrees, of the High Court at Calcutta, which set aside two decrees of the Subordinate Jugde, Second Court, of Zillah 24-Pergunnahs, in Bengal.

The Appeals arose out of two suits instituted in the Court of the said Subordinate Judge in respect of two holdings situate within an estate known as Khas Mehal Panchannagram, included in the Revenue Roll of the Collectorate of the 24-Pergunnahs. These holdings were sold for arrears of revenue, alleged to be due in respect of them, and were bought by the Respondent on the 16th of March 1903. The Suit No. 17 of 1904 was brought by the Appellant to set aside the sale, and Suit 46 of 1904 was filed by the Respondent as the purchaser at the revenue sale for possession of the holdings.

The Subordinate Judge had decreed Suit 17 of 1904, and dismissed Suit 46 of 1904. These Appeals were filed in the ordinary course, and the question for determination in them was whether the revenue sale was held without jurisdiction, and was, therefore, invalid in law.

The facts of the case, now material, may be shortly stated as follows :—

On the 18th February 1874 one Bhagaban Chandra Banerji took a settlement from the Collector of the 24-Pergunnahs of the said holdings and executed a kabuliyat in favour of Government in the following terms :—

"I accept Rs. 14-0-11 pies as the annual jumma of 12 bighas 18 cottahs 4 chittacks of land measured and specified above. I shall pay the said jumma in the Collectorate within the 28th day of June every year. If I do not pay, it shall be realised by the Government according to law and to that I shall not be able to raise any objection whatever. To this effect, I, of my own will and accord, execute this kabuliyat."

On the 27th of March 1902 a son of Bhagaban Chandra Banerji sold the said two holdings to the Appellant for Rs. 16,000, and put him in possession thereof. After the purchase an agent of the Appellant tendered on or before 1st of January 1902 the revenue for the two holdings, but his tender was refused on the ground that there was an order of the Collector not to accept rent from unregistered proprietors.

(2) 13 C. W. N. 633 (1908).

* Reported at 13 C. W. N. 633.—*Durlabh Chandra Kar* v. *Hajee Bux Ellahi.*

HAJI BUKSH ELAHI *v.* DURLAV CHANDRA KAR.

The Appellant thereafter on the 29th of April 1902 applied for registration of his name and it was registered in due course in respect of both the holdings. The Appellant also applied for the redemption of the holdings on payment of the proper fees.

On the 16th of March 1903 the two holdings were put up for sale, on account of an alleged default in payment of Government revenue for the June instalment of 1902, and were sold to the Respondent for Rs. 3,320.

The Appellant appealed to the Commissioner of Revenue to set aside the sale, but his appeal was dismissed on the ground of limitation.

The two suits out of which the present Appeals arose were then instituted.

On the 25th of July 1905 the Subordinate Judge delivered his judgment in the two suits, which were tried together. He observed that the most important question in the two cases was whether under the provisions of secs. 2 and 3 of Act XI of 1859, the sales in question were valid. The kabuliyats executed by Bhagaban Banerji showed that he bound himself to pay his rents on the 28th of June of every year in one instalment, so under sec. 2 of the Act the rent for 1902 was not in arrear until the 1st of July of that year.

The Subordinate Judge also referred to a special notification in respect of Panchannagram holdings, issued by the Board of Revenue on the 6th of October, 1871 and which is quoted in their Lordships' judgment, and made the following comments on the notification :—

"I think this notification of the Board of Revenue purporting to have been done under sec. 3 of Act XI is not strictly in accordance with the law. Under sec. 3 the Board can fix the dates for payment of arrears of revenue in default of which payment the estate in arrear shall be sold. But I think it cannot fix the date of payment of revenue in default of which payment the estate is liable to be sold.

"Now an estate is not in arrear till the first of the month next succeeding to that when the rent is payable. In the present case the rent for 1902 was payable on the 28th of June and the tenure could not be said to be in arrear before the first of July 1902. The Board's notification fixed the 28th of June for payment of rent, in default of which payment the tenure would be sold. So in the present case the tenures could not be sold till the 28th of June, 1903, there being only one date fixed in the year for payment of rent. See the observations of the learned Judges in the case of *Harkhoo Singh* v. *Bunsidhur Singh* (3). There was therefore no arrear due for June 1902 or Ashar 1309. And the sales held, I think, were held without jurisdiction."

In the result the Subordinate Judge held that the sales in question were invalid in law, and should be set aside.

The Respondent preferred an Appeal to the High Court at Calcutta in Suit 17 of 1904, which was registered as Appeal from Original Decree 347 of 1905. In Suit 46 of 1904 he also filed an Appeal to the District Judge of Alipur. The latter Appeal was transferred to the High Court and was registered as Appeal from Original Decree 183 of 1906. In the Appeal 347 of 1905 the present Appellant filed cross-objections under sec. 561 of the Code of Civil Procedure to the decree of the first Court.

The Appeals were heard together by

(3) I. L. R. 25 Cal. 786 at pp. 877-878; s. c. 2 C. W. N. 360 (1898).

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two learned Judges (Harington and Holmwood, JJ.) of the High Court who on the 18th of February 1908 delivered their judgments,* by which they decreed both the Appeals. Referring to the arguments put before them, and the judgment of the first Court, they expressed themselves in the principal judgment as follows :—

"The argument is ingenious but in our view it is not sound.

"The settlement is made on February 18th. Therefore in case of an ordinary contract of lease the annual jumma would be payable on February 18th in each successive year, but under Rule 7 of Part III, C. 16 of the Survey and Settlement Manual a settlement of revenue should ordinarily take effect from the beginning of the financial year next after that in which the proceedings of the Settlement Officer have been completed. If that Rule be applied the settlement dates from April the 1st, 1874, and the jumma would ordinarily be payable on April 1st each year.

"If it were ordinarily payable on April 1st each year, then the latest day of payment under the Board's Proclamation of 1871 is June 28th.

"In our opinion the undertaking in the kabuliyat does not have the effect of extending the time for the payment of the revenue, but is nothing more than a promise by the tenant that he will pay the revenue ordinarily payable on the first day of the financial year by the latest day of payment as fixed by the Board's Proclamation.

"Sec. 2 of the Act of 1859 is clearly applicable to monthly instalments and in revenue-paying estates and does not apply to a yearly jumma of tenures such as the one now under consideration.

"The revenue, therefore, being unpaid after June 28th the Collector was empowered under sec. 11 of Act VII of 1868 to sell up the holding."

Hence these appeals.

Sir R. Finlay, K. C., and *Mr. Ross* for the Appellant.—The sale was held without jurisdiction. The meaning of the kabuliyat is plain. It accepts the *jama* and fixes the date of payment and provides that in default the arrear will be realized according to law. There were no kists. The law is laid down by Act XI of 1859. Under the terms of the kabuliyat the revenue was payable on the 28th June 1902, and it could not possibly be "in arrear" till after that date.

Sec. 2 defines the word "arrear" of revenue. Read wtth sec. 3 and in the light of the preamble to the Act of 1859, the view of the Subordinate Judge that the estate was not in arrear till the 1st of July following was right. The Board of Revenue certainly had jurisdiction to fix dates of payment by the notification but the jurisdiction was to fix a day after the estate had fallen in arrears. There being in fact no arrear at the time of the sale the sale was absolutely void. Reference was made to *Harkhoo Singh* v. *Bunsidhur Singh* (3).

[LORD ATKINSON.—The date of payment is within the 28th June.]

Sir R. Finlay.—Yes. I do not know what the word was in the vernacular, but any way, it means "on or before the 28th."

The High Court has relied on the Survey and Settlement Manual. Rule 7, Pt. III, Ch. 16. That has no application.

* Reported at 13 C. W. N. 633.—*Durlabh Chandra Kar* v. *Hajee Bux Ellahi.*

(3) I. L. R. 25 Cal. 876, 878 : s. c. 2 C. W. N. 860 (1898).

Here the kabuliyat alone is evidence of the terms of the lease. It would be monstrous hardship if the estate were sold two days after the date fixed. The Act intended that there should be a further notice before such a serious step as sale was taken.

Mr. L. DeGruyther, K. C., and *Mr. Brown* for the Respondent.—Act XI of of 1859 does not apply to this case. It is confined to estates paying Government revenue. The present case relates to a tenure which is not a mehal and would not come within the Act. The sale here was held under sec. 11, Act VII of 1868 (B. C.). Sec. 1 of this Act defines "revenue" which has a far greater import there than in the Act of 1859. The Board of Revenue fixed the latest day of payment in 1871. The words "in the manner prescribed in sec. 3 of Act XI of 1859" in sec. 11 of Act VII of 1868 (B. C.), simply mean "according to the manner prescribed by that section, *i.e.*, by the notification, etc., which regulated the procedure of the sale. But the right to sell the tenure here accrued under the provisions of sec. 11, Act VII of 1868 (B. C.). The procedure regulating the sale under the Act VII of 1868 was the same as provided by Act XI of 1859. The kabuliyat was executed subject to the terms of the notification. It means that the tenure would be sold in default of payment on or before the 28th June.

[SIR JOHN EDGE.—You say that sec. 2 of Act XI of 1859 has no application at all.]

Mr. L. DeGruyther.—Yes.

The word "arrear" in sec. 11 for all practical purposes means "due and unpaid" or "due and recoverable." The date of payment is fixed by the Tenancy Acts which governs the relationship of

The fair test to apply is—Could an action for recovery of rent have been brought? I submit it could be. Further, the notification, dated the 6th October 1871, was published prior to the settlement and the kabuliyat. The settlement was made with reference to the notification. When the kabuliyat was executed it must be presumed that the parties did so with full knowledge of the notification. Then again, the word in the kabuliyat is "within." It is advisedly used. It was meant to enable the Court to sell the tenure on the 28th. Our cause of action accrued after the sunset of the 27th and the right to sell on the 28th.

[LORD SHAW.—Is it an arrear or is it not during the course of the day?]

Mr. DeGruyther.—I submit it is. There can be no question that the word is "within." It was an official translation and the practice of the Board has been to take as final the translation certified as correct by the Registrar of the High Court. Sec. 2, Act XI of 1859, deals with cases where payments are made by instalments. It does not apply to annual payment. The result of the construction put by the Subordinate Judge would be that the arrears would not be recoverable before two years. It is quite unreasonable to believe that the Legislature ever intended that. Reference was made to *Mahomed Jan* v. *Munshi Ganga Bishun Singh* (4).

Mr. Ross replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—These are consolidated Appeals from judgments and decrees of the High Court at Calcutta, which set aside two decrees of the Subordinate

(4) L. R. 33 I. A. 80: s. c. 15 C. W. N. 443 (1911).

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Judge in the Second Court of 24-Pergunnahs, in Bengal. The question for determination by the Board is whether a certain sale of holdings for arrears of revenue, made to the Respondent on the 16th March 1903, should be set aside.

On the 27th March 1902, the Appellant purchased these holdings for Rs. 16,000 from a son of Bhagaban Chandra Banerji. By the kabuliyat executed in the year 1874 by Bhagaban, who was thus the Appellant's predecessor in title, it was stipulated as follows :—"I shall pay the said jumma in the Collectorate within the 28th day of June every year." The holdings were Government tenures in Dihi Panchannagram in the District of Twenty-four-Pergunnahs, and it is not disputed that such tenures came under the Act XI of 1859 by virtue of the provisions of Act VII of 1868*. By sec. 2 of the former Act an arrear of revenue was described thus :—

"If the whole or a portion of a kist or instalment of any month of the era, according to which the settlement and kistbundi of any mehal have been regulated, be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered as an arrear of revenue."

It seems accordingly hardly to admit of dispute that, if this section applied the rent payable under the kabuliyat on the 28th June 1902 was not in arrear till the 1st of July thereafter.

Statute having thus made clear what was to be considered an arrear of revenue, and at what date a past due payment was to be "considered as an arrear of revenue," namely, on the first of the month following that in which the payment fell due, the further question is this, *viz.* :— Was this sale conducted in accordance with the procedure prescribed by Statute for the sales of property in respect of unpaid arrears of revenue?

While, as stated, it was admitted that these tenures were brought under the Act of 1859 by the Statute of 1868, it was nevertheless contended that there was some distinction to be made with reference to procedure and with reference to what constituted "arrears." The contention is important and was ably presented, but, in their Lordships' opinion, it is without foundation. The Act of 1868 above referred to extends the word "revenue" so as to include "every sum annually paid to Government by the proprietor of any estate or tenure in respect thereof." As to the attempt to differentiate procedure under the two statutes, the answer to that seems sufficiently contained in sec. 30 of the later Act, which provides that it shall be read with, and taken as part of, the former. The date when a past due payment was to be considered arrears having accordingly been settled by sec. 2 of the Act of 1859, as quoted, their Lordships cannot agree with the judgment of the High Court, which introduces a reference to "the settlement" having been made on 18th February. Therefore, say the learned Judges :—

"In the case of an ordinary contract of lease, the annual jumma would be payable on 18th February in each successive year; but under Rule 7 of Part III, c. 16, of the Survey and Settlement Manual, a settlement of revenue should ordinarily take effect from the beginning of the financial year next after that in which the proceedings of the settlement officers have been completed. If that rule be applied, the settlement dates from April 1874, and the jumma would ordinarily be payable on 1st April each year."

The statements and considerations here given do not appear to their Lordships to bear upon the present case. Whatever might be the ordinary date of payment, or, *secondly*, whatever might be the dat

* Of the Bengal Council.—ED.

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when "the settlement" is made, or, *thirdly*, whatever be the provisions of the Survey and Settlement Manual, it does not appear to their Lordships legitimate, by reason of any one or all of these things, to vary the actual date of payment in the kabuliyat in the present case, which is the 28th June, or the actual date when a past due payment should be considered as an arrear, which is by the Statute of 1859 the 1st July 1902. No variation of the contract of parties and the statutory provisions applicable thereto is possible by reason of general considerations or administrative rules which have not the sanction of Indian Statute. In the words of Lord Watson, in *Balkishen Das* v. *Simpson* (1), referring to the Act of 1859:—

"The Act does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of Government revenue. The whole clauses of the Act of 1859, in so far as these relate to sales or to their challenge at the instance of the proprietor, as well as the provisions of sec 2 of Bengal Act 7 of 1868, are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty."

The date when by Statute accordingly this revenue was considered in arrear was the 1st July 1902. At what date was default made in paying that arrear of revenue, so as to entitle a sale of the estate to be made? This, which appears to their Lordships to be the real question in the case, is clearly answered by the Act of 1859 itself and by the notification which followed thereon. By sec. 3 of the Act, "The Board of Revenue at Calcutta shall determine upon what dates all arrears of revenue, and all demands which by the Regulations and Acts in force are directed to be realised in the same manner as arrears of revenue, shall be paid up in each district under their jurisdiction, in default of which payment the estates in arrear in those districts, except as hereinafter provided, shall be sold at public auction to the highest bidder." In compliance with this section, the Board of Revenue on the 6th October 1871 made and duly published a notification that it—

"has determined and fixed the 28th June of each respective year as the latest date of payment of the rents of all description of tenures in Khas Mehal Panchannagram, in default of which payment on or previous to that date, tenures in arrears in Mehal will be sold at public auction to the highest bidder."

Bearing in mind that the whole provisions with regard to sales are, in the language of Lord Watson, "framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty," and that this tenure could not be considered in arrear until the 1st July 1902, it appears fairly clear that the 28th June 1903 is the first date under the Proclamation and the Statute when there has arisen such a default as would enable that "tenure in arrears" to be sold. It so happens that the payment in the present case is not a monthly, but an annual payment, and it further happens that the payment fell to be made on the 28th June 1902. The Statute having by plain implication forbidden the estate to be considered in arrear until the 1st July, it appears to follow that the date fixed as that on which tenures in arrear will be sold must be the succeeding 28th June, namely, in the year 1903. This estate, however, was sold in the previous month of March, and their Lordships agree with the view of the Subordinate Judge in thinking that the sale is accordingly invalid. In the language of the learned Judge—

"The Board of Revenue are required, under sec. 3 of the Act, to determine on what date *arrears of revenue* shall be paid up, in default of which pay-

(1) L. R. 25 I. A. 151 s. c. 2 C. W. N. 513 (1898).

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ment the estates in arrear shall be sold at public auction."

Their Lordships agree with the view that the notification must, having regard to this section of the Statute which authorised it, be applied to the present estate as fixing the 28th June 1903 as the date on which, if the arrears are not paid up, the estate can be sold. If, in cases such as the present, this holds up the power of sale until nearly a year's revenue stands in arrear, that matter, including the question whether more than one date for payment of arrears should be set up as periods of default, is one for the consideration of the Legislature and the Board of Revenue.

Their Lordships will humbly advise His Majesty that the Appeal should be allowed, the judgment and decree of the High Court reversed, and those of the Subordinate Judge restored, the costs of the suit and of the Appeal being borne by the Respondent.

Solicitors: *Messrs. W. W. Bax & Co.* for the Appellant.

Solicitor: *Solicitor, India Office*, for the Respondent.

B. D. *Appeal allowed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2032 OF 1909.

JENKINS, C. J. N. R. CHATTERJEA, J. 1912, Heard, 28 and 29, March. Judgment, 29, March.	AYENNUSSA BIBI, Plaintiff, Appellant, *v.* SHEIKH ISUF and others, Defendants, Respondents.

Co-sharers—Possession by one tenant in common when adverse to others—Non-participation of profits for a long time, effect of.

In order to establish adverse possession by one tenant in common against his co-tenants, there must be exclusion or ouster and the possession subsequent to that must be for the statutory period.

Mere non-participation of rents and profits would not necessarily of itself amount to exclusion, but such non-participation or non-possession may in the circumstances of a particular case amount to an adverse possession.

What the circumstances may be which may have to be considered in determining the question of ouster, discussed.

This was an Appeal preferred against the decree of Babu Pran Krishna Biswas, Subordinate Judge of Zillah Dacca, dated the 24th of June 1909, confirming that of Moulvi Abdul Khaleque, Munsif of Munshigunge, dated the 11th of February 1909.

The Plaintiff-Appellant, who was the Defendant-Respondent's sister, sued the latter for a certain share in certain lands which she alleged formerly belonged to their father of which she alleged she inherited a share on the death of her father and another on the death of her mother.

The Defendants set up various pleas in defence including that of limitation.

The Munsif found that only some of the plots in suit really belonged to the father of the Plaintiff and the Defendants, that the Plaintiff's claim as her father's heir was barred by limitation but that with regard to her claim as her mother's heir, the latter died within 12 years of the suit and as to this she was entitled to a decree for a half anna share of the said plots.

Both parties appealed. The Subordinate Judge dismissed both appeals. On the question of limitation raised in Plaintiff's appeal, he observed as follows:—

"The next objection of the Appellant is

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that the Munsif is wrong in holding that her claim as her father's heir is barred by time. The father, as I have said, died more than 40 years ago. The Plaintiff was married in her father's life-time and for some 9 or 10 years after that she used to run away from her husband's house and come to her father's and she lived there for the most part during those years. But after that, when she became a mother, she is living continuously at her husband's, only occasionally coming to her paternal *bari* on a short visit to her mother and brother. The brother has got his name registered in the *sherista* of the zemindars and he is alone paying rent and cultivating the lands, taking the produce, for the last 30 years or more. I do not believe for a moment that the Plaintiff's husband and sons cultivated these lands along with Defendant No. 1 and used to get a share of the produce. The evidence on this point is utterly worthless and does not deserve notice. It is urged by the Appellant's pleader that the Defendant never set up an adverse title to these lands to the knowledge of the Plaintiff. But when the Defendant is in sole possession for such a length of time and is alone taking the produce to the exclusion of his sister, it cannot be said that he is in possession not only on his own behalf but on behalf of his sister also. I think that the Plaintiff's claim as her father's heir was properly held to be barred by time.

"One of Plaintiff's sisters died some years ago and the Plaintiff contends that her mother got a portion of her deceased daughter's share and thus she was the owner of more than 2 annas. But the claim of that daughter also was barred for the same reason as applies to the case of the Plaintiff and the mother could not get any share as that daughter's heir. The Defendant No. 1 is the sole owner of that daughter's share as he was in sole possession and the lower Court properly held that the mother's share was only 2 annas and the Plaintiff is entitled to a fourth of this share."

Both the appeal and cross-appeal are dismissed with costs.

Babu Ramesh Chandra Sen for the Appellant contended that the parties being co-sharers, the Defendant No. 1's possession did not become adverse to his sisters merely because he had alone enjoyed the profits for a long time; and on the other hand, if his possession was adverse, as he possessed the lands on behalf of his mother as well as for himself the mother had also a share in the title which he had thus acquired by adverse possession, so that the Plaintiff as one of the heirs of the mother was entitled to a share in that title. Under sec. 28 of the Limitation Act the Plaintiff's title is extinguished and in this country adverse possession for 12 years has always been held to confer a good title on the person in adverse possession for that period. So if the Plaintiff lost her title by the adverse possession of the mother and brother, she gets part of it back as the mother's heir. But in this case the Defendant's possession really never became adverse as no distinctly hostile title was openly set up by the brother. *Ujalbi Bibi* v. *Umakanta Karmokar* (5) and *Jogendra Nath* v. *Baladeb Das* (6). The question whether possession under certain circumstances is adverse or not is not a mere question of fact, it is a mixed question of law and fact which can be gone into in second appeal. *Luch-*

(5) 9 C. W. N. 32: s. c. I. L. R. 31 Cal. 970 (1904).

(6) 12 C. W. N. 127 (1907).

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meswar Prosad Singh v. *Manowar Hossein* (7). The rule laid down by Lord Mansfield in the case of *Doe Dem Fishar and Taylor* v. *Prosser* (1), applied in *Gangadhar* v. *Parashram* (3), was that it was for the jury to say whether from the length of possession by one co-sharer an actual ouster could be presumed. But so long as it is possible to presume that the sisters allowed the brother out of natural love and affection to enjoy all the profits, the brother's possession will not be presumed to be adverse to the sisters. This is specially so in the case of females in this country. *Abdool Hossain* v. *Lall Chand* (8). Of course there may be cases where a presumption of ouster at some previous time may arise from length of possession but then all the other surrounding circumstances must be considered and not merely the length of possession. Moreover, if the suit is to be held to be barred by limitation it is not sufficient merely to hold that the Defendant's possession is adverse, it must be found that it has been adverse for 12 years or more before suit. As for Tasarunnissa's share, if at the date of her death, the Defendant No. 1 had not already been in adverse possession for 12 years or more, her title was not extinguished and the mother became one of her heirs and the Plaintiff is entitled to a share in that also. So unless the Defendant No. 1's possession had become adverse 12 years before her death the Plaintiff's claim with respect to that cannot be barred by limitation.

Babu Surendra Nath Guha for the Respondent-Defendant No. 1 who was called upon to reply on the question of limitation and Defendant No. 1's adverse possession only and not on the question whether the mother acquired a title by adverse possession which she transmitted to her heirs, relied on *Gangadhar* v. *Parashram* (3) and *Bandacharya* v. *Shriniwasacharya* (4).

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This appeal arises out of a suit for exclusive possession of land on partition, and the real question in dispute between the parties is what is the amount of the shares of the respective litigants. This, as the case has been placed before us, depends solely and exclusively on the question how far Defendant No. 1 can claim the benefit of the statute of limitations. The claim under the statute of limitations arises as follows:—Defendant No. 1 is the brother of the Plaintiff, and on their father's death, which occurred many years ago, the property devolved on the father's widow, his son Defendant No. 1 and three daughters of whom the Plaintiff is one. It is the case of Defendant No. 1 that he has been in exclusive possession of the land in dispute from his father's death, or at any rate, in possession to the exclusion of his sisters, and on that ground he claims to have acquired a title by adverse possession, urging that their interests have become extinguished by virtue of sec. 28 of the Indian Limitation Act. Both the lower Courts have decided in his favour, and from the decree of the lower Appellate Court the Plaintiff, one of the sisters, has preferred the present appeal.

It is urged that there are no materials on which the lower Courts were entitled to hold that there was an adverse posses-

(1) 1 Cowper 217 (1774).
(3) I. L. R. 29 Bom. 300 (1905).
(7) I. L. R. 19 Cal. 253 (1891).
(8) 18 C. L. R. 323 (1883).

(3) I. L. R. 29 Bom. 300 (1905).
(4) 5 Bom. L. R. 742, 744 (1903).

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sion by Defendant No. 1. The law on the subject I take to be well settled. In order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster and the possession subsequent to that exclusion or ouster must be for the statutory period. The findings of the lower Appellate Court would go to satisfy these conditions, but I do not read the judgment of the Subordinate Judge as satisfying both those conditions, that is to say, *first* of all, that there has been an exclusion, and, *secondly*, that subsequently to that exclusion there has been an adverse possession for the statutory period of twelve years and upwards.

Accepting this statement as the legal position, the only other question that arises is what is sufficient evidence of exclusion. To my mind this must depend upon the the circumstances of each case. I am prepared to repeat what I have said in a previous case that mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession, but such non-participation or non-possession may in the circumstances of a particular case amount to an adverse possession. Regard must be had to all the circumstances, and a most important element is the length of time. In this connection I cannot do better than refer to what was said by Lord Mansfield and the other Judges in *Doe* v. *Prosser* (1) and the statement of the law by Lord Denman in *Culley* v. *Doe dem Taylerson* (2). For convenience of reference I may say that quotations from these cases may be found in *Gangadhar* v. *Parashram* (3) and *Bandacharya* v. *Shriniwasacharya* (4). The circumstances that have to be taken into consideration appear to me to be these among others,—the relationship of the parties, their position, the mode of life in the particular community to which the parties belong, the character of the property and other circumstances of a similar character. What has to be seen is whether, having regard to the long possession and to all the circumstances, it can be said that there has been such an exclusive possession or perception of profits by the brother in this case as to afford an indication of a denial of the rights of the other co-tenants, and whether on the facts as found it would be right and reasonable to hold that there had been not only an exclusion of the co-tenants but an exclusion so distant in date as to justify the view that there had been twelve years' adverse possession on the part of Defendant No. 1 at the time when this suit was instituted.

There is a subsidiary point in this case which has to be considered. It is urged on the part of the Plaintiff that in addition to the share to which she succeeded as part of her mother's original share, the mother's estate was augmented by a portion derived by her from a predeceased daughter. When that daughter died does not precisely appear. The Plaintiff stated that she died 5 or 6 years ago; we are told that the evidence is that she died 15 years prior to the institution of the suit. Now, with reference to this daughter and the share alleged to have been derived by the mother, it will be necessary for the Court to consider whether at the date of the daughter's death, there had been twelve years' adverse possession against the daughter in the sense that I have indicated, for if there had been none, then the daughter's share was not extinguished and a portion

(1) 1 Cowper 217 (1774).
(2) 11 A. & E. 1008, 1014 (1840).
(3) I. L. R. 29 Bom. 300 (1905).
(4) 8 Bom L R. 742, 744 (1871).

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of it came to the mother and from the mother there would be a devolution in respect of it on the Plaintiff, for it is not suggested that there was any adverse possession on the part of Defendant No. 1 against his mother.

We think that in the circumstances the proper course will be to send down the following issues for determination by the lower Appellate Court: (1) Whether having regard to all the circumstances it is to be inferred that there was an exclusion by Defendant No. 1 of the Plaintiff and her deceased sister, (2) If so, whether by adverse possession, (a) the Plaintiff's right to her share and (b) Tasarunnissa's right to her share became extinguished. This must be decided on the record as it stands and the return should be made within two months.

Case remanded.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO. 278 OF 1910.

BRETT, J.	SHEIKH GOLAM RAHMAN,
SHARFUDDIN, J.	Petitioner, Appellant,
1912.	*v.*
Heard,	SHAIKH WAHED ALI
16, April.	and ors., Creditors,
Judgment,	Opposite Party, Respondents.
24, April.	

Provincial Insolvency Act (III of 1907), sec. 15—Debtor's application for insolvency not made bonâ fide*—Adjudication, if may be refused.*

Quære:—***Whether if upon the facts before the Court it is clear to the Judge that the debtor applying for insolvency is not an insolvent he is bound to adjudicate him an insolvent.***

GIRWARDHARI *v.* JOY NARAIN (4), UDAY CHAND MAITY *v.* RAM KUMAR KHARA (1), SHEIKH SAMIRUDDIN *v.* SRIMATI KADUMOYI DASI (2) AND KALI KUMAR DAS *v.* GOPI KRISHNA RAY (3) *referred to.*

This was an Appeal preferred on the 10th of June 1910 against the order of Mr. F. Roe, District Judge of Zillah 24-Pergunnahs, dated the 9th of May 1910.

The material facts will appear from the judgment.

Mr. J. W. Chippendale for the Appellant.

Moulvis Nuruddin Ahmed, Wahed Hossain and *Babu Surendra Madhub Mullick* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This Appeal is against an order of the District Judge of 24 Pergunnahs, dated the 9th May 1910, dismissing an application made by the Petitioner-Appellant to be declared an insolvent. The learned Judge has disposed of the application after examining the applicant alone and his judgment which is very brief is as follows:—"The application is refused with costs. The property transferred to the mother is worth more than the debts and there is a legal presumption that the transfer was fraudulent. If the mother succeeds in establishing her right against the creditors, the debtor may apply again to be declared insolvent." The Petitioner, the original applicant, has appealed and the appeal has been opposed by the Creditors who opposed the original application.

In support of the Appeal, reliance is placed on the decisions of this Court in three cases reported in 15 Calcutta Weekly Notes and on another case reported in I. L. R. 32 Allahabad. The cases in 15 Calcutta Weekly Notes are *Uday Chand Maity* v. *Ram Kumar Khara* (1), *Sheikh*

(1) 15 C. W. N. 213 (1910).
(2) 15 C. W. N. 244 (1910).
(3) 15 C. W. N. 990 (1911).
(4) I. L. R. 32 All. 645 (1910).

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Samiruddin v. *Srimati Kadumoyi Dasi* (2) and *Kali Kumar Das* v. *Gopi Krishna Ray* (3) and the Allahabad case is *Girwardhari* v. *Joy Narain* (4). Relying on these decisions, it is contended on behalf of the Appellant that the learned District Judge was not justified in dismissing the application in the way in which he has done. It is contended that on an application for adjudication being made by a debtor, he is entitled to be adjudged an insolvent and that, under sec. 15 of the Act, the learned Judge cannot deal with the case in the way in which he has done in the present instance and dismiss the application on the ground that it may not have been made in good faith. We do not think it necessary to express any opinion on the broad contention which has been advanced before us but we would observe that the learned Judges of the Allahabad High Court have noticed that an Insolvency Court has inherent powers to dismiss an application if it is not made with a *bonâ fide* view of obtaining an adjudication, but for an inequitable or collateral purpose; and it seems open to question whether, if on the facts before the Court it is clear to the Judge that the applicant is not an insolvent, the Court is, under the law, bound to adjudicate him an insolvent. But, in the present case, the learned Judge has really not gone into the application at all and we think, in consequence, that the case must be sent back for retrial. The evidence as recorded does not support the conclusion that the applicant is able to pay his debts nor is there anything to show on the face of the judgment that the grounds on which possibly the learned Judge might have arrived at the conclusion that the application was not *bonâ fide* are made out. In these circumstances, we think the Appeal must be decreed, the judgment and order of the lower Court must be set aside and the case sent back to that Court for decision according to law. Costs will abide the result. We assess the hearing-fee in this Court at two gold mohurs.

Case remanded.

(2) 15 C. W. N. 244 (1910).
(3) 15 C. W. N. 990 (1911)
(4) I. L. R. 32 All. 645 (1910).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 2306 OF 1909.

CARNDUFF, J. CHAPMAN, J. 1912, Heard, 10 and 11, June. Judgment, 11, June.	SHEIKH MAJEBAR RAHMAN, Defendant, Appellant, *v.* SYED MUKTASHED HOSSAIN and another, Plaintiffs, Respondents.

Indian Contract Act (IX of 1872), sec. 23—Criminal breach of trust, prosecution against gomastha *dropped at the instance of Magistrate on accused executing mortgage bond for the amount embezzled—Compounding non-compoundable offence, if contrary to public policy.*

Where at the trial of a gomastha *for criminal breach of trust under sec. 408, Cr. P. C., the Magistrate having suggested that the matter should be settled out of Court the accused executed out of Court a mortgage bond in favour of his master for the amount embezzled, and the prosecution was dropped and the accused was acquitted or discharged, though the withdrawal of the prosecution was not mentioned in the mortgage bond as forming part of the consideration :*

Held—*That the mortgage bond was illegal and a suit on its basis was not maintainable.*

SHEIKH MAJEBAR RAHMAN *v.* SYED MUKTASHED HOSSAIN.

Per CARNDUFF, J.—*It is against public policy to compound a criminal case which is declared to be non-compoundable by the Criminal Procedure Code and an agreement to that end is wholly void in law.*

WILLIAMS *v.* BAYLEY (2) *referred to.*

The circumstance that the Magistrate wrongfully suggested or sanctioned the compromise makes no difference.

COLLINS *v.* BLANTERN (6) *relied on.*

SHEIKH NUBBEE BUKSH *v.* MUSSTT. BIBEE HINGON (1) *not followed.*

This was an Appeal preferred on the 15th of November 1909 against the decree of Mr. F. Roe, District Judge of Zillah 24-Pergunnahs, dated the 1st of June 1909, confirming a decree of Babu Basanta Kumar Pal, Munsif of Basirhat, dated the 23rd of December 1909.

The Defendant was the Plaintiffs' *tehsildar* and was suspected of embezzling a large sum of money and was arrested by order of the Sub-Divisional Magistrate of Basirhat. This case was subsequently transferred by the order of the High Court to Baraset. The Sub-Divisional Magistrate of Baraset before whom the case was pending for trial suggested that the case was one which might properly be settled out of Court. Accordingly the Defendant after consultation with his legal adviser entered into an agreement to pay Rs. 800 to the Plaintiffs in instalments, the whole sum being charged on Defendant's property. The present suit was instituted to recover Rs. 700, the balance left after an alleged payment by the Defendant of one instalment of Rs. 100 only. The defence *inter alia* was that the Defendant had been induced by undue influence to execute the mortgage and that no portion of the amount mentioned in the bond was due from him to the Plaintiffs. The Munsif upon the evidence found that the Defendant had not been induced to execute the bond by undue influence and he further held that there was consideration for the bond and in that view he decreed the suit.

On appeal the plea of undue influence was abandoned and the only point argued was that the agreement resulting in the bond was contrary to public policy and hence the bond was not enforcible. The District Judge upon this plea observed that the Magistrate charged with the maintenance of the criminal law in this case virtually told the Plaintiffs "the criminal law will be satisfied if your servant makes restitution to you"; and accordingly the Plaintiffs accepted from their servant not immediate restitution but an assurance of ultimate restitution. In such circumstance the learned District Judge held that his conscience felt no repugnance to such an agreement and he failed to see any danger to the public good in it. He also relied on *Sheikh Nubbee Buksh* v. *Musstt. Bibee Hingon* (1) and affirmed the decree of the Munsif. The Defendant preferred this Second Appeal.

Babus Dwarka Nath Mitter and *Satindra Nath Mukerjee* for the Appellant.

Moulvi Wahed Hossain for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

CARNDUFF, J.—The Appellant before us was the *gomastha* of the Respondent. He was prosecuted by the Respondent for criminal breach of trust under sec. 408 of the Indian Penal Code in respect of

(1) 8 W. R. 412 (1867)
(2) L. R. 1 H. L 200 (1866).
(6) 1 Sm. L. C. Ed. 11, at p. 369 (1765).

(1) 8 W. R. 412 (1867).

certain moneys collected in the course of his duty. The Magistrate before whom the case was being tried, suggested, after having drawn up a charge, that the matter was one which might appropriately be settled out of Court. Accordingly the matter was settled out of Court. The Appellant executed a mortgage bond for the amount embezzled, and, though the withdrawal of the criminal prosecution is not mentioned in the instrument as forming part of the consideration, the prosecution was in fact dropped by the Respondent after the execution of the deed, and the Appellant was then acquitted or discharged. The suit out of which this appeal arises, was afterwards brought upon the mortgage bond executed in the circumstances just described, and it has been decreed by both the Courts below. The Defendant has now preferred this Second Appeal to the High Court.

In my opinion, the Appeal clearly must be allowed. The lower Appellate Court has held that no general rule as to what is, or what is not, contrary to public policy can be, or has been, laid down, and, relying on *Sheikh Nubbee Buksh* v. *Musstt. Bibee Hingon* (1), has declared that its conscience felt no repugnance towards the agreement between the Respondent and the Appellant, and that it entirely failed to see any danger to the public good therein. Now, the case cited by the learned District Judge stands, as far as I know, absolutely alone, and it appears to me to run counter to the trend of all authority. It is a case, moreover, of 1867, that is to say, at a time when the law on the subject had not been codified by the Indian Contract Act of 1872 and when the Code of Criminal Procedure in force contained no provision such as that to be found in sec. 345 of the present Court for the compounding of offences. The law, therefore, as to when there might be a compromise in a criminal case was not settled, and the law as to agreements contrary to public policy was probably equally unsettled. Now, we have for our guidance sec. 345 of the Code of Criminal Procedure of 1898 and sec. 23 of the Indian Contract Act of 1872 with its Ill. (*h*), and there can, so far as I can see, be no doubt as to what the legal position is.

The broad principle is laid down by Lord Westbury in *Williams* v. *Bayley* (2), and the learned District Judge has himself referred to that decision, although he seems to have failed to appreciate its effect. If a criminal case is declared to be non-compoundable, then it is against public policy to compound it, and any agreement to that end is wholly void in law. Criminal breach of trust is (see sec. 345 of the present Code of Criminal Procedure) non-compoundable, either with or without the sanction of the Court. *Keir* v. *Leeman* (3), which was affirmed by the Exchequer Chamber in *Keir* v. *Leeman* (4), and followed by the Court of Appeal in *Windhill Local Board of Health* v. *Vint* (5) is ample authority for holding the view that the circumstance that the Magistrate wrongfully suggested or sanctioned the compromise makes no difference whatever. And the principle, established by *Collins* v. *Blantern* (6) that illegality may be pleaded as a defence to an action on a bond, has been so often recognised and is so well settled that it

(1) 8 W. R. 412 (1867).

(2) L. R. I H. L. 200, 220 (1866).
(3) 13 L. J. R. Q. B. 259 (1844).
(4) 9 Q. B 371 (1846).
(5) 45 Ch. D. 351 (1890).
(6) 1 Sm. L. C. Ed. 11, at p. 369 (1765).

would be useless to enter into any discussion regarding it.

This Appeal, therefore, must be allowed, the decrees of the Courts below discharged and the Respondents' suit dismissed with costs throughout.

CHAPMAN, J.—I agree but desire to carefully confine my reason for holding that the bond was void to the ground that the consideration for the bond was found by the lower Court to be a promise to withdraw from the prosecution in a case the compromise of which is expressly forbidden by the Code of Criminal Procedure.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 168 OF 1910.

HARINGTON, J.
MOOKERJEE, J.
1912.
7, March.

NIM CHAND SHAHA, Plaintiff, Appellant,
v.
JOY CHANDRA NATH and another, Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 48—Raiyat letting out a portion of holding to under-raiyat—Rent if must be limited to 25 per cent. in excess of rent assessable on that plot.

Sec. 48 of the Bengal Tenancy Act which provides that the landlord of an under-raiyati holding at a money-rent shall not recover rent exceeding that which he himself pays by more than 25 per cent. applies only to cases on which the land held by the raiyat is co-extensive with the land held by the under-raiyat.

The mere fact that the raiyat's lease showed what rent was assessed in respect of the particular plot let out to the under-raiyat did not entitle the latter to pay rent up to 25 per cent. in excess of the assessed rate.

This was an Appeal preferred on the 29 h of January 1910 against the decree of Mr. G. N. Roy, District Judge of Zillah Tipperah, dated the 11th of October 1909, modifying the decree of Babu Amulya Gopal Roy, Munsif at Commillah, dated the 29th of March 1909.

The material facts will appear from the judgment.

Babus Jara Kishore Chaudhury and *Gopal Chandra Das* for the Appellant.

Babu Birendra Chandra Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal on behalf of the Plaintiff in an action for rent. The sole point in controversy relates to the rate at which the Plaintiff is entitled to realise rent in view of sec. 48 of the Bengal Tenancy Act. The Plaintiff is an occupancy raiyat and the Defendants are under-raiyats under him. The Defendants were on a previous occasion sued in ejectment ; they then pleaded that they held these lands on payment of rent at the rate of Rs. 10 a year. On the present occasion the Plaintiff claims at the rate of Rs. 14 a year. The defence is that under sec. 48 of the Bengal Tenancy Act he is not entitled to claim rent at a higher rate than Rs. 3-5-7. This contention was overruled by the Court of first instance and a decree was made at the rate of Rs. 10 a year. Upon appeal the District Judge has allowed the contention of the Defendants to prevail. The question raised is apparently one of first impression and the solution must depend upon the true construction of sec. 48.

The Plaintiff has an occupancy holding which contains 12 kauris and 13 gundas of land. In his lease, the lands are classi-

NIM CHAND SHAHA *v.* JOY CHANDRA NATH.

fied and rent is assessed at rates varying from Rs. 2-4 to Re. 1 a kauri, the aggregate rent is stated to be Rs. 21-14 a year. The Defendants have taken a lease of one of these plots only, the rent whereof was assessed at Rs. 2-4 a kauri in the lease of the Plaintiff. The contention of the Defendant is that under sec. 48, cl. (*b*), the Plaintiff is not entitled to recover rent at a rate in excess of Rs. 2-13 a kauri. In our opinion there is no foundation for this contention.

Sec. 48 of the Bengal Tenancy Act provides that the landlord of an under-raiyat holding at a money-rent shall not be entitled to recover rent exceeding the rent which he himself pays by more than 25 per cent. It will be observed that the section does not expressly mention the land held by the under-raiyat, but the meaning plainly is that the landlord of the under-raiyat who holds under a money-rent is not entitled to recover rent exceeding by more than a quarter the rent which he himself pays in respect of the land let out to the under-raiyat. It has not been disputed that in cases in which the land comprised in the holding of the raiyat is of different qualities and there is no indication to show at what rates the various classes of lands were assessed, sec. 48 cannot be made applicable, if only a part of the land has been sublet to an under-raiyat. But the learned Vakil for the Respondent has suggested that where, as here, on the face of the lease of the raiyat the rates at which the different classes of land were assessed can be determined, the under-raiyat is not bound to pay more than 25 per cent. of the rent assessed with respect to the parcels in his possession. This argument, in our opinion, is based on a fallacy. It cannot be affirmed that the under-raiyat pays so much rent for any particular parcel. No doubt for the purposes of the assessment of the aggregate rent, certain rates were taken as the basis of the calculation by the superior landlord. Nevertheless the raiyat holds the entire land of the holding for the aggregate amount. If he fails to pay any portion of this rent, the entire holding is liable to be sold, and he cannot clearly save any particular parcel out of the holding by payment of the rent assessed upon the land comprised therein. In our opinion, sec. 48 applies to cases in which the land held by the raiyat is co-extensive with the land held by the under-raiyat. The section was never intended to apply to cases of the class now before us.

We may add that in the course of the argument at the bar, reference was made to the decision of Mr. Justice Geidt in the case of *Akhil Chandra* v. *Amjad Ali* (1), where a question similar in scope to the one before us, appears to have been raised but not decided ; that judgment, so far as it goes, supports the view we take.

The result therefore is that this appeal is allowed, the decree of the Court below set aside and that of the Court of first instance restored with costs in this Court.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 636 AND 637 OF 1912.

HOLMWOOD, J.
IMAM, J.
1912,
Heard,
13, June.
Judgment,
18, June.

RAM PRATAP NEMANI
and others,
v.
KING-EMPEROR.

Betting on cotton figures, if an offence—Calcutta Police Act (IV, B. C. of 1866, as amended

(1) S. A. 415 of 1903, unreported.

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by Act III, B. C. of 1897), sec. 44—Distinction between gaming and wagering—Cotton gambling not a game of contest.

No form of betting or wagering without instruments other than rain-gambling is an offence as created by Act IV (B. C.) of 1866. Apart from legislation, rain-gambling is gaming only when a complete apparatus is used for the purpose, otherwise it is not.

Gaming is playing at any game, sport, pastime or exercise, lawful or unlawful, for money or any other valuable thing which is staked on the result of the game, i.e., *which is to be lost or won according to the success or failure of the person who has staked.*

QUEEN *v.* ASHTON (3), LOCKWOOD *v.* COOPER (4) *referred to.*

Wagering which includes betting is making a contract on an unascertained event past or future (in which the parties have no pecuniary interest other than that created by the contract) by which the parties are to gain or lose according as the uncertainty is determined one way or another.

CARLILL *v.* THE CARBOLIC SMOKE BALL CO. (5) *referred to.*

Cotton gambling is betting pure and simple. Books, papers, notice boards and lists of prices furnish evidence of gambling but are not instruments of gaming.

This was a Rule granted on the 6th of May 1912 against the order of Mr. E. Keays, 2nd Presidency Magistrate of Calcutta, dated the 6th of May 1912, convicting the accused who took part in a certain form of gambling which has become well-known in Calcutta as "cotton gambling" under sec. 44 of Act IV of 1866 (B. C.), and sentencing them to one month's rigorous imprisonment each.

(3) 1 Ellis and Blackbourn 286 (1852).
(4) [1903] 2 K. B. 428.
(5) [1892] 2 Q. B. 484.

The facts of the case so far as they are material for this report appear from the judgment.

Mr. B. C. Mitter, Standing Counsel with *Mr. S. Roy*, appeared to show cause.

Messrs. Jackson, St. John Stephen C. R. Dass and *K. N. Chaudhuri* with *Babu Monmatha Nath Mukherjee* appeared in support of the Rule.

[HOLMWOOD, J.—The question before us is purely one of law. To all intents and purposes cotton gambling does not come within the purview of Act IV of of 1866. The question here is whether it is a gaming or wagering. Wagering has not been penalised in Bengal.]

Mr. Mitter—My contention is that it is gaming and not wagering.

[HOLMWOOD, J.—How can you say that after what the Bombay High Court had decided in *Queen-Empress* v. *Narottamdas Motiram* (1) about rain-gambling ?]

That stands on a different footing. Rain-gambling does not depend on the manipulation or anything done by the parties.

[HOLMWOOD, J.—Nor does it here.]

In gaming they required some instruments whereas in wagering one need not have anything at all. Now the question arises what are the instruments here. He relied on the case, *Anonymous Reference by the Recorder of Rangoon* (6), which was a case of lottery. The present case was much stronger. The Legislature has by implication accepted the construction of law in *Anonymous Reference by the Recorder of Rangoon* (6), for when an exposition of law has been made and in subsequent legislation that is not reversed, the presumption is that the Legislature knows it and has impliedly given sanction to it.

(1) I. L. R. 13 Bom. 681 (1889).
(6) 12 W. R. 34 (Cr.) (1869).

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[HOLMWOOD, J.—Mr. Justice Stephen says in *Hari Singh* v. *Jadu Nandon Singh* (2), that although contest is not necessary, a complete apparatus used for the purpose is necessary. Here there are no instruments at all. These papers and books are purely evidence and not instruments.]

Referred to the meaning of "gaming" according to the dictionary and said that it meant an agreement between two or more persons to risk any money in a contest or chance of any kind when the one must be a loser and the other a gainer. He also cited *Tollett* v. *Thomas* (7).

Mr. Jackson in reply pointed out that the intention to commit a wrong might be no element of a wager. He cited authorities and relied mainly on the following cases: *In re Hallett's Estate* (9), *Queen-Empress* v. *Govind* (10), *Queen-Empress* v. *Kanji* (11), *Emperor* v. *Tribhovandas* (12), *Emperor* v. *Jusab Alli* (13).

Cur. Adv. Vult.

The JUDGMENT OF THE COURT was as follows:—

The question upon which this Rule was issued is whether a certain form of gambling which has become well-known in Calcutta as Cotton Gambling comes within the provisions of sec. 44 of Act IV of 1866, as amended by Act III of 1897 (B. C.).

We may safely say at the outset that this is a pure question of law, and has nothing to do with the nature and effect of the particular form of gambling now under consideration, which may be, and in our opinion is, a most pernicious form of gambling, and yet may not be rendered penal by the Act under which these convictions have been held.

The offence which is created by sec. 44 of the Calcutta Police Act is that of owning or keeping, or being employed in, a common gaming house, or advancing or furnishing money for the purpose of gaming with persons frequenting that house.

The question then that arises in this case is whether the premises in which the Defendants carried on this cotton gambling is a "common gaming house" within the definition given in the Act. That definition is: "The words 'common gaming house' shall be taken to mean any house, room or place in which cards, dice, tables or other intruments of gaming are kept or used for the profit or gain of the person owning or using such house, room or place, whether by way of charge for the use of the instruments of gaming, or of the house, room or place or otherwise." (Sec. 3, Act IV of 1866). By Act III (B. C.) of 1897, the following was added to the definition of "common gaming house," in sec. 3 of the Calcutta Police Act, 1866: "or in which rain-gambling, that is to say, wagering on the occurrence or non-occurrence of rain, is carried on for the profit or gain of any such person as aforesaid;" (2) after the said definition was inserted: "gaming" shall include rain-gambling, "instruments of gaming" shall include books or registers in which rain-gambling wagers are entered, all other documents containing evidence of such wagers, and anything used as a means of rain-gambling. Clearly, therefore, by this enactment, the Legislature declared that it was doubtful whether rain-gambling

(2) 8 C. W. N. 468 (1904).
(7) 6 Q. B. 514 (1871).
(9) 13 Ch. D. 696 at p. 712 (1880).
(10) I. L. R. 16 Bom. 283 (1891).
(11) I. L. R. 17 Bom. 184 (1892)
(12) I. L. R. 26 Bom. 533 (1902).
(13) I. L. R. 29 Bom. 386 (1905).

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came within the scope of the Act before this amendment, and if it was doubted there could be no conviction.

In the year 1889, the Bombay High Court had held in the case of *Queen-Empress* v. *Narottamdas Motiram* (1), that Bombay Act IV of 1887, a similar Act to the Calcutta Police Act, did not apply to betting and that there was no law in India which made betting illegal. There is a distinction between betting and gaming, and to constitute a game there must be a contest and an active participation of certain persons is also necessary. Merely watching the rainfall was no contest and no active participation taken by the bettors. Rain betting is, therefore, not a game, and the place where it is carried on is not a "common gaming house." In the year 1904, seven years after the amending Act III of 1897 dealing with rain-gambling had been passed, this ruling was considered by a Bench of this Court in the case of *Hari Singh* v. *Jadu Nandon Singh* (2), where it was held that the machine known as "little horses" was an instrument of gaming, and that the act complained of was done in a public place.

These, as pointed out by Ghose, J., were the only points for decision, and he held that the question decided in the Bombay case, which was much pressed before this Court, was not in point, as it certainly is not, if the *ratio decidendi* is confined to the *dicta* which we have cited above from the *placitum*. But it was pointed out in a concurrent judgment by Stephen, J., that the Bombay Court had gone further, and he felt bound to express doubts which he felt as to the soundness of the judgment in *Queen-Empress* v. *Narottamdas Motiram* (1).

(1) I. L. R. 13 Bom. 681 (1889).
(2) 8 C. W. N. 458 (1904).

We do not quite follow him in his *dictum* that a more satisfactory distinction between gaming and betting is to be found by considering the popular rather than the scientific use of the word "game."

He lays down, as all the cases have laid down, that the Gambling Act has nothing to do with betting or wagering which may be considered synonymous terms. It is concerned only with gaming. It would appear, therefore, that all forms of betting and wagering which do not depend on the manipulation of instruments of gaming are excluded from the Act. He clearly holds that apart from legislation, rain-gambling is gaming if a complete apparatus is used for the purpose, otherwise it is not. Here we are in entire agreement with him, and we are not prepared to hold that the Bombay case, so far as it decided that a special apparatus consisting of a gutter and a rain guage used for the purpose of gambling and for no other purpose is not an instrument of gaming, was rightly decided.

But we cannot agree that the difference between gaming and betting depends on the event on which the bet is made. Betting must always be on an uncertain event, and betting in itself, apart from stakes being laid on a particular game or instrument of gaming in a public place, is not penal. Playing cards for money, whatever the game, is not penal, unless the game is played in a public place. Playing with cards, dice or money is penal, if done in a public place, whether it is ostensibly for money or not. It may be that horse-racing, if it degenerates into nothing but an occasion for betting, becomes gaming, but that is because the race-horses may, as

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Stephen, J., points out, then probably become instruments of gaming. We do not say that they do, but the criminality, if any, lies not in betting but in placing stakes publicly upon instruments of gaming for the pecuniary benefit of those who keep the racing establishment.

The offence as created by the Calcutta Act is a purely technical one and nothing has ever been done on this side of India to include any form of betting or wagering without instruments in the offence, except in the single case of rain-gambling without a machine, and in order to include this, extraordinary legislation has had to be undertaken to make the books and registers in which rain-gambling wagers are entered, and all other documents containing evidence of such wagers, instruments of gaming.

This they could not possibly be except for this express enactment, for evidence of a transaction cannot be the *causa causans* or instrument for carrying out that transaction. This has a most important bearing on this case, since, as we shall presently see, the only alleged instruments of gaming produced in this case are the books and papers, notice boards and lists of prices, which furnish evidence of the gambling upon cotton quotations, which is the subject of this Rule.

This distinction between gaming and wagering is clearly laid down by certain English authorities and though the English statutes do not apply in this country the distinction between wagering and gaming which has never been defined in any Indian Act may very well be gathered from the considered findings of English Judges.

Gaming is playing at any game, sport, pastime or exercise, lawful or unlawful, for money or any other valuable thing, which is staked on the result of the game, *i.e.*, which is to be lost or won according to the success or failure of the person who has staked. *Queen* v. *Ashton* (3), *Lockwood* v. *Cooper* (4). Wagering, which includes betting, is making a contract on an unascertained event past or future (in which the parties have no pecuniary interest other than that created by the contract) by which the parties are to gain or lose, according as the uncertainty is determined one way or the other, *Carlill* v. *The Carbolic Smoke Ball Co.* (5). The general effect of the legal meaning of these terms as interpreted by the Judges is well set out by Mr. C. F. Craes, the well-known authority on the interpretation of statutes, whose remarks we may adopt as expressing our own view on the subject. "It is somewhat difficult," he says, "exactly to define or adequately to distinguish these terms of allied meaning. The word 'game' is applicable to most pastimes and many sports irrespective of their lawful or unlawful character. 'Gaming' is now always associated with the staking of money or money's worth on the result of a game of pure chance or mixed skill and chance, and 'gambling' has the same meaning with a suggestion that the stakes are excessive, or the practice otherwise reprehensible, while 'wager' and 'wagering' are applied to money hazarded on any contingency in which the person wagering has no interest at risk, other than the amount at stake. Betting is usually restricted to wagers on events connected with sports or games, and 'lottery' applies to speculation to obtain prizes by lot or chance."

We mention this last because reference

(3) 1 Ellis and Blackburn 286 (1852).
(4) [1903] 2 K. B. 428.
(5) [1892] 2 Q. B. 484.

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has been made at the Bar to the case of *Anonymous Reference by the Recorder of Rangoon* (6), dated July 28th, 1869, upon Act III of 1867, an Act which contained similar provisions to Act IV of 1866. There it was held that lottery tickets, by reference to which it is to be decided whether the holder or purchaser wins the whole or any part of any stake, are instruments of gaming, similar to cards. This is not a judicial decision, inasmuch as no specific case was before the Court, but any *dictum* of Sir Barnes Peacock, C. J., and Dwarka Nath Mitter, J., carries with it weighty authority. But all that this amounts to is that a lottery is a game, inasmuch as an apparatus (usually a barrel) containing numbers corresponding to the tickets purchased by the shareholders is used for drawing and the drawers are players who are on the same footing as persons drawing from a pack of cards to see who gets the highest or lowest card. But we may accept this dictum without in any way impinging on the facts of this case. So it was held in *Tollett* v. *Thomas* (7) that a "pari mutual" for registering bets is an instrument of gaming; but it has never been held that a betting book or a notice in the newspapers giving the odds are instruments of gaming, though it has been held under a special Statute which has no application to India that boards showing the odds at race-courses are instruments of gaming. Now what are the facts here? People are invited to bet on the odds offered by the Defendant, who is *pro tanto* a book-maker, on certain figures. They can choose any figure from 1 to 10 or any combination of figures and they can wager any sum from 2 annas up to

(6) 12 W. R. 34 (Cr.) (1869).
(7) 6 Q. B. 514 (1871).

Rs. 10, receiving a voucher in return on which is entered in one column the amount they have paid and in an opposite column the amount they will win if the result of the quotations for the day divided by 5 ends in the figure they have selected.

Exhibit 2 is one of these voucher books, and in the examples we have seen as much as 40 to 1 is given by the book-maker and the system seems perfectly open and above-board.

Five quotations appear to be received daily, two from New York, and two from some other American market, and there is one quotation which is known as 'spot,' but this is immaterial, as they are all of a similar character. At 12 o'clock daily the result of the addition of these five quotations divided by five is posted on a board, and those who have betted on the winning digit get the sum marked on their voucher. The odds given are so liberal that at first sight it would appear a very advantageous business for the bettors, but it is alleged in Exhibit 15, an extract from the *Empire* newspaper, dated February 17th, 1912, that wholesale cheating goes on in this respect, the winning number being surreptitiously changed, if too much money has been laid on it. How far these allegations are true, we are unable to say, but the allegations, as well as the article in which they are exhibited, are wholly irrelevant for the purposes of this case. What is charged in the newspaper is cheating and there is no charge of cheating before us, and it has been held on the highest authority in England and India, the Judicial Committee of the Privy Council in the case of *Ramlol Thackoorsey Das* v. *Soojunmull Dhoondumull* (8), that the ques-

(8) 4 Moo. I. A. 339, 443 (1848).

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tion whether frauds might be committed or attempted from the desire of gain in such speculations was irrelevant, if the wager in question is not in itself illegal, and that it was for the Legislative Council in Calcutta to consider how far it may be conducive to the benefit of our Indian Empire to legislate on English lines against such wagers.

The judgment was pronounced by Lord Campbell in February 1848 and appears to have been speedily followed by the enactment of Act XXI of 1848, entitled an Act for avoiding wagers, which was passed by the Governor-General in Council on the 10th October 1848. This Act opens with the words: Whereas it is expedient to discourage gaming and wagering for money—thus making a clear distinction between the two, and it proceeds to make all agreements by way of gaming or wagering null and void. Its only other section abolishes the trial of issues on feigned wagers for ascertaining any disputed facts.

Having clearly recognised this distinction, the Legislature in India has made gaming in public places penal, and has, intentionally we must presume, refrained from passing any penal legislation against wagering or betting.

Finding that the system pursued in this cottton gambling appeared to be pure betting, we, at an early stage of the hearing, asked the learned Standing Counsel to have produced before us the exhibits to which Roman figures are attached which were alleged by him to be instruments of gaming. It was his first contention that the house was an instrument of gaming, but this proposition carries its own refutation on the face of it. The house is the place which is alleged to be a common gaming house and it has to be proved that (1) instruments of gaming were supplied for money or money's worth in that place, and (2) that that place is a public place. Now the alleged instruments of gaming are Exhibits I to 9 and they may be briefly described as follows:—

Exhibt I is a tin board hung up in the room containing the day's cotton figures. This is no more an instrument of gaming than the original telegram or an extract from a newspaper would be.

Exhibit 2: A similar wooden board hung up outside the premises in the open street and not challenged by the police authorities for several months.

Exhibit 3 is a canvas sign-board showing the name of the firm.

Exhibit 4 is a board showing the odds on a series of figures.

Exhibit 5 is a small board for writing the figure of the day. When seized this had on it $\frac{1072}{8}$.

Exhibit 6 is a small tin ticket with 9, the winning digit on it.

Exhibit 7 is a board giving the odds on place-betting.

Exhibit 8 is a board giving the odds on mixed double and triple events.

Exhibit 9: A box containing Rs. 410.

Every one of these things is exactly what may be found on the stall of any book-maker at the races, and though such boards may have been declared illegal in England, they have certainly not been made penal by any statute in force in Calcutta. What the effect of the introduction of the word "wagering" into the Bombay Act may be, it is not for us to enquire. They are mere evidence of gambling and are on exactly the same footing as the books and papers used for recording the bets.

In the case of rain-gambling these

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Contents.

NOTES.

WE HAD NOTICED SOME TIME AGO IN THESE columns the movement that has been gaining ground in England for bringing legal relief within the reach of poor people. Voluntary societies have been organised by young lawyers for giving legal advice and bringing legal remedies within their reach. We were apprehensive at first that the activities of these societies would go to increase litigation in the country. But we are glad to find that these poor men's lawyers not only protect the rights of the poor, but also discourage frivolous litigation. Their work is naturally meeting with general appreciation. We publish in another column a leading article from the *Times* which notices the excellent work that is being done by these societies. This leading English journal suggests that in England the Scotch system of helping poor men to avail themselves of legal remedies should be adopted and we see no reason why something similar may not be done in India. As the system is sufficiently explained in the article we would invite attention to it and commend it as a practical means of bringing justice within the reach of the humblest and the poorest of citizens.

IN MARKED CONTRAST WITH THE MOVEMENT IN England we find that some people in this city who are equally keen about bringing legal remedies within the reach of all at a moderate cost advocate the setting up in Calcutta of Courts of a lower status with judges of an inferior type dealing out justice to its citizens at a breakneck pace. Or in other words the suggestion is that there should be a City Court which, we presume, would be but a Small Cause Court of a magnified type with only higher jurisdiction. No one in England would ever dream of suggesting that the jurisdiction of the High Court should be ousted from the city of London and replaced by that of inferior Courts. But there are a class of people both here and in England who are for reducing everything in India to a lower level and, curiously enough, with the avowed object of securing efficiency.

THEY ARE BLIND TO THE FACT THAT JUDGES of inferior qualification will neither be able to dispose of contested cases any quicker than High Court Judges of much greater ability nor would the public be satisfied with the quality of justice that they would get from inferior Courts. It is a well-known fact that a contested case is disposed of on the Original Side of the High Court much more speedily than in any mofussil Court. So the remedy lies not in reducing the status of the Court or the qualification of the Judges but in cheapening the legal procedure. We would not at all object if strict limitations were imposed in respect of lawyers' fees and measures were adopted for the strict enforcement of rules or regulations that may be made in this behalf. We had in these columns complained last year about high fees. There are indications already that people are coming to realize that they have been appraising legal advice and services at a fictitious value and fees are already falling on the Original Side. We think much more may be achieved by Judges not observing any distinction between juniors and seniors and taking their cases and argument at their real worth. If this is done legal fees would soon automatically come down to a reasonable level.

WE HAVE SHOWN IN OUR LAST ISSUE BY REFERence to the provisions of the Code of Criminal Procedure itself how the interpretation put upon secs. 96 and 105 of the Code by the Judicial Committee in *Clarke* v. *Brojendra Kishore Roy Chowdhury* (16 C. W. N. 865) is not warranted by either the spirit or the language of the provisions of the Code or its Forms and Schedules. If the Hon'ble Judges of the Calcutta High Court had alone and for the first time held that the power under sec. 96 of the Code of issuing search warrants must be exercised by a Magistrate acting as a Court and in connection with a judicial proceeding, the question might have been open to

doubt and the dictum of the Judicial Committee would, perhaps, have caused less surprise. But referring to the judicial interpretation placed on the section during a period extending to nearly half a century, we find a perfect unanimity amongst all the High Courts in India in this respect.

IN THE CODE OF 1861, THE USE OF THE EXPRESSION *such thing* in the corresponding section served to indicate that the search was to be for a *specific* thing. Seton Karr and Hobhouse, JJ., in *Queen* v. *Syed Hossain*, (1867) 8 W. R. Cr. 75, held that the section contemplated the production of some specified object such as a blood-stained knife, a forged document, which might be deemed essential to the conduct of an enquiry and conviction of the accused. The learned Judges observed that "It could scarcely have been the intention of the Legislature to empower Police officers or other underlings to make harassing domiciliary visits." *In re Ahmed Mohamad*, (1887) I. L. R. 15 Cal. 109, although Norris and Ghose, JJ., were only incidentally called upon to consider the validity of a search warrant under sec. 96, there can be no question from their observations that the issue of a search warrant was, in their opinion, a judicial act and such warrants could only be issued after judicial enquiry, upon proper materials and for specific things.

IN THE MADRAS HIGH COURT THEIR LORDSHIPS Sir Arthur Collins, C. J., and Mutusami Ayyar, J., in *Queen-Empress* v. *Mohunt of Tirupati*, (1889) I. L. R. 13 Mad. at p. 20, laid down the law with regard to the issue of search warrants under sec. 96 of the Code in the following terms :—"The Magistrate is entitled, in our judgment, to act upon information which he considers credible provided that there is a complaint before him and the complainant is examined by him in solemn affirmation in the manner prescribed by the Code of Criminal Procedure."

THE BOMBAY HIGH COURT ALSO FOLLOWED THIS Madras decision in the case of *Harilal Buch*, (1897) I. L. R. 22 Bom. 949. Parsons, J., says at p. 956, that there must be a complaint on oath. In this case the information had been conveyed by a telegram and his Lordship held that the telegram could not be regarded as a legal information as contemplated by the expressions "information has been laid (or complaint has been made)" in Sch. V, Form viii. The only information upon which the Magistrate can act under the Code . . . . is a complaint . . . . as to which see sec. 4 (*a*) and sec. 200," (C. Cr. P. 1882). Or, in other words, the complaint must be in writing signed by the Magistrate and the complainant. This decision was followed by the Calcutta High Court in the case of *Rash Behari Mondal* (12 C. W. N. 1075 at p. 1079) in 1908, where Stephen and Holmwood, JJ., held that the District Magistrate on receiving information of the commission of an offence cannot issue search warrant under sec. 96 (1) of the Code before he has acted ju upon the information so received. Thus it will be seen that all the leading High Courts in India have uniformly held for nearly half a century the issuing of a search warrant is a judicial ac and that Magistrates should not issue such war or hold searches themselves before recordi judicial proceeding and satisfying themselves th there are good grounds for the issue of su warrants.

IT IS A WELL-KNOWN CANNON OF INTERPRETATION of statutes that when any provision of a statute has been interpreted by the superior courts in a particular way and the Legislature in amending the statute from time to time, have not interfered with the interpretations in any way, it is to be presumed that the Legislature has accepted that interpretation as the correct interpretation of the law. The Madras and Bombay interpretations above referred to were given prior to the amendment of the Code in 1898 and it must be presumed that the Indian Legislature has regarded them as the proper interpretation of sec. 96 of the Code. In this connection, we may quote the high authority of Lord Justice James in *Ex parte*, *Campbell*, *in re Cathcart*, L. R. 5 Ch. Ap, p. 703. At p. 706, His Lordship concludes the judgment by saying :—

"Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them."

THE EVIDENT OBJECT OF THE CODE OF CRIMINAL Procedure in providing that search warrants under sec. 96 may only be issued by Courts or Magistrates acting judicially is that the Magistrates should not act hastily or thoughtlessly in the matter. It is a very large power and may be used to the great annoyance of people against whom such processes may be issued. It is highly desirable in the public interest that if any informer or other evil-minded person negligently, falsely or maliciously sets the law in motion, the person who may be harassed in this way ought to have his legal remedies against such person. If the Magistrate records the information or complaint on oath as the law provides, there would be

chance of the process being abused. A man whose house may be unnecessarily searched would in such case have his remedies against a man who falsely accused him before a Magistrate. We fail to see how public safety would suffer if Magistrates performed their duties in accordance with the law. When the Judicial Committee is of opinion that in making a general search even for concealed military stores under the Arms Act a Magistrate must record his grounds of belief before holding such searches, surely, searches under the Code of Criminal Procedure cannot be of a more urgent nature so as to justify any searches without recording any proceeding as is required by the Code.

IN THE JUNE NUMBER OF THE *Columbia Law Review*, a writer (Henry Winthrop Ballantine) discusses the subject of "Martial Law" in regard to which there seems to be no difference between the English and the American standpoints. He divides the subject into two parts: I. Martial Law in times of peace. II. Martial Law in times of War. Upon the first topic, the writer vigorously combats the opinion of Holmes, J., which prevailed in the Supreme Court in *Moyer* v. *Peabody*, (1909) 212 U. S. 78, who observed: "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process." This, the writer points out, is opposed to what has up till now been regarded as a fundamental principle of English Constitutional law, *viz*, that a Military Commander may be held accountable after the exigency has passed, either by prosecution in the Criminal Courts or by civil action at the instance of the parties aggrieved, and compelled to show reasonable ground for believing that the infringement of personal and property rights was demanded by the occasion.

OR, IN OTHER WORDS, AS THE AUTHOR SAYS LATER on, "the jurisdiction of the Courts is merely postponed not ousted. The exercise of the supreme force of the State is at all times guided by law, not by executive discretion, and remains subject to judicial investigation and review." The true view, the writer concludes, is that "during a riot or other disturbance, militia men and their officers are authorised to act merely as a body of armed police with the ordinary powers of police officers. Their military character cannot give them indemnity for unreasonable excess of force. The Governor of a State, as Commander of the militia is merely the Chief Conservator of the Peace, and entirely destitute of power to proclaim Martial Law, (so that such proclamation or command alone should take the place of a Statute) punish criminals or subject citizens to arbitrary military orders which he unreasonably believes to be demanded by public emergency."

WITH REGARD TO THE SUPPOSED SPECIAL APPLIcability of Martial Law in times of War, (due, it may be, to foreign invasion or to civil disturbance) the writer states the correct view of the law to be that "Citizens cannot be arrested, deported, imprisoned or put to death by arbitrary military authority when war is raging any more than during a state of peace and the fact that the Courts are closed or that a proclamation of Martial Law has been made will not justify a resort to the arbitrary unregulated exercise of military power." In this connection, the writer notices the decision of the Privy Council in the case of *Ex parte D. F. Marais*, L. R [1902] A. C. 109: s.c. 6 C. W. N. lvii, where the Judicial Committee held that Martial Law having in fact been declared (during the Boer War) in certain districts of the Colonies of Natal and Cape Colony, the Courts ought not to go into the question of the necessity of such proclamation or enquire into the acts of the military authorities in pursuance of it. The decision really amounted to holding that when actual war is raging Civil Courts have no jurisdiction to deal with military action and that a state of war exists whenever the military authorities choose to say so. This decision, the writer notices, was not based on the ground that the constitution does not follow the flag into foreign dependencies nor that the authority of Parliament had been exercised to supersede the established course of justice, nor that these districts were enemy territory in military occupation. The writer agrees with Sir Frederick Pollock who trenchantly observed that the decision misquotes and judicially repeals the Petition of Rights.

NO ONE WHO HAS STUDIED ENGLISH CONSTITUtional law carefully will seriously question the soundness of the views expressed by the writer on both points. But that the latest pronouncements of the highest Courts of the United States as well as of the British Empire should be in opposition to those views is significant as indicating the reactionary tendencies of the Courts which must in course of time yield to the dictates of reason and give effect to the considered opinion of jurists. The writer summarises his conclusions on this branch of the subject in the following words:—

The doctrine that when once the status of actual war is established by proclamation or otherwise, the Civil Courts have no more jurisdiction of military action toward citizens, is based on a misconception of the maxim "*Inter armes silent leges*," which means merely that between enemies the

law of war, a branch of International Law, governs combatants and non-combatants; it clearly does not mean that on the occurrence of war, the Government of England, of the United States, or of a State can by proclamation be converted into a military despotism

In a garrisoned city, held as an outpost of loyal territory, or in home districts threatened or recently evacuated by the enemy, military necessity for the public defence would certainly justify all temporary restrictions on the liberty of citizens essential to military operations, such as the extinguishment of lights, the requiring of military passes to enter or depart, and the quelling of public disorder But the prosecution and punishment of persons suspected of conspiracy, sedition, or disloyal practices, and of treason itself, belong to the tribunals of the law, and not to the sword and bayonet of the military Where the army is not invading enemy territory of a recognized belligerent, but is in its own territory, the military authorities remain liable to be called to account either in *habeas corpus* or any other judicial proceeding for excess of authority toward citizens, no matter whether it occurred in propinquity to the field of actual hostilities or while the Courts were closed, or after a proclamation of Martial Law.

COMMISSIONS FOR THE EXAMINATION OF WITNESSES IN CRIMINAL CASES.

Criminal Courts are sometimes called upon to decide whether a particular witness should not be allowed to be examined on commission. The matter seems to be one which deserves careful consideration and it may be useful to examine the law on the subject.

In the first Code of Criminal Procedure (Act XXV of 1861) there was no provision for the issue of a commission for the examination of a witness in a criminal case. The Code of 1872 (sec 330) for the first time provided for the issue of a commission under certain circumstances to a District Magistrate or a Magistrate of the first class in whose jurisdiction the witness might be, but the power to issue such commissions was given to High Courts and Courts of Sessions only. This Code was amended by Act XI of 1874 and power was given to the High Courts to issue commissions to Police Magistrates (corresponding to the present Presidency Magistrates) for the examination of witnesses within the local limits of their Ordinary Original Criminal Jurisdiction. The High Courts Criminal Procedure Act was passed in 1875 to regulate the procedure of the High Courts in the exercise of their Original Criminal Jurisdiction and sec. 76 provided for the issue of commissions by High Courts for the examination of witnesses. In 1877 the Presidency Magistrates Act was passed and it gave power to Presidency Magistrates to issue such commissions (secs. 157 and 158). The Criminal Procedure Code of 1882 which practically repealed the whole of the High Courts Criminal Procedure Act and the Presidency Magistrates Act consolidated the various provisions of the law relating to commissions (Chap. XL, secs. 503—508) and authorised a District Magistrate to issue a commission in addition to the Courts already empowered under the Acts which this Code superseded. Doubts have however been expressed as to the power of a Presidency Magistrate to issue a commission for the examination of a witness within his own jurisdiction (*Hem Coomari Dassi*, I. L R. 24 Cal. 551 : s. c. 1 C. W. N. 333).

By successive legislation the power to issue commissions has been extended to different Courts but the ground on which alone a commission can issue, namely, that the attendance of the witness in question cannot be procured "without an amount of delay, expense, or inconvenience which under the circumstances of the case would be unreasonable" has been the same throughout in the various enactments and it has all along been left to the discretion of the Court to decide whether the exemption from attendance at Court should be allowed to a particular witness or not.

The question becomes one of very great importance if the witness in whose favour such an exemption is asked for is a purdanashin lady.

The system of purda which is peculiar to this country makes it derogatory for a lady of position to appear in Court for examination as a witness and the first question that arises is, can a purdanashin lady summoned as a witness in a criminal case claim, as a matter of right, exemption from appearing in Court? The answer must be in the negative.

Some confusion has been caused by the erroneous report of a case decided by the Calcutta High Court published in I. L. R. 4 Cal. 20 (*In the matter of Huro Sundary Chowdhurain*). The headnote runs thus:—"A purdanashin woman summoned as a witness in a criminal case has a right to be exempted from personal attendance at Court and to be examined on commission." In this case the High Court on being moved made an order directing the Magistrate to issue a commission for the examination of the petitioner, Haro Sundary, but the learned Judges nowhere in the judgment reported laid down a broad proposition as to the right of a purdanashin lady in these matters. This case can be cited only as an instance in which the High Court on the application of a purdanashin lady directed the lower Court to issue a commission for her examination.

We next proceed to consider the point that has arisen for judicial determination from time to time, namely, whether the inconvenience to which a purdanashin lady is likely to be put if compelled to appear in Court is such as *may* justify a Judge or Magistrate in making the exemption contemplated by sec. 503, Cr. P. C., on the ground that the inconvenience "under the circumstances of the case would be unreasonable."

Although our Courts have always shown the most anxious consideration for the peculiar customs prevailing in the country we do not find in the reports any other instance except the one already

noted (I. L. R. 4 Cal. 20) in which a commission was issued for the examination of a witness on the ground of her being a purdanashin lady, although in every case the lower Court was directed to make special arrangements for the examination of such a witness.

Not long after the decision of the Calcutta High Court in *Huro Sundary's* case the High Court at Allahabad had to consider the application of a purdanashin lady who being a complainant in a criminal case prayed for being examined on commission in support of the charge brought by her (*In the matter of Faridunnissa*, I. L R. 5 All. 92). In disposing of the application Straight, J., observed :—"I always have been and always shall be, to the fullest extent possible, consistently with common sense, ready and willing to make every concession I can, in the administration of justice, to the customs and prejudices of Hindus and Mahomenans alike. . . . . I admit to the full the necessity for still preserving a tenderness and sympathy for ideas and notions some of which to the European mind might seem absurd, and indeed it is my duty to do so."

The application for the issue of a commission was however rejected on the ground that "the fact of her being a person who had set the criminal law in motion materially altered her position" as regards the question under consideration. Nevertheless the Magistrate was directed to "allow her to be brought into his room at the Court-house in her palki and if this was not feasible to make such other arrangements as might enable her to remain in it and strictly preserve her privacy and subject her to the least inconvenience or annoyance for the purpose of recording her evidence according to law in the presence of the accused after identification by some approved *female witness*."

The next case was in the Calcutta High Court, (*In the matter of the petition of Din Tarini Debi*, I. L. R. 15 Cal. 775). The Petitioner, a respectable Hindu lady with a considerable income from zemindary and other sources living at a distance of thirty-seven miles from Calcutta, was summoned by the Chief Presidency Magistrate of Calcutta to give evidence before him in Court in a certain case. She applied for the issue of a commission but the Magistrate refused to make the order prayed for. The learned Judges while observing "that in matters of procedure the customs and habits of the people should be taken into consideration" did not make any order for the issue of a commission but directed the Magistrate to examine the Petitioner in a house to be taken by him, not far from the Court-house.

In *Basanti Bibi*, I. L. R. 11 All. 69, Straight and Tyrell, JJ., remarked "Although there is no provision in the Criminal Procedure Code which protects *pardanashin* ladies from appearing in a Court of Justice, nevertheless it is very undesirable to compel the attendance of such persons." The lower Court was directed to make arrangements so as to take the lady's evidence either in an empty Court-room in the presence of himself, the accused and the pleader for the prosecutor or if no empty Court-room was available, in the Magistrate's own private room or some other room in the Court building.

An order similar to that made in *Din Tarini Debi*, I. L. R. 15 Cal. 775, for the examination of the witness in a house taken by her, not far from the Court, was passed in the case of *Hem Coomari Dassi*, I. L. R. 24 Cal. 551 : S. C. 1 C. W. N. 333, which has already been referred to in another connection. In this case their Lordships considered the legality of giving directions to the lower Courts for making special arrangements and held that it was quite within the province of the High Court, having regard to the powers conferred by the Charter, to direct the Magistrates as to the mode in which the evidence of a particular witness might and should be taken.

In this state of the case law which seems to lay down that a *purdanashin* lady as such is not entitled to the benefit of a commission, witnesses of this particular class must find themselves at a peculiar disadvantage. It would be impossible for any one acquainted with the habits and customs of the people of this country to conceive of anything more inconvenient for a *purdanashin* lady than to appear in a Court in the midst of surroundings to which she is quite unaccustomed and one is surprised to find that the words "inconvenience which under the circumstances of the case would be unreasonable" have not enabled Courts, not usually inclined to disregard the peculiar conditions of life in this country, to make the concession contemplated by the section in favour of this class of witnesses. The wording of the section (503) may be plain enough but the case-law on the subject which undoubtedly shows that in its practical application considerable difficulty has been experienced renders it necessary that the Legislature should recast it so as to give greater protection to witnesses of the *purdanashin* class.

The Indian Law Commissioners in their report, dated the 14th October 1837, after remarking that "law-givers ought not to disregard even the unreasonable prejudices of those for whom they legislate" suggested that "the peculiar state of public feelings in this country may render it advisable to frame the law of procedure in such a manner that families of high rank may be dispensed as far as possible from the necessity of performing acts which are here regarded, however unreasonably, as humiliating;" and the Legislature has expressly recognised the existence of a strong feeling in Indian society against *purdanashin* ladies appearing in public by exempting, as of right, women who according to the customs

and manners of the country ought not to be compelled to appear in public, from personal appearance in Court in civil cases (sec. 132, Civil Procedure Code.)

No doubt in criminal cases a complainant and an accused occupy peculiar positions and it may be desirable to compel their appearance in Court in all cases without exception but so far as witnesses are concerned the law should be uniform in regulating the procedure in Civil and Criminal Courts.

The question of inconvenience from the point of view of witnesses in general apart from any custom in any particular society came up for consideration in *Empress* v. *R. P. Counsell*, I. L. R. 8 Cal. 896. In this case an application was made by one Mrs. Dunne, a resident of Darjeeling, who was one of the material witnesses for the prosecution in a case pending in the High Court in its original criminal jurisdiction, for the issue of a commission for her examination on the ground of her old age and ill health, but Wilson, J., refused to make the order prayed for. In *Empress* v. *Balgangadhar Tilak*, I. L. R. 6 Bom. 285, the High Court, however, directed the examination by commission of a witness who was a Government servant and who had executed a recognizance to appear and give evidence for the prosecution in a criminal trial to take place in the High Court Sessions but was ordered to a distant station on public service and could not with due regard to the public interests return to Bombay in time for the trial.

Another question of considerable importance, namely, the admissibility of evidence taken on commission issued by a Court other than that in which the evidence is sought to be used arose in the case of *Queen-Empress* v. *A. M. Jacob*, I. L. R. 19 Cal. 113, in which the accused was tried in the High Court Sessions before Mr. Justice Wilson on the prosecution of H. H. the Nizam of Hyderabad on a charge of criminal breach of trust. In this case during the course of the preliminary enquiry the Chief Presidency Magistrate of Calcutta issued a commission for the examination of the Nizam. The commission after execution was duly returned to the Magistrate and in the High Court the prosecution sought to put it in but was not allowed to do so, Wilson, J., holding that the evidence taken under that commission was admissible only in the enquiry before the Magistrate and not in the subsequent trial. The point has now been settled by the addition of cl. (2), sec. 507 in the Code of 1898, which provides that any deposition taken under a commission, if it satisfies the conditions prescribed by sec. 33 of the Evidence Act, may also be received in evidence at any subsequent stage of the case before another Court.

SURESH CHANDRA MUKHERJEE,
Vakil, High Court.

POOR SUITORS.

(From the Times, 24th June 1912).

It is an old saying that our Courts of Justice are open to all comers, but only in the same sense as are the best taverns or hotels. The suitor as well as the traveller or guest must pay, it may be, much and often. At each stage or step in litigation the State takes toll; there are fees to be paid; and he must find at his own expense remuneration for counsel, solicitors, and witnesses. Some Judges—for example, LORD LANGDALE—have condemned this system; justice ought, in their view not to be thus sold; the State ought not to impose taxes upon those who seek its aid. As far back as 1495 some measures were taken for the relief of poor suitors; and there exist ways and means of suing, as it is called, *in forma pauperis*. A statement of facts upon which the litigant relies is prepared; the opinion of counsel, founded upon that statement, to the effect that the suitor has reasonable grounds for bringing an action, is produced; and the Court exempts him from the payment of fees. It also assigns to him a counsel and solicitor. It is universally agreed that this system is very faulty. It permits the bringing of totally unfounded claims; for there is no examination of the truth of the statement submitted to counsel, which may be a tissue of falsehoods, and is at best pretty certain to be highly coloured. The system excludes many of those who might fairly be relieved from payment of fees. They may not be able truthfully to swear that they are not worth more than £25, though they may be quite unable to prosecute an action at their own expense. Often poor suitors have in their mind a lawyer not with the best professional reputation, who takes up the case with some sinister object in view or solely with an eye to his own interest.

The defects of this system have been among the causes which have created the "poor man's lawyer." In several parts of London and elsewhere young barristers and solicitors are doing excellent work in advising the poor whose rights are in question. Very often their influence is exercised in discouraging or stopping frivolous litigation, often in writing letters to the persons from whom redress is sought with good effect, and often in advising as to the proper legal remedies. In quiet ways an immense amount of excellent work is done by poor men's lawyers But more than the voluntary efforts of private societies or individuals is needed; and the system which has existed in Scotland in one form or another since 1424 is a model well worthy of study. For centuries it has been the duty and privilege of young advocates and writers to the signet to give their services to poor suitors and to carry out a system based upon the principle "See that such as are in need and necessity have right," one which assumes that poor suitors have a call upon the services of counsel and solicitors in their early professional days and which has, by almost universal testimony, worked well. It prevents miscarriage of justice and the stifling of well-founded claims; it supplies an admirable school and training to the young lawyer; it enables him to put his foot on the first step of the ladder of advancement. "The agents for the poor," appointed under statutory powers, are a part of the Scotch system of procedure of which all concerned are justly proud. They work in connexion with the legal dispensaries, which act as advisers and conciliators, and with good effect. From the latest report of the Edinburgh Legal Dispensary it appears that in 1910-11 and 1911-12 1,290 and 1,180 clients were seen and received advice, with the result in a large number of cases of an amicable settlement.

It has long seemed to many English lawyers that the time has come for remodelling, in the light of the experience of other countries, the existing very imperfect rules as to pauper litigation. Some progress has been made in devising the outlines of a new system. Though the suggested rules have failed so far to recommend themselves to the whole Bar,

the avowed objections relate for the most part to points of detail, as to which there may well be differences of opinion. The main idea of those who have put forward proposals on the subject is that there should be lists of solicitors and counsel willing to inquire into and report upon the application of any one to take proceedings as a "poor person," as well as lists of solicitors and counsel willing to assist those who have been permitted to sue *in formâ pauperis*. The applicant will make, it is suggested, his request in a prescribed form, and his case will be sent for inquiry and report to one or more of those who are on the official lists. Their report, if favourable, will be submitted to the Court, which, if satisfied, will admit the applicant to the privileges of a poor suitor, and will assign to him a solicitor and a counsel. Under the present rules the applicant must swear that he is not worth more than £25—a limitation which is generally believed to operate unfairly The nature of the proposed litigation ought not to be lost sight of. It may be of such a character that A possessed of £50 to £70, is as little able to pursue his action in the ordinary way as B. worth only £20, whose remedy happens to be simple. Some persons might think that no hard-and-fast line as to means should be drawn. Others might suggest a sum far in excess of the present figure. Few, if indeed any, would say that it should be retained. Difficulties and differences of opinion arise when the question of costs to be allowed in the event of the pauper litigant succeeding is considered. Not a few would cling to the present practice according to which no remuneration for counsel or solicitors is recoverable; they dread the effect of a system under which the remuneration of the solicitor might depend upon results. Many points of detail call for careful study. The application of the proposed system to district registries and circuits presents difficulties; and it may be necessary, in order to complete the machinery, to appeal to the Treasury for assistance. But it will be a pity if dissension as to minor matters or intemperate or simulated desire for perfection at the outset should wreck a scheme which has so much to recommend it.

Reviews.

MAXWELL ON THE INTERPRETATION OF THE STATUTES. Fifth Edition. 1912. *By the late F. Stroud. Sweet & Maxwell, Ld., 3, Chancery Lane, London. Price 25s.*

A work of this kind could not have been placed in abler hands than that of the late Mr. Stroud, the well-known author of the Judicial Dictionary, for bringing it up to date. The scheme of the work has been kept to the lines of the original work and the editor has added recent cases for further illustrating the principles. A work of established reputation of this kind does not afford much scope for any detailed review. To illustrate the clear terms in which the reasons of interpretation has been formulated in this work, we shall only refer to the question which has been brought to the fore by the recent Privy Council decision in *Mr. Clarke's* case as to what provisions of a Statute must be regarded as mandatory and what only directory. The law is thus explained at p. 599 of this edition. "Where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right on the authority." The Judicial Committee in *Clarke* v. *Brojendra Kishore* (reported in this issue) have affirmed the truth of this proposition by expressing their agreement with the majority of the Judges of the Calcutta High Court that the Magistrate, Mr. Clarke, not having recorded the grounds of belief prior to entering upon the premises of the Plaintiff, as is required by the Indian Arms Act, his entry and search for arms in the Plaintiff's premises could not be justified under that Act.

A HAND-BOOK OF CRIMINAL CASES. Being a reprint of Criminal Cases reported in the Indian Law Reports, 1907 to 1911. *Compiled by Manibhai Vasanji Desai and Kishorbhai Ajubhai Patel. Baroda. 1912.*

The book is what it purports to be—a verbatim reprint, not merely of the judgments reported in the Indian Law Reports for the years mentioned, but of the head-notes also and in many cases of the statement of facts as well. More consideration appears to have been shown in respect of the abstracts of argument which (so far as we have been able to examine them) have not, it appears, been similarly "lifted." But in reprinting the report of *Emperor* v. *Abani Bhushan Chackerbutty*, I. L. R. 37 Cal. 845, we notice that whilst the main argument of counsel for the accused and the Crown are omitted the former in reply is faithfully reported as citing the case of *In re Alagirisawmy*. This strikes us as somewhat clumsy even for an increasing class of publishers who make it their sole business to appropriate and utilize for their own profit the result of trouble and expense incurred by others. The publishers of this work very appropriately express their obligations to their printers through whose labours alone this work has come into existence.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CARNDUFF and CHAPMAN, JJ. APPEAL FROM APPELLATE ORDER NO. 195 OF 1910. BENODE BEHARI BHADRA, Decree-holder, Appellant *v.* RAM SARUP CHAMAR, Judgment-debtor, Respondent. Heard, 21st and 25th June. Judgment, 25th June 1912.

Appeal, maintainability—Old and new Code of Civil Procedure—Execution sale, setting aside of—Fraud.

The appeal arose out of an application made

on the 23rd July 1907 to set aside a mortgage sale under the provisions of secs. 244 and 311 of the Code of Civil Procedure. The Petitioner was a minor and his allegation was that the deceased judgment-debtor (his father) died within 10 or 12 days after the date of the sale and that as such, by reason of his minority, he was not bound to make his application within the period of three years under Art. 178, Second Schedule of the Limitation Act. The sale took place on 17th September 1900.

The Court of first instance set aside the execution sale on the 6th July 1908, on the ground of fraud and material irregularity in publishing and conducting it. On appeal, the order was reversed and the case was remanded on the 6th November 1908 for further consideration. On remand the application was dismissed by the Court of first instance on the 12th June 1909. There was an appeal, and on the 29th January 1910 the original order was once more set aside and the case again remanded. The present second appeal was against the remand.

Held—That no second appeal lay.

That the words "present right of appeal in sec. 154 of the Code of Civil Procedure meant a right existing on the 1st January 1909 to appeal against a particular order passed under the former Code and subsisting on that date."

The provisions of sec. 6 of the General Clauses Act are limited by sec. 154 of the Code of Civil Procedure.

Babu Shama Charan Roy for the Appellant.

Babu Bepin Behary Ghose for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before RICHARDSON and BEACHCROFT, JJ. APPEAL FROM APPELLATE DECREE NO. 1567 OF 1910. KAMALA KANTO CHAKI, Defendant, Appellant *v.* BEJOYA KANTO LAHIRI, Plaintiff, Respondent. Heard, 27th June. Judgment, 2nd July 1912.

Bengal Tenancy Act (VIII of 1885), sec. 87, cls. (2) and (3)—Non-transferable holding, mortgage of —Abandonment—Re-entry—Mortgage suit—Decree —Possession.

The Defendants were formerly the tenants of the Plaintiff in respect of a non-transferable raiyati holding. In 1897, the Defendants mortgaged the holding by way of conditional sale and put the mortgagee in possession. The Defendants then left the village without making any arrangement for the payment of the rent due to the Plaintiff. On the 7th Falgun 1306 (1900), one Nalin Nath executed a kabuliyat in the Plaintiff's favour for a term of 5 years which expired before the present suit was brought. Two days after he acquired the mortgage interest from a mesne assignee and he then entered into possession of the holding. He remained in possession till the year 1904 when the Defendants brought a suit against him to redeem the mortgage. In that suit they were successful and upon payment into Court of the sum due upon the mortgage they were restored to possession. The Plaintiff then brought the present suit to recover possession on the footing that the Defendants had abandoned the holding and that as against him they had no right to evict Nalin Nath and take possession themselves. The first Court dismissed the suit holding that there had been no abandonment and that the relationship of landlord and tenant between the Plaintiff and the Defendants had never ceased and still subsisted. The lower Appellate Court came to a different conclusion. It found that the evidence established an abandonment of the holding by the Defendants in 1897 and upon that basis it made a decree in favour of the Plaintiff. The Defendants appealed to the High Court.

Held—Notice to the Collector under cl. (2) of sec. 87 of the Bengal Tenancy Act is important for the purpose of the suit which the tenant is allowed to bring under cl. (3) but is not essential to complete an abandonment and a landlord who has not given such notice is still at liberty to prove that an abandonment has in fact taken place.

Ram Pershad v. *Jarvahid* (12 C. W. N. 902) followed.

Whatever rights the Defendants might have had against Nalin Nath, as between the Plaintiff and the Defendants, the possession of Nalin Nath should be treated as possession of the Plaintiff and not of the Defendants. As against the Plaintiff the Defendants by their own act deprived themselves of the title which they once had and were in no better position than trespassers.

The payment of the mortgage debt did not give the Defendants any sort of equity against the Plaintiff.

Babu Chandra Kant Ghose for the Appellant.

Babu Tarak Chandra Chakrabarti for the Respondent.

A. T. M. *Appeal dismissed.*

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have been specially made instruments of gaming by the Legislature in Act III (B. C.) of 1897, and it is, therefore, clear that they are excluded from the operation of the Police Act in the case of cotton gambling. To sum up, therefore, we find that this cotton gambling is not a lottery, it is not a game or contest, and it is not a form of gambling in which instruments of gaming are kept or used for the profit or gain of the person owning or using the place.

It is betting pure and simple, and if it gives rise to all the evils which are ascribed to it by the learned Magistrate, in his very thoughtful judgment, it is, as Lord Campbell said, for the Legislature to consider what measures should be taken to put a stop to it. Under the law as at present constituted, we are unable to find that any offence has been committed within the meaning of sec. 44, Act IV of 1866, as amended by Act III (B. C.) of 1897 and we accordingly make the Rule absolute, set aside the conviction and sentence, and direct that the Petitioner be acquitted and released. This judgment will govern Rule 637 which was issued on the same grounds.

M. N. M. *Rules made absolute.*

[PRIVY COUNCIL.]

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN.	
LORD ATKINSON.	LOFTUS OTWAY
LORD SHAW.	CLARKE
SIR JOHN EDGE.	*v.*
MR. AMEER ALI.	BROJENDRA
1912,	KISHORE ROY
Heard, 30, April and	CHOWDHURY and
1, May.	another.
Judgment, 18, June.	

Criminal Procedure Code (Act V of 1898), secs. 4, 36, 96, 105, 177, Schs. III, V, Form viii—Search, Magistrate when may make—"Court," if includes every Magistrate—Indian Arms Act (XI of 1878), sec. 25—Search for arms if may be made without specifying grounds—Judicial Officers Protection Act (XVIII of 1850), Magistrate issuing search warrants if protected by.

Where an offence against public tranquility was committed in a sub-division and the District Magistrate who was present there made a search of the cutcheries towards which the offenders were alleged to have fled,

Held—*That the District Magistrate was authorised by sec. 105 read with secs. 96, Sch. III and Form viii of Sch. V of the Criminal Procedure Code to hold the search.*

The word 'Court' in sec. 96 includes every Magistrate and every Magistrate has the power to issue search warrants and make searches though the proceeding in connection with which the search is made may not yet have been instituted.

Semble—*A Magistrate cannot make a search for arms under sec. 25 of the Indian Arms Act without complying with the preliminary condition laid down in that Act.*

Semble—*A Magistrate who makes a general search of a house in view of an enquiry under the Criminal Procedure Code acts in the discharge of his judicial function and may therefore claim the protection of Act XVIII of 1850.*

These were two consolidated Appeals from two decrees of the High Court of Judicature at Fort William in Bengal, Appellate Civil Jurisdiction, dated the 20th of February 1909, which affirmed two decrees of the High Court in the exercise of its Extraordinary Original Civil Jurisdiction, dated the 19th of June 1908.

The suit giving rise to the Appeal No. 65 of 1911 was instituted on the 25th of July 1907 in the Court of the 3rd Sub-

ordinate Judge of Mymensingh by the Respondent Brojendra Kishore Roy Chowdhury as Plaintiff, against the Appellant Loftus Otway Clarke as Defendant. The plaint alleged that the Respondent was a zemindar and had considerable zemindari property within the sub-division of Jamalpur in the District of Mymensingh and one of his principal zemindari cutcheries (places of business) was situate in the town of Jamalpur which is the headquarters of the said Sub-Division of Jamalpur; that the Appellant who was a member of His Majesty's Indian Civil Service was, at the time of the matters therein complained of, the District Magistrate of Mymensingh; that on the 28th April 1907 the Appellant accompanied by Mr. J. J. Barniville, the then Sub-Divisional Officer of Jamalpur, Mr. M. L. A. Luffman, the then District Superintendent of Police, Mymensingh, and other Officers and followed by a number of armed policemen and a number of Mahomedan rowdies carrying lathies (sticks) wrongfully trespassed into and invaded the Respondent's said cutchery where under the orders of the Appellant and in his presence those who accompanied him forcibly, wantonly and wrongfully broke open and smashed boxes and chests in the said cutchery, searched the contents thereof and in carrying out the search scattered destroyed and mutilated valuable zemindari papers and documents belonging to the Respondent; that the Appellant acted wrongfully and maliciously without any reasonable or probable cause and had no lawful excuse or justification or authority for so acting; and that by reason of the Appellant's acts therein complained of, the Respondent had been greatly humiliated in the estimation of the public and in particular of his tenants in the District of Mymensingh and had suffered damages. The Respondent prayed for a decree for Rs. 10,500 as damages particulars of which were given in the plaint.

The Appellant filed his written statement setting out at some length what occurred at Jamalpur prior to the 28th of April 1908. He admitted that the search was in fact made and that it was made by his orders and under his directions but he pleaded that he was authorised to make the search under the Code of Criminal Procedure, secs. 94, 96, 105 and 165 or in the alternative under the Indian Arms Act, sec. 25 and that he was not liable to be sued by virtue of the provisions of the Act for the Protection of Judicial Officers. He denied that he acted maliciously or wrongfully or that any unnecessary or unavoidable force was used in making the search or that any damage was done to any place, box or thing in the said cutchery.

By an order, dated the 29th January 1908, the suit was transferred to the High Court at Calcutta.

After recording the oral and documentary evidence adduced by the parties Mr. Justice Fletcher who tried the suit delivered his judgment and passed a decree on the 24th of July 1908 awarding the Respondent Rs. 500 as damages and costs of the suit.*

Against the decree passed by Mr. Justice Fletcher the Appellant filed his Memorandum of Appeal and the Respondent filed his cross-objections. The Appeal and the cross-Appeal were heard by Maclean, C. J., Harington and Brett, JJ., of the High Court sitting in its Appellate Civil Jurisdiction who delivered their judgments on the 12th January 1909† the

* Reported in 12 C. W. N. 982 (1908).

† Reported in 13 C. W. N 458 (1909).

majority dismissing the appeal without costs.

The Appellant thereupon applied for leave to Appeal to His Majesty in Council but the High Court refused his application on the 13th of July 1909 on the ground that the case did not comply with the provisions of the Code of Civil Procedure to entitle him to a certificate under it.*

By an order of His Majesty in Council made on the 30th of June 1910 on the petition of the Appellant it was ordered *inter alia* that the Appellant should have special leave to appeal on his undertaking to abide by any order as to costs that their Lordships might see fit to make upon the hearing of his Appeal.

The suit in the Appeal No. 66 of 1911 was instituted on the 25th July 1907 in the Court of the 3rd Subordinate Judge of Mymensingh by the Respondent Srimati Bisweswari Debi Chowdhurani as Plaintiff against the Appellant Loftus Otway Clarke as Defendant. The allegations made and the reliefs sought by the Plaintiff as well as the Appellant's defence were similar to his defence stated in paragraph 4 hereof. The parties appear to have agreed to treat the suit in Appeal No. 65 of 1911 as a test case and the decrees and orders in this case were the same *mutatis mutandis* as those in the test case.

Sir E. Richards, K. C., with *Mr. Brown* for the Appellant submitted that the search in question did not constitute an actionable trespass. The Appellant's defences to the action were three, namely, (1) that being a District Magistrate of Mymensingh he acted under the powers conferred upon him by law and particularly by secs. 94, 96, 105 and 165 of the Code of Criminal Procedure ; (2) in the alternative by sec. 25 of the Indian Arms Act, 1878 ; and (3) that he acted in discharge of his judicial duties and within the limits of his jurisdiction and was protected by the provisions of Act XVIII of 1850. Both Courts have found that the Appellant's act was *bonâ fide* and that there was no improper motive or malice in his conduct. The facts of the case were correctly stated in the judgment of Brett, J. Briefly stated, a riot had taken place in which 3 or 4 revolver shots were fired, one Moslem was wounded and serious breach of the peace was threatened. The District Superintendent of Police and the Sub-Divisional Magistrate reached the spot and report was made to them that the assailants had taken refuge in the Respondents' cutcheries, they called upon the men to open the cutcheries but they refused and fired shots instead, the Appellant received a wire—"Serious riot just, averted, come at once," he went immediately and heard all that had occurred. Under these circumstances the Appellant ordered and conducted the search complained of. There can be no doubt that the Respondents would not have produced the revolvers which had been used if a summons to produce them had been served upon them under sec. 94, Cr. P. C. At least the Appellant had reason to believe that. He therefore acted under sec. 96, Cr. P. C. The section is wide enough and empowers a Court to issue a search warrant or to conduct a search even when there is no trial or proceeding before that Court : sec. 105, Cr. P. C. The whole scheme of the Code is not to narrow the power of the Court but to widen it. The word "Court" and "Magistrate" are interchangeable in the Act.

[LORD MACNAGHTEN.—There is no definition of "Court" in the Act.]

Sir E. Richards.—No, there are classes

* 13 C. W. N. 1127 (1909).

of Courts described in the Act, and their powers are specified. Sometimes "Court" is used as in sec. 104 and sometimes "Magistrate" as in sec. 105. There is this distinction that when "Magistrate" is used the High Court and the Court of the Sessions Judge, etc., are excluded. Further, under the provisions of secs. 154, 155, 156 and 157, Cr. P. C., the Police has to send a report of every cognizable offence to a Magistrate, and under sec. 159. The Magistrate "may direct an investigation or if he thinks fit at once proceed to hold a preliminary inquiry into the case." The Appellant had received such a report. It was a verbal report which would be covered by the sections. A written report was not essen ial. Then again the District Superintendent of Police could make the search under sec. 165, Cr. P. C. The Appellant did little more than stand there although we do not deny that the Appellant did make the search. A cognizable offence had been committed. It was essential to arrest the criminals who had used the firearms and it was also necessary to prevent a further breach of the peace or commission of the crime. The District Magistrate is also a police-officer. Sec. 4 of the Police Act read with sec. 165, Cr. P. C., puts general control of the Police of the district under the District Magistrate.

Secondly, as to sec. 25 of the Arms Act (XI of 1878) it was not essential that the Appellant should make a record of the reasons for the search. The making of such a record was not a ground of jurisdiction. The record was meant for the information of the Executive Government. It was not intended for the protection of the subject. If it were, some form of record would have been provided. Sec. 26 of the Act shows that it was not meant for the protection of the subject as the Local Government can search without recording any reasons. The decided cases show that the provision was merely directory and not a condition precedent to the Magistrate's taking action. Reference was made to *The Liverpool Borough Bank* v. *Turner* (1), *The Margate Pier Company* v. *Hannam* (2), *The King* v. *John Patteson* (3); Maxwell on Interpretation of Statutes (4th Edn.), p. 556.

Thirdly, in any case he was protected by sec. 1, Act XVIII of 1850. The functions both of the Police and the judiciary are combided in India in the person of the District Magistrate. The Appellant acted on a police-report and the information of the wounded man (Genda). At any rate he *bonâ fide* believed that he had jurisdiction to act as he did. He was acting in the discharge of a judicial duty. It was a judicial act. The cross-examination of the Appellant as to the nature of the act was very unfair. It ought not to have been allowed. Whether it was a judicial act or not is a matter of law and not of evidence. Throughout the Code of Criminal Procedure, 1908, the word "Magistrate" is convertible for a "Court." *Vide* secs. 32, 35, 36, Sch. 5. The Appellant proceeded under the Code. It must therefore be a judicial act. It has been held that an issue of a search warrant is a judicial act. *Midland Railway Company* v. *Walton* (4), *Lea* v. *Charrington* (5), *In re Ahmed Mahomed* (6). Even if a record of the reasons was a condition precedent under sec. 25 of the Arms Act, since the act itself was a judicial act the

(1) 30 L. J. Ch. 379 (New Series) (1861).
(2) 3 Bar. & Alder. 266 (1819).
(3) 4 Barn & Adol. 9 (1832).
(4) L. R. 17 Q. B. D. 30, 39 (1886).
(5) L. R. 23 Q. B. D. 45 (1889).
(6) I. L. R. 15 Cal. 109, 139 (1887).

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Appellant was possibly mistaken in his view. In any case he was protected. *Seshaiyangar* v. *R. Raghunath Row* (7).

Mr. Brown followed.

Mr. L. DeGruyther, K. C. (with *Mr. J. M. Parikh*).—There are concurrent findings of fact as to what the Appellant did at the search. He admits that he did not take cognizance of any case or offence. The only offence that was committed was in relation to Genda, who was wounded. The report of that offence was not sent by the Police prior to the 2nd May long after the search. As to the firing of the revolvers at the crowd or the officers nothing was done. No proceeding or inquiry regarding it was ever instituted. There was consequently no offence of which the Appellant could have taken cognizance under the terms of the Code of Criminal Procedure.

[SIR JOHN EDGE.—What was the Appellant doing then ?]

Mr. DeGruyther.—He wanted to search the houses of the Hindus purely as an administrative measure. He did not exercise any judicial judgment. He might possibly have done so, but as a fact he did not. Secs. 96 and 165, Cr. P. C., do not apply. Under sec. 96 it was essential that some proceeding must be pending before the Magistrate. Nor was action taken under sec. 165, Cr. P. C. Fletcher, J., found as follows :—"I am satisfied on the evidence that the search was not intended to be under the provisions of sec. 165. The search was for the purpose of discovering arms generally." This finding was affirmed by the Chief Justice and Harington, J., and the Appellant's evidence fully supports that finding. The case should therefore be governed by the ordinary law. The Appellant must justify his act by which he caused injury to another man's property by proof of some particular authority. All criminal proceedings under the Code are divided into four heads :—(1) investigation, (2) inquiry, (3) trial and (4) other proceedings. Before an act can be judicial, proceedings must commence before a Court or Magistrate in one or other of the ways provided by Ch. V (B), secs. 190—195, Cr. P. C. An investigation under the Act can be done by the Police only, and the Appellant had not taken cognizance of any offence under sec. 190 or sec. 200.

[LORD ATKINSON.—Is "cognizance" defined ?]

Mr. DeGruyther.—No, my Lord.

[LORD MACNAGHTEN.—What is an "inquiry"? Is not the word wide enough ?]

Mr. DeGruyther.—It is defined by sec. 4.

[LORD MACNAGHTEN.—It is not an exhaustive definition.]

If a Magistrate takes cognizance of any offence he must proceed under sec. 200. If he takes cognizance of his own knowledge or suspicion under sub-sec. 1, cl. (*c*), sec. 190, he must inform the accused that he is entitled to have the case tried by another Court, sec. 191. Further proceedings then follow as provided by sec. 200. In sec. 94 the word "such Court" means a Court sitting in a judicial capacity after having taken cognizance of an offence under sec. 190. It does not apply to a Magistrate who has not taken cognizance of an offence.

[SIR JOHN EDGE.—What is the use of a Magistrate then ? A District Magistrate is responsible for the peace of the District.]

Mr. DeGruyther.—Yes, but he must act under the powers given to him by the Legislature. Sec. 96 must be read with

(7) 5 Mad. H. C. R. 345, 353 (1870).

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sec. 94 which is limited to cases before the Court and in which a summons will not be effective. The Court must be seised of some inquiry, trial or proceeding. This view is supported by *Rash Behary Lal* v. *Emperor* (8).

[LORD MACNAGHTEN.—There was no inquiry of any sort in that case.]

Mr. DeGruyther.—The ground of decision was that he was not seised of the case, *Re Hari Lal Buch* (9).

[LORD MACNAGHTEN.—There again no inquiry seems to have been made by the Magistrate.]

Mr. DeGruyther.—The Appellant himself says he was not making any inquiry.

[LORD ATKINSON.—What is meant by taking cognizance ?]

Mr. DeGruyther.—Becoming seised or the case under sec. 190, and thereafter issuing a summons or a warrant against the accused.

A "Court" under sec. 96 means a judicial officer sitting as a Court. If that were not the meaning of the section the Appellant would not have brought to his aid Act XVIII of 1850. It is true that a District Magistrate is both a judicial and executive officer. But he has no power to search for arms generally. This is not a case of searching for arms in a particular offence. Tne Appellant admits he was making a general search. He searched several places. A Magistrate's power to search is limited to some case he is seised of. A District Magistrate undoubtedly had wide powers of a general search for arms under the Arms Act. But the Appellant himself admits that he did not think of the act at the time. If he really had information about the arms he was bound to exercise a judicial discretion and to record the reasons for the search. Sec. 25 of the Arms Act lays it down in clear terms that he must first make a record. Even Brett, J., finds that this defence was an after-thought. Sec. 26 does not require a record for a subject has no remedy against the act of the Supreme Government.

Act XVIII of 1850 is not applicable. The Appellant did not act as a "Court," and his act was therefore not a judicial act. Reliance was placed on *Doswell* v. *Impey* (10).

[LORD MACNAGHTEN.—If the Appellant *bonâ fide* believed that he was doing a judicial act in making the search, will he be protected ?]

Mr. DeGruyther.—I submit not. The act must be a judicial act. *Sinclair* v. *Broughton* (11), *Houlden* v. *Smith* (12), *Mitchell* v. *Foster* (13).

Sir E. Richards replied.—The definition of "inquiry" is not exhaustive. In sec. 96 "any inquiry" is sufficiently wide. Sec. 159 deals with preliminary inquiry only. The word "cognizance" is not limited to the ways in which a Court can take cognizance of an offence prescribed by sec. 190. "Cognizance" means "applying one's mind to a matter." The protection given by Act XVIII of 1850 is wider than what was given by 11 and 12 Vic., Ch. 74.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—The pecuniary amount involved in this Appeal is comparatively trifling. But the case is one of grave importance, and their Lordships are compelled to add that, in their

(8) I. L. R. 35 Cal. 1076 at p. 1081 (1908).
(9) I. L. R. 22 Bom. 949 at p. 955 (1897).
(10) 1 L. J. K. B. (old series) 99 (1823).
(11) L. R. 9 I. A. 152 (1882).
(12) 19 L. J. Q B. 170 (1850).
(13) 9 L. J. M. C. 95 (1840).

opinion, there has been a serious miscarriage of justice in both the Courts which dealt with the matter in India.

In April 1907, Mr. Clarke, the Appellant, was the District Magistrate of Mymensingh, an extensive district in the Province of Bengal. The principal suit, the result of which governs this consolidated Appeal, was brought by the first Respondent, as Plaintiff, claiming damages for trespass on the allegation that Mr. Clarke had illegally and wantonly searched his cutchery, and that Mr. Clarke had not only acted illegally, but that he had acted out of personal malice and ill-will. The suit originally brought in the Court of the third Subordinate Judge of Mymensingh was transferred, at the Plaintiff's instance, to the High Court in its Extraordinary Original Civil Jurisdiction. It was tried by Fletcher, J. He found in favour of the Plaintiff and gave a decree for Rs. 500, but without costs. Costs were not awarded to the successful Plaintiff on account of the charge of personal misconduct which his Lordship held to be unfounded and grossly improper. Mr. Clarke appealed to the High Court in its Appellate Jurisdiction. The Plaintiff filed cross-objections reiterating his charge of personal misconduct. The Court of Appeal, consisting of the late Chief Justice and Harington, J. (Brett, J., dissenting) dismissed the appeal but without costs.

The result is that a Magistrate placed in a very difficult position and called upon to act on a sudden emergency has been adjudged guilty of trespass and subjected to a fine though he seems to have acted properly, with courage and good sense, and strictly in accordance with the powers committed to him.

The facts of the case are not really in dispute.

Jamalpur is a sub-division of Mymensingh. The zemindars in that part of the country are Hindus, most of them, apparently, absentees living in Calcutta. The bulk of the population is Mahomedan. For some time before the occurrence which led to this suit, owing, it was said, to the measure known as the Partition of Bengal, there had been a good deal of disaffection and excitement in the district, and the relations between the Hindus and the Mahomedans were dangerously strained.

On the 21st of April 1907 there was a large fair or mela held at Jamalpur. Some Hindus, apparently at the instance of the servants and agents of the Plaintiff and his co-sharers known collectively as the Gouruckpur (? Gouripur) zemindars, tried to prevent the sale of bideshi or foreign goods. The Mahomedans resented this attempt. There were serious disturbances out of which there sprang up a bitter feeling between the Hindus and the Mahomedans. On the evening of the 27th of April some Hindus dressed or supposed to be dressed in Mahomedan clothes were observed wandering about the town. They were followed by a band of Mahomedans. The Hindus turned on the men following them and fired three or four revolver shots and a Mahomedan was wounded. An uproar followed. Mr. Barniville, the Sub-divisional Magistrate of Jamalpur, and Mr. Luffman, the District Superintendent of Police, who were then in the Dak bungalow, hastened to the scene of disturbance. They met some Mahomedans carrying away the wounded man, and they received information that the persons who had committed this offence had fled in the direction of the cutcheries of the Gouruckpur (*sic*) zemindars. These cutcheries appear to be close

together in an open piece of ground. Hard by is a temple of Thakurani Doya Moyee. An excited crowd of Mahomedans was collected there apparently bent on attacking the cutcheries. The Sub-divisional Magistrate and the District Superintendent of Police found 40 or 50 men armed with lathies. After they had disarmed them they were told that armed men were concealed in the temple. They went there. They found the doors locked and were refused admittance. The Sub-divisional Magistrate ordered the persons inside to open the doors assuring them of protection. In response several shots were fired from inside, and a man was wounded slightly. The two officers then withdrew after dispersing the Mahomedan crowd outside.

The Sub-divisional Magistrate wired at once to the Commissioner of the Division and the District Superintendent of Police sent a telegram to Mr. Clarke to the following effect:

"Serious riot just averted, come at once."

Mr. Clarke received this telegram at 2 a.m. on the morning of the 28th of April. He started for Jamalpur by the first train, and arrived there at 10 a.m. On his arrival he found the following telegram from the Commissioner headed "Urgent":—

"Barniville has wired for available armed police by special train, saying serious disturbance impending. What do you know? Can you send Gurkhas from Mymensingh to be replaced if required by men from here.—Dacca."

Mr. Clarke, who had spent most of his time after the mela disturbance between Jamalpur and Mymensingh, and knew the state of feeling in the district, took counsel with the Superintendent of Police and the Sub-divisional Magistrate. From what he heard and from what he knew himself he came to the conclusion that it was his duty to search the cutcheries. And accordingly he did so, accompanied by the Sub-divisional Magistrate, the Police officer, and a force of police. The Plaintiff's cutchery was found locked. It seems that the jamadar in charge of the building had locked it up, and left at 1 p.m. There was no one on the ground to open the doors. So the doors were forced open. Boxes in the cutchery were also opened and their contents taken out. The actual search within the building was made by the police, but Mr. Clarke had charge and direction of the whole proceeding. He remained outside.

There was nothing of an incriminating nature found in the cutcheries.

The question and the only question on this appeal is whether Mr. Clarke was authorised by law to make the search. That depends on the provisions of the Code of Criminal Procedure and on nothing else.

It cannot be denied that a serious offence had been committed against the public tranquility and that under the Code of Criminal Procedure* (which defines offences against the public tranquility and is summarised in Chapter viii of Sch. II of the Code†) every member of the unlawful assembly from which the shots proceeded was equally guilty of the offence. Nor can it be disputed that it was the duty of the District Magistrate to enquire into that offence.

Now sec. 177 of the Code provides that every offence shall ordinarily be enquired into, and tried by a Court within the local limits of whose jurisdiction it was committed. Mr. Clarke, by virtue of his superior rank, superseded the Sub-

* ? Indian Penal Code.—ED.

† ? Criminal Procedure Code.—ED.

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divisional Magistrate of Jamalpur, and properly assumed jurisdiction there.

An enquiry under the Code is a proceeding distinct from a trial. There is no definition of the word "enquiry" in the interpretation clause, sec. 4. But there is this explanation of the term as used in the Code:—

"(*k*) 'Enquiry' includes every enquiry other than a trial conducted under this Code by a Magistrate or Court."

Sec. 36 is in the following terms:—

"All District Magistrates, Sub-divisional Magistrates, and Magistrates of the first, second and third classes have the powers hereinafter respectively conferred upon them and specified in the third schedule Such powers are called their 'ordinary powers.'"

Sch. III, referring back to sec. 36 defines the "ordinary powers" of Provincial Magistrates beginning with Magistrates of the third class. Every Magistrate of a higher class is invested with all the "ordinary powers" of a Magistrate of the class immediately below that to which he belongs, with further powers appertaining to Magistrates of his own grade.

Among the "ordinary powers" of a Magistrate of the third class specified in Sch. III is:—

"(8) Power to issue search warrants. Sec. 96."

In sec. 96 the following provision occurs:—

"Where the Court considers that the purpose of any enquiry, trial, or other proceeding under this Code will be served by a general search or inspection, it may issue a search warrant."

Then sec. 105 provides as follows:—

"Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant."

It seems clear from these sections and Sch. III that Mr. Clarke was authorised by the Code to direct a search of the Plaintiffs' cutchery in his presence if he considered it advisable to do so.

Now the learned Trial Judge disposes of Mr. Clarke's defence in rather a summary manner. Beyond referring to sec. 105 he does not consider or refer to any one of the sections on which the defence is based, nor does he deal with Sch. III at all. All that the learned Judge says on this part of the case is this:—

"It is obvious in the present case the Defendant was not competent to issue a search warrant under the provisions of the Criminal Procedure Code. The Defendant was not acting as a Court within the meaning of sec. 94 of the Criminal Procedure Code, as there was no proceeding pending before him."

On appeal the late Chief Justice and Harington, J., took the same view and dealt with the matter much in the same way. After citing sec. 105 the learned Chief Justice proceeds as follows:—

"The Magistrate can only act under this section where he is competent to issue a search warrant. That takes us to sec. 96. That section applies to the issue of a search warrant by the Court. Here the Defendant was not acting as a Court and all that sec. 105 enacts is that instead of the Court issuing a search warrant the Magistrate may direct a search to be made in his presence. It is reasonably obvious why this power is given to a Magistrate, but the section does not assist the present Defendant."

The opinion of Harington, J., is to the same effect. He says:—

"In my opinion sec. 96 only authorises the Magistrate to issue a search warrant when sitting as a Court, *i e.*, when some proceeding under the Code has been initiated before him. And this view is strengthened by the form of the search warrant given in Sch V which recites that information has been laid or complaint has been made."

If his Lordhsip had read to the end of the form in Sch. V he would have seen that it disposes of his theory altogether. The form contemplates the issue of a search warrant before any proceedings of

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any kind are initiated and in view of an "enquiry about to be made."

It would seem that the Trial Judge and both the learned Judges who formed the majority of the Court of Appeal were misled by the use of the word "Court" in sec. 96. For the sake of brevity the Code uses the terms "Court" and "Magistrate" generally if not always as convertible terms. Sec. 6 headed "Classes of Criminal Courts" enacts that :—

"Besides the High Courts and the Courts constituted under any law under this Code for the time being in force there shall be five classes of Criminal Courts in British India, namely :—

I. Courts of Session.
II. Presidency Magistrates.
III. Magistrates of the First Class.
IV Magistrates of the Second Class.
V. Magistrates of the Third Class."

Sec. 36 taken in conjunction with Sch. III places the matter beyond all doubt. The ordinary powers of all Provincial Magistrates are declared to be those "hereinafter conferred upon them and specified in the third schedule." That means : conferred upon them by the Act and specified in the third schedule to the Act. As appears by the schedule the power to issue search warrants is specified among the "ordinary powers" of all Provincial Magistrates, but the only section conferring the power is sec. 96 to which the schedule itself refers.

It seems to their Lordships therefore clear that what Mr. Clarke did was warranted by the Code. If that be so there is an end of the case.

Two other points were discussed by the Trial Judge and the learned Judges of appeal at much greater length than the ground on which the real defence to the action was based. It seems that the Defendant or his advisers not content with relying on the Code of Criminal Procedure, unwisely perhaps, prayed in aid sec. 25 of the Indian Arms Act, 1878, and also Act No. XVIII of 1850, entitled "an Act for the protection of Judicial Officers." The one seems inapplicable; the other in the present case wholly unnecessary. Their Lordships are disposed to agree with the majority of the Court of Appeal that Mr. Clarke not having complied with the preliminary condition prescribed by the Arms Act cannot defend his action under that Statute. On the other hand they have no doubt that Mr. Clarke in directing a general search of the Plaintiff's cutchery in view of an enquiry under the Code of Criminal Procedure was acting in the discharge of his judicial functions, and they think that if it had been necessary he might have appealed for protection to the Act No. XVIII of 1850.

Their Lordships think that there was no foundation for the suit. Mr. Clarke's action under the circumstances was quite justified. The charge of personal misconduct advanced and reiterated without any shadow of proof deserves the severest reprobation.

Their Lordships will therefore humbly advise His Majesty that this Appeal ought to be allowed, the order of the Court of Appeal discharged, and the suit dimissed with costs in both Courts.

The Respondent must pay the costs of the Appeal.

Solicitors : *The Solicitor, India Office*, for the Appellant.

Solicitors : *Messrs. Downer and Johnson* for the Respondents.

B. D. *Appeal decreed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 574 OF 1910.

MOOKERJEE, J.
CARNDUFF, J.
1912,
18, April.

KENARAM AKHULI and another, Defendants, Appellants,
v.
SRISTIDHAR CHATTERJEE and others, Plaintiffs, Respondents.

Tort—Overflow of water into Plaintiff's land from tank belonging to stranger caused by Defendant lowering level of his own land to make it culturable—Plaintiff's right to injunction and damages.

Where the Defendants with a view to make their land culturable lowered its level with the consequence that water in a tank belonging to a third party passed to that land and subsequently overflowed into lands belonging to the Plaintiff:

Held—*That no right of the Plaintiff had been infringed by the act, and the Plaintiff was not entitled to a mandatory injunction to compel the Defendant to raise an embankment in order to prevent this overflow or to damages for harm caused by such overflow.*

RYLANDS *v.* FLETCHER (1) *distinguished.* SMITH *v.* KENRICK (2), NIELD *v.* LONDON AND N. W. RY. CO. (6) *referred to.*

Where the owner of land without wilfulness or negligence uses his land in the ordinary manner though mischief thereby accrues to his neighbour he is not liable for damages, but if with a view to use the land in an unusual manner he brings upon the land water which would not naturally have come upon it he will be liable for damages for the escape of the water into the land of his neighbour.

HODGSON *v.* MAYOR, ETC., OF YORK (7), CHASEMORE *v.* RICHARDS (8) *relied on.*

(1) L. R. 3 H. L. 330 (1868).
(2) 7 C. B. 515 (1849).
(6) L. R. 10 Ex 4 (1874).
(7) 28 L. T. 836 (1873).
(8) 7 H. L. Cas. 349 (1859).

This was an Appeal preferred on the 5th of December 1910 against an order of Babu Jogendra Nath Chakravarti, Subordinate Judge of Zillah Bankura, dated the 2nd of September 1910, reversing an order of Babu Girindra Nath Mukherjee, Munsif of that place, dated the 20th of August 1909.

The material facts will appear from the judgment.

Babu Kshetra Mohun Sen for the Appellants.

Babu Bepin Behary Ghosh for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal on behalf of two of the Defendants in a suit for an injunction to restrain them from passing water from their land to the land of the Plaintiffs, as also for recovery of damages. The Plaintiffs are the owners of two parcels of land which adjoin a third parcel owned by the Defendants. Towards the south of this property there is a tank not owned by either of the parties to the suit. The case for the Plaintiff is that the Defendants have lowered the level of their own land with the result that the water from this tank passes to the land of the Defendan's and subsequently overflows into the lands of the Plaintiffs. The question, therefore, arises whether upon these facts the Plaintiffs are entitled to a mandatory injunction against the Defendants to compel them to raise an embankment for the benefit of the Plaintiffs and also to recover damages already caused. The learned Vakil for the Plaintiffs-Respondents has contended upon the authority of *Rylands* v. *Fletcher* (1), that the Defendants have no right to bring water upon their land which may subsequently

(1) L. R. 3 H. L. 330 (1868).

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flow out and cause damage to the land of the Plaintiffs. The principle deducible from that decision is that the occupier of land who brings or keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape and is liable for all the natural and probable consequences of its escape even if he has been guilty of no negligence. In our opinion, this principle cannot be applied to the circumstances of the present case. It is not disputed, and it cannot be seriously disputed, that the Defendants have not used their land in any artificial or unusual manner. They lowered the level of their own land so as to make it culturable, and they were amply within their rights in what they did: *Smith* v. *Kenrick* (2). It cannot be suggested that they had recourse to any artificial structures for the purpose of storing water in their land, *Hurdman* v. *N. E. Ry. Co.* (3), *Broder* v. *Saillard* (4), nor can it be suggested that they have forced water from their land into the land of the Plaintiffs, *Whalley* v. *Lancashire, etc., Ry. Co.* (5). Under these circumstances, we are of opinion that the Plaintiffs are not entitled to an injunction, as against the Defendants, to compel the latter to raise a barrier for their protection. In support of this view reference may be made to the case of *Nield* v. *London and N.-W. Ry. Co.* (6), where it was ruled that an occupier is not bound to prevent damage to his neighbour by the natural escape of flood water from higher to lower levels. As Bramwell, B., observed :—"The neighbour is not entitled to say 'you have caused me an injury in law.' The law allows what may be termed a kind of reasonable selfishness in such matters. It says 'let every one look out for himself and protect his own interests.'" If this view were not adopted the result would be that a man could not reasonably use his property lest some neighbour of his might complain that he had caused him an injury. The true principle is that where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner, though mischief thereby accrues to his neighbour, he is not liable for damages, but if with a view to use the land in an unusual manner, he brings upon his land water which would not naturally have come upon it, he will be liable for damages for the escape of the water into the land of his neighbour. This doctrine was recognised in the case of *Hodgson* v. *Mayor, etc., of York* (7), see also *Chasemore* v. *Richards* (8). We are of opinion therefore that although the Plaintiffs may have suffered damage, no legal right of theirs has been infringed and they have no cause of action against the Defendants.

The result is that this Appeal is allowed, the order of the Subordinate Judge discharged and the decree of the Court of first instance restored with costs both here and in the Court of Appeal below. We assess the hearing-fee in this Court at two gold mohurs.

Appeal allowed.

(2) 7 C. B 515 (1849).
(3) 3 C. P. D. 168 (1878).
(4) 2 Ch. D. 692 (1876).
(5) 13 Q B. D. 131 (1884).
(6) L. R. 10 Ex. 4 (1874).
(7) 28 L. T. 836 (1873).
(8) 7 H. L. Cas. 349 (1859).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1421 OF 1910.

HARINGTON, J. MOOKERJEE, J. 1912, Heard, 11 and 12, January. Judgment, 12, January.

SREMATI PARBATTY DEBYA, Plaintiff, Appellant, *v.* MATHURA NATH BANERJEE and others, Defendants, Respondents.

Bengal Tenancy Act (*VIII of 1885*, *secs. 3* (*9*), *30—Undivided share in a parcel of land, let out to tenant, if holding- Rent of undivided share if enhancible*—Res judicata—*Decision in previous suit which was dismissed on the merits, that rent enhancible, if binding on Defendant.*

When the owner of an undivided 6 as. share in a howla *gave a lease of that share to the owner of the remaining share, and later on sued the latter for enhancement of rent under sec. 30 of the Bengal Tenancy Act:*

Held—*That an undivided share in a parcel or parcels of land is not a holding within the meaning of sec. 30 of the Bengal Tenancy Act, and the suit was not maintainable.*

JARDINE SKINNER & CO. *v.* RANI SURUT SOONDARI DEBI (7), BAIDYA NATH *v.* SUDHARAM (8) *distinguished.*

HARI CHARAN BOSE *v.* RONJIT SINGH (4), BAIDYA NATH DE *v.* ILIM (5), HARIBOLE BROHMO *v.* TASIMUDDIN MONDUL (1), AHADULLA *v.* GAGAN (6) *followed.*

Where in a previous suit the Court held that the rent was liable to enhancement but dismissed the suit on the ground that the rent paid by the Defendants was not lower than the rate at which rent was paid by tenants of adjoining lands:

(1) 2 C. W. N. 680 (1898).
(4) I. L. R. 25 Cal. 917n (1896).
(5) I. L. R. 25 Cal. 917 (1897).
(6) 2 C. L. J. 10 (1902).
(7) 3 C. L. R. 140 (1878).
(8) 8 C. W. N. 751 (1904).

Held—That the decision that the suit was not maintainable was not res judicata.

This was an Appeal preferred on the 12th of April 1910 against a decree of Babu Umesh Chandra Sen, Subordinate Judge of Zillah Dacca, dated the 6th of January 1910, affirming a decree of Moulvi Sayidur Rahaman, Munsif at Munshigunge, dated the 27th of July 1909.

The facts of the case sufficiently appear from the judgment.

Babu Harendra Narain Mitter for the Appellant.

Babu Ramesh Chandra Sen for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

HARINGTON, J.—This is an Appeal by the Plaintiff whose suit for enhancement of rent has been dismissed by both the Court of first instance and the lower Appellate Court. The facts are that the Plaintiff and the Defendants are howladars, the Plaintiff having six annas of the howla and the Defendants ten annas. The Defendants took the undivided six annas of the howla from the Plaintiff as his tenants and it is in respect of this undivided six annas of the howla tha the Plaintiff seeks to obtain an enhancement of rent. The Munsif and the learned Judge of the lower Appellate Court held that the Plaintiff was not, in respect of this undivided six annas, the landlord of a holding held at a money rent by an occupancy raiyat within the terms of sec. 30 of the Bengal Tenancy Act; and on that ground, amongst others, dismissed the suit of the Plaintiff.

Now, on behalf of the Appellant it is contended, *first*, that this issue has been previously determined in favour of the Plaintiff and that therefore under the rule of *res judicata* the Court was not entitled

to dismiss his suit on this ground; and, *secondly*, it is argued that the Plaintiff was the landlord of a holding within the terms of sec. 30 of the Bengal Tenancy Act.

Now with regard to the first question, a suit was previously brought and it was held that in that suit the landlord was entitled to bring his action; but the suit was dismissed on the ground that the rent which it was sought to enhance was not lower than that of the surrounding lands. Therefore judgment was given in favour of the Defendants, although the Defendants' objection to the competency of the suit was in fact overruled. In my opinion the rule of *res judicata* does not apply to such cases. The judgment was passed in favour of the Defendants, and it was not open to them to appeal against the view of the Munsif who overruled the contention urged by them. If we were to hold that the rule of *res judicata* applied it would come to this, that the Defendants were bound by the decision of the first Court and were debarred from appealing against the view expressed against them because the decision was in their favour—the principal point which the Court decided against them not being a ground on which the suit was decided, because the suit was decided in their favour. The Defendants were therefore debarred from questioning the soundness of the decision. The rule of *res judicata* cannot therefore be applied to this case.

Then, on the second point, what is sought to be enchanced is the rent of an undivided six annas share of the *howla* and my view is that an undivided six annas is not a 'holding' within the meaning of sec. 30 of the Bengal Tenancy Act. Under that Act holding is defined as a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy. I can understand no process of reasoning by which an undivided six annas can be described as a parcel or parcels of land because the use of the word 'parcel' implies that the land in question has metes and bounds. The result is that an undivided six annas of the *howla* does not come within the definition of the word 'holding' and therefore does not fall within sec. 30 of the Bengal Tenancy Act. The case is not without authority because the case of *Haribole Brohmo* v. *Jasimuddin Mondul* (1) is a case in which this very same question arose and there it was decided that an undivided 8 annas share was not itself a holding under sec. 30 of the Bengal Tenancy Act. On a consideration of the Statute and the authority it seems to me that the appeal ought not to succeed. It is conceded that there is no authority in support of the interpretation which the Appellant wants to put on the Statute; and it is a very significant fact, as my learned brother points out, that although this decision in the case of *Haribole Brohmo* v. *Jasimuddin Mondul* (1) was given so far back as 1898, there is no subsequent amendment of the Act so as to in any way derogate the effect of that decision.

For these reasons I hold that the decree of the lower Court ought to be affirmed and this appeal dismissed with costs.

MOOKERJEE, J.—I desire to add a few observations, in view of the earnest endeavour made to upset what has been accepted as good law for at least fifteen years.

The Plaintiff and the Defendants are landlords of a property; the share of the Plaintiff is six annas and that of the Defendants ten annas. The Defendants have taken a raiyati lease from the

(1) 2 C. W. N. 680 (1898).

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Plaintiff of his share of the property. The Plaintiff now seeks, under sec. 30 of the Bengal Tenancy Act, to enhance the rent payable by the Defendants. The Courts below have dismissed the suit. This decision is sought to be assailed by the Plaintiff-Appellant before this Court on two grounds, namely, *first*, that the question of his right to enhance the rent of the Defendants is *res judicata*; and, *secondly*, that upon a true construction of sec. 30 of the Bengal Tenancy Act, he has a right to enhance the rent of the Defendants.

In support of the first contention, reference has been made to the decision in the earlier litigation between the parties when the Plaintiff fruitlessly endeavoured to enhance the rent payable by the Defendants. In that suit it was decided in favour of the Plaintiff that he had the right to enhance the rent of the Defendants; but the suit was dismissed on the ground that the rent paid by the Defendants was not lower than the rate at which rent was paid by tenants of adjoining lands. It has been argued on the authority of the case of *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (2) that the decision in favour of the Plaintiff upon the question of his right to enhance the rent is concluded by the judgment mentioned. That case however is clearly distinguishable. There it was ruled that when a decision has been based on two grounds either of which is sufficient to support the decree, the decision upon each of the grounds is conclusive between the parties. Here, however, the decision upon the question of the right of the Plaintiff to enhance the rent is not the basis of the decree ultimately made. Consequently it cannot be maintained under sec. 13 of the Code of Civil Procedure of 1882 that the question was directly and substantially in issue between the parties or was finally decided. This view is in accord with that taken in the case of *Thakur Magundeo* v. *Thakur Mahadeo* (3). The first ground upon which the decision of the Court below is sought to be assailed cannot, therefore, be supported.

In support of the second ground, it has been contended that although the Defendants held a share of the *howla* under the Plaintiff, yet the Plaintiff is the landlord of a "holding" within the meaning of sec. 30 of the Bengal Tenancy Act. Now the term 'holding' as defined in cl. (9) of sec. 3 of the Act means a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy. Stress is laid, however, by the Appellant on the introductory words of the section which provide that the definitions given are to apply unless there is something repugnant in the subject or context. But it has not been shown to us that there is anything in sec. 30 repugnant to the definition of the term 'holding' given in cl. (9) of sec. 3 of the Act. On the other hand the cases of *Hari Charan Bose* v. *Runjit Singh* (4), *Baidya Nath De* v. *Ilim* (5), *Haribole Brohmo* v. *Tasimuddin Mondul* (1) and *Ahadulla* v. *Gagan* (6) conclusively show that an undivided share in a parcel or parcels of land cannot be a holding. In fact a parcel of land is land defined by metes and bounds and consequently a share in a parcel of land cannot be deemed to be a parcel of land within the meaning of

(1) 2 C. W. N. 680 (1898).
(2) I. L. R. 24 Cal. 900 (1897).
(3) I. L. R. 18 Cal. 647 (1891).
(4) I. L. R. 25 Cal. 917n (1896).
(5) I. L. R. 25 Cal. 917 (1897).
(6) 2 C. L. J. 10 (1902).

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the definition of the term 'holding'. Reference has finally been made to the terms of sec. 5, cl. (2) and sec. 3, cl. (5) of the Bengal Tenancy Act where definitions are given of the terms 'raiyat' and 'rent' respectively; and it has been pointed out that a raiyat may hold a share of a parcel of land for which he may be liable to pay rent to the landlord. That need not be disputed. But it does not follow that, when a raiyat holds a share in a parcel of land, he has a "holding" as defined in sec. 3, cl. (9). The case of *Jardine Skinner & Co.* v *Rani Surut Soondari Debi* (7), where their Lordships of the Judicial Committee held that a right of occupancy might be acquired in respect of an undivided share of land under the Bengal Rent Law of 1868, and the decision of this Court in *Baidya Nath* v. *Sudharam* (8), where a similar view was taken, are clearly of no assistance to the Plaintiff, because what he has to establish is that he is the landlord of a "holding" within the meaning of the Bengal Tenancy Act. In my opinion, he has failed to do so.

Both the points urged fail, and the Appeal must therefore be dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE
No. 545 OF 1909.

BRETT, J.
N. R. CHATTERJEA, J
1912.
8, May.

GOUR CHANDRA DAS, Plaintiff, Appellant,
v.
SARAT SUNDURI DASSYA, Defendant, Respondent.

Probate and Administration Act (V of 1881), sec. 50, Expl. (4)· Revocation of grant—"Just cause," mal-administration if—Quarrels between co-administrators, making grant useless and inoperative, if ground for annulment.

Mal-administration is not under sec. 50, Expl. (4), of the Probate and Administration Act a just cause for revoking probate.

ANNODA PROSAD *v.* KALIKRISHNA (1) *followed.*

The words "become useless and inoperative" in sec. 50, Expl. (4), of the Act imply the discovery of something which if known at the date of the grant would have been a ground for refusing it, e.g., *the discovery of a later will or codicil or a subsequent discovery that the will was forged or that the alleged testator was still living.*

BAL GANGADHAR TILAK *v.* SAKWARBAI (2) *approved.*

One of two joint administrators applied for the revocation of the grant to the other on the ground that in consequence of quarrels between them it had become impossible to carry on the administration and the grant had in this way become inoperative and useless:

Held—*That this was no ground for revoking the grant.*

This was an Appeal preferred on the 13th of December 1909 against the decree of Mr. W. S. Coutts, District Judge of Zillah Dacca, dated the 18th of September 1909.

The material facts of this case will appear from of the judgment.

Babu Kritanta Kumar Bose and *Dr. Sarat Chandra Basak* for the Appellant.

Babu Harish Chandra Ray for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal against an order

(7) 3 C. L. R. 140 (1878).
(8) 8 C. W. N. 751 (1904).

(1) I. L. R. 24 Cal. 95 (1896).
(2) I. L. R. 26 Bom. 792 (1902).

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passed by the District Judge of Dacca on the 18th September 1909 refusing an application made by the present Appellant for the removal of Sarat Sundari Dasi from the administration of the estate of Chaitan Krishna Poddar. It appears that the Appellant and Sarat Sundari Dasi are related to each other as adopted son and adoptive mother and that letters of administration to the estate of Chaitan Krishna Poddar were granted to them after the death of the widow of Chaitan Krishna in whose favour as the first beneficiary under the will, letters of administration had previously been granted. There was some difference of opinion between the parties at first and, on the 31st August 1903, a compromise was arrived at and joint administration was granted to both. On the 26th May 1909, the Petitioner made an application to the Court which contained several allegations against Sarat Sundari Dasi. Amongst them one was that she had taken *hatchitta* from various debtors to the estate during the time when she was the sole administratrix and that these *hatchittahs* have been taken in her name only. It was asked that the name of the present Appellant as joint administrator should be added in those *hatchittahs*. The learned Judge took action on that complaint with the result that the addition asked for was made in most of the *hatchittas*; but, in the order recorded on the 3rd September 1909, it was stated that in certain *hatchittas* the addition prayed for had not been made and, therefore, they would remain in Court in the record until the change could be made. There was also in the same petition a complaint against Sarat Sundari Dasi that she had not paid the allowance due to the Appellant regularly and that she had not paid the municipal tax for his house which she was bound to pay. Sarat Sundari put in, on the 16th July 1909, a petition in which with reference to these later complaints she made certain statements and alleged that if there had been any failure on her part to pay the allowance as it fell due and the municipal tax, it was not the result of any fault on her part but was owing to the action taken on the part of the Appellant and his father-in-law. That matter does not appear to have been dealt with in the proceedings before the Judge on that application; but on the 17th September 1909, a fresh application was put in by the present Appellant asking that Sarat Sundari should be removed from the administration and that the grant of letters of administration to her should be revoked. It is not quite clear whether the learned Judge, in passing the order which he did dismissing that application, did so in view of the action which had been previously taken on the previous application; but the question which we have to consider in this case is whether we should interfere with the order passed by the District Judge on the ground that that order was not in accordance with law or not justified by the circumstances of the case. The learned pleader who appears in support of the Appeal admits that the application was made under the provisions of sec. 50 of the Probate and Administration Act, and he contends that "the cause" for which it was asked that the grant of letters should be revoked or annulled in respect of Sarat Sundari was "a just cause" within the meaning of that section. He refers to the 4th explanation attached to that section and argues that in this case "the grant has become useless and inoperative through circumstances." On being pressed to ex-

plain what the circumstances are, the learned pleader is unable to advance any other circumstance than the one that the lady and her adopted son have quarrelled and he says that, in consequence of this quarrel, it has become impossible to carry on the administration. It has also been suggested but not very strongly pressed before us that the allegations that she had not administered the estate properly would be a sufficient ground for annulling the grant of letters of administration. In our opinion, the grounds which have been advanced in support of the contention that the decision of the learned Judge should be set aside on the ground that he was not right in holding that just cause for annulling the letters of administration had not been made out cannot be sustained. It has been held by this Court in the case of *Annoda Prosad* v. *Kalikrishna* (1), that a mal-administration is not, under sec. 50, Expl. (4) of the Probate and Administration Act, a just cause for revoking the probate. It has also been held by the Bombay High Court in the case of *Bal Gangadhar Tilak* v. *Sakwarbai* (2), that the words "become useless and inoperative" in sec. 50, cl. (4) of the Probate Act, imply the discovery of something which, if known at the date of the grant, would have been a ground for refusing it; *e.g.*, the discovery of a later will or codicil of the subsequent discovery that the Will was forged or that the alleged testa or was still living. We see no reason to differ from the view which has been taken by the learned Judges in these two cases and, following that view, we are of opinion that the only ground which has really been pressed in support of this appeal, namely, that the grant has become useless and inoperative because of the disagreement between the administrators is not a just cause for annulling the letters. In these circumstances, we are of opinion that we cannot interfere with the decision of the lower Court and that the Appeal must be dismissed with costs. At the same time, we desire to say that if the Appellant considers that he has any sufficient ground for pressing the complaints which were made in his application of the 26th May 1909, supposing that those complaints have not up to date received the consideration of the District Judge, it will certainly be open to him to apply to the lower Court in order that an enquiry may be made into the substance of the complaints and such action taken as to that Court may seem fit

We assess the hearing-fee in this Court at two gold mohurs.

Appeal dismissed.

(1) I. L. R. 24 Cal. 95 (1896)
(2) I. L. R. 26 Bom. 792 (1902)

(CIVIL REVISIONAL JURISDICTION.)

CIVIL RULE NO. 2304 OF 1912.

MOOKERJEE, J. BEACHCROFT, J. 1912, 20, May.

JUGAL KISHORE MARWARI
v.
AMBIKA DEBI.

Civil Procedure Code (Act V of 1908), Or. 21, rr. 58, 63, 99—Claim, dismissed for non-prosecution—Obstruction by claimant to taking of possession by purchaser—Court if bound to investigate into bonâ fides *of claim.*

Where a claim preferred under O. 21, r. 58 to immoveable property attached in execution of a money decree was dismissed for non-prosecution, and the property was sold, but the purchaser on proceeding to take possession was obstructed by the claimant.

Held—*That the only remedy of the claimant after his claim was dismissed under Or. 21, r. 63, though for default, was by a*

JUGAL KISHORE MARWARI v. AMBIKA DEBI.

fresh suit and he could not ask the Court to hold an investigation of the claim under Or. 21, r. 99.

This was a Rule granted on the 15th of April 1912 against an order of Babu A. C. Dutt, Munsif of Asansole, dated the 13th of January 1912.

The Opposite Party, Ambika Debi, on the 10 h December 1909 preferred a claim under Or. 21, r. 58 to property attached in execution of a decree against her son. She failed to pay process-fees for service of notice on the decree-holder and the claim petition was dismissed on 9th April 1910.

On the 11th June 1910, the property was sold and purchased by the decree-holder. The decree-holder went to take possession but was obstructed by the claimant, who at the same time preferred an application under Or. 21, r. 99, for the investigation of her claim. Upon this petition the Munsif passed order withdrawing a previous order directing police protection to be given to the decree-holder.

Babu Atul Krishna Roy for the Petitioner.

Babu Nagendra Nath Ghosh for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

We are invited in this Rule to set aside an order under r. 99 of Or. 21 of the Code of 1908. The Petitioners in execution of a decree against their judgment-debtor, one Bejoy Krishna Mookerjee, attached his house and the adjoining lands. Thereupon, one Ambika Debi, the mother of the judgment-debtor, and the Opposite Party in this Rule, preferred a claim under r. 58 of Or. 21 of the Code on the 10th December 1909. Her allegation at the time was that the house and the land belonged to her and that she was in possession thereof in her own right. She did not, however, prosecute her claim, with the result that it was dismissed on the 9th April 1910. Execution, thereupon, proceeded on the basis of the decree, and on the 11th June 1910 the decree-holders purchased the property at the execution sale. They subsequently applied for delivery of possession, and on the 20th November 1911 symbolical possession was delivered to them. Later on, they applied for delivery of actual possession. The peon who went to execute the writ reported that he had been obstructed, and on the 13th January 1912 the mother of the judgment-debtor put in an application under r. 97 of Or. 21 of the Code. The Court did not investigate whether the objector was *bonâ fide* in possession of the property; but made an order the effect of which was a denial of all assistance to the auction-purchasers in their endeavour to obtain possession of the property purchased by them. The order of the Court below clearly cannot be supported.

Even if it be assumed that the application of the objector could have been entertained, the Court could not make an order under r. 99 without an investigation as to whether she was in possession of the property in good faith and on her own account. This position has not been controverted on behalf of the Opposite Party and it has been suggested that the case should be remitted to the Court below in order that the requisite enquiry may be made. We are not however prepared to accede to this prayer. The application clearly ought not to have been entertained. The objector, as we have already stated made an application

JUGAL KISHORE MARWARI *v.* AMBIKA DEBI.

under r. 58 on the 10th December 1909. Her claim was dismissed on the 9th April 1910. It is true that there was no investigation on the merits, but that was entirely by reason of her own default; she wilfully deprived herself of the opportunity open to her at that stage. Rule 63 shows that where a claim of this character has been preferred, the party against whom the order has been made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order is conclusive. It has been contended, however, on behalf of the Opposite Party, on the authority of the decision in the case of *Kunj Behary Lal* v. *Kandi Prasad Narain Singh* (1), that as there was no investigation on the merits, she is in the same position as if she had never made an application under r. 58. We are of opinion, that this position cannot be supported. No doubt, in relation to the question of limitation applicable to a suit of the description mentioned in r. 63, it has been held that Art. 11 of the Second Schedule of the Limitation Act does not apply if the application has been refused without an investigation on the merits, *Kallar Singh* v. *Toril Mahton* (2). Upon this point, however, there is a divergence of judicial opinion and there is weighty authority in support of the view that where an application has been dismissed, with or without investigation, a regular suit, if instituted, must be commenced within one year from the date of such order. *Gooroo Das* v. *Sonamonee* (3), *Sreemunta* v. *Tajooddin* (4), *Tripoora* v. *Ijatoonnessa* (5), *Sadut Ali* v. *Ramdhone* (6). But it is not necessary for our present purpose to express any opinion upon this question. It is sufficient to hold that, on the face of r. 63, the order of refusal is plainly final till a regular suit has been instituted and successfully prosecuted. Consequently the objector cannot now be allowed to practically reiterate the claim which she preferred on the 10th December 1909, and which was disallowed without investigation by reason of her own default. The petition of objection filed on the 12th January 1912, in this view, ought not to have been entertained. This conclusion is supported by the decision in *Sankar Nath Pandit* v. *Madan Mohan Das* (7).

The result is that the Rule is made absolute and the order of the Court below set aside. That Court is directed to place the auction-purchasers in actual possession of the property and to render such assistance to the peon as may be necessary to carry out the order of the Court. The Petitioners are entitled to their costs in this Court. We assess the hearing fee at three gold mohurs.

Rule made absolute.

(1) 6 C. L. J. 362 (1907).
(2) 1 C. W. N. 24 (1895).
(3) 20 W. R. 345 (1873).
(4) 21 W. R. 409 (1874).
(5) 24 W. R. 411 (1875).
(6) 12 C. L. R. 43 (1882).
(7) 11 C. L. J. 61 (1909).

[CRIMINAL REFERENCE.]

No. 25 OF 1912.

HOLMWOOD, J.
IMAM, J.
1912.
18, April.

EMPEROR
v.
BHIKU HOSSEIN.

Criminal Procedure Code (Act V of 1898, secs. 202, 203, 476 and 529 (f)—Deputy Magistrate in charge of office of District Magistrate—Power of such Magistrate to send case under sec. 202 of the Code to the Sub-Divisional officer for investigation—Legality of investigation and of subsequent orders by the Deputy Magistrate dismissing the complaint and directing the prosecution of the complainant—Government Circular as to charges against the Police, effect of—Nature of judicial investigation thereunder.

A Deputy Magistrate in charge of the District Magistrate's office, at head-quarters, has no power as such, after taking cognizance of a complaint and examining the complainant on oath, to send the case, under sec. 202 of the Criminal Procedure Code, for local investigation by the Sub-Divisional officer to whom he is by law subordinate, nor to dismiss the complaint, and to direct the prosecution of the complainant under sec. 476 on the report and investigation by the latter.

The effect of sec. 529 (f) could be only to give the Sub-Divisional Magistrate jurisdiction over the case, but not to empower the Deputy Magistrate to dismiss the complaint and direct the prosecution of the complainant.

The Government Circular with regard to enquiries into complaints against the Police has been misunderstood. It does not refer to local investigations under sec. 202, but the investigation it mentions is a full and complete judicial enquiry on the spot after the issue of process, and after hearing witnesses on both sides and taking the explanation of the accused person.

Reference under sec. 438, Cr. P. C., from B. V. Nicholl, Esq., the Sessions Judge of Dinajpur, made on the 15th of February 1912, recommending that so much of the order of the Deputy Magistrate of Dinajpur, dated 15th January 1912, as directs the trial of the accused under sec. 476 of the Criminal Procedure for an offence under sec. 211, I. P. C., be set aside.

The facts of the case were as follows:— On the 27th November last one Bhiku Hossein, a resident of the Balurghat subdivision of the Dinajpur District, filed a complaint before Mr. Gyan Sunker Sen, Deputy Magistrate of the first class, then in charge of the office of the District Magistrate during his absence on tour, charging the darogah, head constable and chowkidars of the Balurghat thana with wrongful confinement and extortion under secs. 342 and 384, I. P. C. The Magistrate examined the complainant on oath, and passed the following order: "Copy of complaint to S. Police for information and for the deputation of a superior officer for investigation with the Sub-Divisional officer of Balurghat to whom the original complaint is forwarded for inquiry." In compliance with the order the Sub-Divisional officer held a judicial inquiry, and after examining witnesses submitted a report which concluded as follows: "I have no doubt that the case is a false one. The complaint may be dismissed under sec. 203, Cr. P. C. He (the complainant) may also be prosecuted under sec. 211, I. P. C." On the receipt of the report the Deputy Magistrate in charge heard the complainant's pleader, dismissed the complaint under sec. 203 of the Code, and, acting under sec. 476, directed the prosecution of the complainant for an offence under sec. 211, I. P. C., and sent the case to the District Magistrate for orders.

It appeared that the Government Notification transferring Mr. Gyan Sunker Sen to the District of Dinajpur did not define

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the local limit of his powers as a first class Magistrate, and that he was empowered to take cognizance on complaint, and had been, by an order of the District Magistrate, appointed to act for him during his absence on tour.

The complainant thereupon moved the Sessions Judge of Dinajpur to set aside the orders of the Deputy Magistrate dismissing the complaint and direc ing his prosecution. The Judge referred the order passed under sec. 476 to the High Court as without jurisdiction. His letter of Reference was as follows:—

On the 27th November 1911, one Bhiku Hossein, a resident of the Balurghat sub-division preferred a complaint charging the daroga, head constable and chowkidar, etc, with offences under secs. 384 and 342, I. P. C, committed at the residence, and against the person, of the complainant on 3rd November 1911.

The facts constituting the alleged offences are not material to the purpose of this Reference. There is a rider added to the statement of facts giving explanations (1) of the delay in making the complaint, (2) of the complainant's reasons for not presenting it to the Sub-Divisional Magistrate, Balurghat, and asking that, under sec. 531, C. P. C., the case may be tried here, (*i e.*, Dinajpur).

The complaint was entertained by Mr. Gyan Sunker Sen, Deputy Magistrate, with 1st class powers who was in charge of the station. He examined the complainant and recorded the following order: "Copy of statement to S. Police for information and for deputation of a superior officer for investigation along with the Sub-Divisional officer of Balurghat to whom the original complaint is forwarded for enquiry."

This was evidently an order under sec. 202, Cr. P. C. In compliance thereof the Sub-Divisional Magistrate of Balurghat had the witnesses examined and discussed the evidence before him and concluded "I have no doubt that the case is a false one. The complaint may be dismissed under sec. 203, Cr. P. C. The complainant may also be prosecuted under sec. 211, I. P. C."

After receiving this report, the Deputy Magistrate in charge at head-quarters heard the complainant's pleader and recorded an order in which he (1) accepted the conclusion arrived at by Sub-Divisional Magistrate and accordingly dismissed it under sec 203, Cr. P. C, (2) discussed the question of his own jurisdiction to dispose of this case and (3) under sec. 476, Cr. P. C., directed the trial of the complainant for an offence under sec. 211, I. P. C., and sent the case to the District Magistrate for orders.

It is with this portion of the order that the present Reference is concerned.

The Government Notification transferring Mr. Gyan Sunker Sen to this district does not define the local area within which he may exercise the powers of a 1st class Magistrate, and it would seem, therefore, that he is right in holding that his local jurisdiction extends over the whole district (sec. 12, Cr. P. C.). Moreover, as he is empowered to take cognisance of offences upon complaint, it would seem that he had jurisdiction to entertain a complaint and take cognisance of the offence it reveals, so long as the offence was committed in any part of the district in which he exercises jurisdiction (sec. 177). Consequently, the fact that the offence complained of by Bhiku was committed in the Balurghat sub-division, did not preclude the Deputy Magistrate from dealing with the complaint in any manner authorised by law. Therefore, he was competent to order an enquiry under sec. 202, Cr. P. C. But the persons whom he could legally direct to hold a local investigation under this section are (1) any officer subordinate to himself, (2) a Police officer, (3) some other person not a Magistrate or Police officer. The Deputy Magistrate ordered the investigation to be made by the Sub-Divisional Magistrate of Balurghat, and the point submitted is that a Sub-Divisional Magistrate is not in any sense subordinate to any senior Deputy Magistrate or Joint-Magistrate at head quarters.

If this view is correct, it follows that the enquiry by the Sub-Divisional Magistrate, the order of dismissal under sec. 203, Cr. P. C., founded upon it, and the order under sec. 476, Cr. P. C, directing the prosecution of the petitioner for an offence under sec. 211, I. P. C., are all void for want of jurisdiction.

There is another motion by the same Petitioner against the order dismissing his complaint, pending before this Court; but as, if I gave effect to the view above expressed the effect of setting aside the order of dismissal would be to nullify the order

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under sec. 476, Cr. P. C, with which this Court has no jurisdiction to interfere, and as my view may possibly be held not to be correct, and the order under sec. 476 to be otherwise unimpeachable, it has seemed to me that the proper course to take was to submit this Reference for decision before proceeding to dispose of the other motion.

Before concluding, I think that I ought to point out that the language in which the learned Deputy Magistrate describes the purport of the Government Circular he quotes, does not fairly represent the sense of the orders it contains.

He says that by this Circular "cases of this nature have to be investigated jointly by a 1st class Magistrate and a superior officer of Police." I have read the Circular and find that it is careful to disclaim any intention of interfering with or fettering the discretion of a Magistrate taking cognisance on complaint of an illegal offence by a Police officer. It simply lays down instructions to ensure that both sides may be properly represented and heard at any judicial enquiry that may be held in connection with a charge against a Police officer of a certain rank.

The Advocate-General (*Mr. G. B. Kenrick, K. C.*), with *Mr. Monnier*, for the Crown—The Deputy Magistrate in question had the powers of a first class Magistrate throughout the district, under sec. 12 (2) of the Code, no local limits of jurisdiction having been assigned him by the Local Government on his being posted to the Dinajpur District. He was also empowered to take cognizance on a complaint. He, therefore, had jurisdiction to entertain the complaint. As he was in charge of the office of the District Magistrate during his absence, by an order passed by the latter, he must be taken to have the same powers as the District Magistrate, and the Sub-Divisional officer was subordinate to him under sec. 17 (1). In any case the error is cured by sec. 529 (f) of the Code. His orders dismissing the complaint and taking action under sec. 476 are, therefore, not without jurisdiction.

Mr. J. N. Roy (with him *Babu Monmatha Nath Mukherjee*) for the complainant submitted that the Deputy Magistrate in charge was himself subordinate to the Sub-Divisional Magistrate, and could not direct a local investigation by the latter under sec. 202 of the Code, and that his subsequent orders based on receipt of the report of the Sub-Divisional officer and the evidence taken at the local investigation by him were *ultra vires*.

The JUDGMENT OF THE COURT was as follows:—

This was a Reference made by the learned Sessions Judge of Dinajpur recommending that the order passed by the Deputy Magistrate at head-quarters, under sec. 476, Cr. P. C., directing the trial of the complainant under sec. 211, and sending the case to the District Magistrate for orders, should be set aside. At the same time he informed us that there was a motion before him to order further enquiry into the matter. He did not think it proper to deal with it himself because it might prejudice our order in regard to the matter under sec. 476, Cr. P. C. He says it seemed to him that the proper course to take was to submit this Reference for decision before proceeding to dispose of the other motion.

We need not, therefore, go into the point of necessity for further enquiry under sec. 203 as we have dealt with it in a similar case to this in a somewhat lengthy judgment delivered this morning in which we pointed out that the Government Circular with regard to enquiries into complaints against Police officers has been greatly misunderstood, that that Circular cannot be held to refer to any kind of local investigation under sec. 202, Cr. P. C., and that the local investigation which it mentions is a full and complete

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judicial enquiry on the spot after process issued, and hearing witnesses on both sides, and taking the explanation of the accused person.

It is clear that the accused person cannot be called upon for an explanation, nor can he be called upon to produce witnesses, unless and until there is ground for issuing process against him, and the law says that if upon complaint there is ground for issuing process against him the Magistrate shall issue summons for the attendance of the accused. That is sec. 204. The idea seems to have been that the Police officer might have an opportunity of defending himself and getting his accuser charged with bringing a false case, without a trial, that is to say, a judicial trial. Now that would be as unfair to the complainant as the converse procedure would be to the accused. We must take it that the Government intended that both sides should have full and free justice, and therefore when a complaint made is against a Police officer of a certain offence, under sec. 202, the Magistrate who entertains the complaint must either go to the spot and make enquiry himself, and issue process if he finds it necessary to call upon the accused to answer to anything, or if he makes it over under sec. 192 to any other Magistrate of the first class, that Magistrate must be vested with full seisin of the case and must continue the enquiry up to the necessary order of discharge, acquittal or conviction, as the case may be. But that is hardly the point which the learned Judge has referred to us. This is a point which he will have to deal with in the light of the remaks which we have just made.

The point which he makes is that the Deputy Magistrate at head-quarters had no power as such to transfer the investigation to the Sub Divisional officer of Balurghat, and the District Magistrate in his explanation has frankly admitted that this is so; but, as he points out, an error made in good faith is cured by sec. 529. Granted that this is so, the Sub-Divisional officer was vested with full seisin of the case and he alone can enquire into it and pass final orders. But this is just what the Petitioner in this case intended to avoid when he went to the District Magistrate with his complaint; and it appears to us that the reasons which weighed with the District Magistrate in allowing him to make his complaint before the officer at head-quarters are equally cogent now. Nothing has occurred since to render it the less desirable that some officer other than the local officer at Balurghat should make this enquiry. The cure of the erroneous order of transfer by sec. 529 would only give the Sub-Divisional officer, as we have seen, jurisdiction; it could not confer jurisdiction on the Deputy Magistrate at head-quarters to recall the case to be dealt with under sec. 203 or pass any orders under sec. 476. All these orders, therefore, are *ultra vires* and without jurisdiction. Whether there should be a further enquiry into the case or not is a matter which the Sessions Judge will now no doubt have no difficulty in deciding. But we must make the Rule absolute as far as this Reference is concerned, and hold with the learned Judge that the order for prosecution under sec. 476 is without jurisdiction, and must be set aside.

Rule made absolute.

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Contents.

NOTES.

WE REGRET TO HAVE TO RECORD THE DEATH of Babu Nobin Chand Baral who was one of the oldest Attorneys of the Calcutta High Court. He had latterly practically retired from business. His name will be chiefly remembered in connection with the famous *Wahabi case* in which Mr. Baral was the Solicitor for Ameer Khan. He was also at one time a well-known figure on the Original Side of the High Court where he enjoyed considerable practice. He was at College with Sir Gurudas Banerjea and Dr. Rash Behary Ghose and was himself a good scholar. He was a Master Mason and as a citizen he also performed important civic duties as a Municipal Commissioner, Honorary Presidency Magistrate and Justice of the Peace and especially as one of the chief promoters of the Deaf and Dumb School. He died at the mature age of 69.

THE ATTACK OF SIR JOHN REES ON THE JUDGES of the Calcutta High Court before the empty benches of the House of Commons displayed such colossal ignorance and bad taste that it would be unworthy of notice but for the ruling it elicited from the Right Hon'ble the Speaker of the House regarding the procedure which should be followed when it is intended to call in question the conduct of His Majesty's Judges in India. Sir John Rees on this occasion displayed the same species of ignorance of his subject-matter which has won for him an unenviable notoriety in the House of Commons and has made him the laughing stock of the public outside.

HE BEGAN HIS ATTACK ON THE CALCUTTA HIGH Court by saying that Mr. Clarke was found guilty of "criminal trespass" by "the native Chief Justice of the High Court of Bengal" meaning surely Sir Francis Maclean. After taxing the patience of the Speaker and the unfortunate forty members who happened to be present with valuable information of this kind, he was about to direct a general attack on the Barrister-Judges of Calcutta High Court, when the Speaker of the House administered to him a well-merited rebuke in the course of which he was led to give the ruling above referred to. This practically places the High Court Judges here on the same footing as His Majesty's Judges in England regarding the calling in question of their conduct before the House of Commons. Thus out of evil cometh good. In ruling Sir John Rees out of order, the Speaker said :—

"If the Hon'ble Member is going to attack the Judiciary in India he should bear in mind the rule which obtains in this country. If an attack is made on the Judiciary here it must be made in due form after notice and on a separate motion. The Hon'ble Member referred just now to the criticism passed upon Mr. Justice Grantham. That was passed after due notice had been given and on a special motion calling his action in question I think the same procedure might properly be applied to Judges in other parts of the Empire."

THOSE WHO BELIEVE IN THE ESTABLISHMENT of a City Court in Calcutta will do well to study the course of litigation in the Calcutta Court of Small Causes. A great deal of the business which ordinarily comes up before this Court is of a non-contentious nature. The judges there daily dispose of a large number of such suits as also others in which a settlement is arrived at either before them or out of Court. The bulk of the time of the judges is taken up by such matters or with suits in which the matter of difference is very simple. But cases in which there are any complications concerning the facts or law or both can seldom be disposed of in the Small Cause Court in less than six months. If once a case is put down in the adjourned list either for summoning witnesses, or from any other cause it is difficult to bring it to a hearing before many months have elapsed.

THE JUDGES ARE NOT AT ALL TO BLAME FOR THIS. After adjourning a contested case they find the

daily pressure of ordinary work so great that they cannot take it up again without putting back a vast amount of petty matters which they know would cause serious inconvenience to a large class of people. The natural consequence is that contested cases in the adjourned list can only be taken up by the Court in times of less pressure and even then only for a part of the day. It is therefore not unusual to find such contested cases in the Small Cause Court dragging on their existence on the list for months and months together. Such a state of things is unknown on the Original Side of the High Court. To improve matters in the Small Cause Court what is required is that the number of judges in the Small Cause Court should be increased and that they should be recruited from amongst practising members of the profession.

OUR ENGLISH CONTEMPORARY OF THE *Law Notes* makes the following remark in connection with an observation of Mr. Justice Bankes in a recent speech made at the festival of the Law Clerks' Society.

> Mr. Justice Bankes, at the festival of the Law Clerks' Society, made a speech which should be printed, framed and exhibited in some of our judges' robing rooms. "There were many things," he said, "he had realized since he had been on the Bench. One was, what an unruly thing the tongue of a judge was. It was a very unruly member and there was no more difficult task when one was upon the Bench than to restrain that unruly member."

IN *Clarke* v. *Brojendra Kishore* THE PRIVY Council granted special leave to Mr. Clarke to appeal upon his merely undertaking through Counsel to abide by any order as to costs that their Lordships might see fit to make upon the hearing of the appeal. So Mr. Clarke in this case did not have to give any security as to costs as ordinary litigants have to do even when they obtain leave as of right. We may quote in this connection the following observations of Lord Langdale in *Spooner* v. *Juddow*, 4 M. I. A. 353 at page 360.

"The question appears to be of considerable importance but you observe that the amount at issue is only a sum of Rs. 250 and for the purpose of deciding that you put the Respondent to the expense of this appeal. The question is whether this prosecution being by the East India Company and no doubt important to be decided for the benefit of the whole country the whole expense of this appeal should not be borne by them."

By an order in Council bearing date the 2nd March 1848 it was ordered by the Privy Council that "the Appellants should have leave to appeal from the judgment and order, the East India [illegible]ny undertaking to bring the appeal to a [illegible] before the Judicial Committee and to pay costs, charges and expenses which might be incurred on behalf of the Respondent as well as on behalf of the Appellants."

The appeal was ultimately allowed and the judgment appealed against was reversed. But no costs were allowed. This also contrasts with the order of the Privy Council in Mr. Clarke's appeal where the Respondent has been ordered to pay Mr. Clarke's costs in all Courts.

IN AN ARTICLE ON "CORPORATE PERSONALITY" by Arthur W. Machen, Jr., in 24 *Harvard Law Review*, pp. 253, 347, which we noticed in 15 C. W. N. clxx we expressed our concurrence with the writer that corporate entity is not imaginary or fictitious, but quite real, whereas corporal personality is a fiction. But we were not quite convinced that the author was altogether justified in regarding this fiction of personality as the mere outcome of the psychological tendency towards personification. All legal fictions are intended to serve, and in fact are tolerated in advanced systems of law in so far as they serve the purposes of justice. But whenever a legal fiction operates to obstruct the course of justice it has to be discarded. The fiction of corporate personality is, as we have observed before, a fiction of this character.

PURSUING A SOMEWHAT SIMILAR TREND OF thought I. M. Wormser, of the Illinois University, in the July number of the *Columbia Law Review*, has sought to establish, upon a review of the American authorities, that Courts of law never hesitate when justice requires it to lift the veil of corporate entity and treat the Corporation as a collection of persons. The question when the concept of corporate unity should be adhered to and when it should be disregarded has therefore depended for its answer not on any logical application of an immutable legal concept but on considerations of justice. The writer cites cases to show that Corporations have not unfrequently been constituted to evade the personal obligations of its ultimate shareholders, that the same set of persons have successively constituted themselves into a number of Corporations for the purpose of taking over by one of the properties of its predecessor free from the claims of the creditors of the latter. To grant relief to the creditors in such a case, the Courts have not even in all cases insisted upon proof of fraudulent intention on the part of the individuals concerned.

THE WRITER SUMS UP HIS CONCLUSIONS IN these terms :—

> "When the conception of corporation entity is employed to defraud creditors, to evade all existing obligation, to circumvent a Statute, to achieve or perpetuate monopoly or to protect knavery or crime, the Courts will draw aside the web of entity, will regard

..e Corporate Company as an association of live, up-..nd-doing, men and women shareholders, and will do ..stice between real persons. This is particularly true .. Courts of Equity, but finds many illustrations in ..ourts of Law as well, for it must not be thought that ..our Lady of the Common Law" is not sufficiently ..owerful to explode sophistry or scholastic theory ..hen used as a cloak for wrong-doing. In neither ..ribunal is the concept exalted into a fetish to be wor-..hipped "in the sacrifice of those who, in the last ana-..ysis, are the real parties in interest."

Reviews.

The Practice of the Privy Council in Judi..ial Matters. *By Norman Bentwich, Bar-at-..aw. Published by Messrs. Sweet & Maxwell, ..d., London. 1912. Price 21s.*

This work is founded on Safford and Wheeler's ..ell-known work on the subject. But the author ..as been able to reduce its size considerably owing ..o the Judicial Committee having standardized ..he rules of appeal from most of the Colonies and ..n consequence of the fact that the federation of ..he South African Colonies has imposed restric-..ions both as regards appeals from the Courts of ..he different States as also from the Supreme ..ourt of the Union. The self-governing Colonies ..uch as Australia and Canada have also imposed ..imitations on the prerogative of the Crown to ..rant special leave to appeal from the decisions ..f the Supreme Courts of such Colonies. The ..emand of these Colonies that the power to grant ..eave in special cases should belong to the local ..ourts has practically been conceded and the ..urisdiction of the Judicial Committee is now ..rdinarily restricted to the determination of the ..ppeals. The author has embodied in this work ..he substance of the provisions of the Appellate ..urisdiction Bill which was introduced in Parlia-..ent last year and which promises to found one ..mperial Court of Appeal for the Empire by the ..nification of the Judicial Committees of the ..ouse of Lords and the Privy Council. The ..roposal is that the Court will sit in two divisions ..o exercise the jurisdiction of the Privy Council ..nd the House of Lords respectively, that the ..ourt will be strengthened by the addition of two ..ew Lords of Appeal selected from amongst the ..ost eminent of English Judges and that six ..aw Lords would sit in their full strength succes-..ively in the two divisions but in the same building. ..he author also refers to the clauses of the Irish ..ome Rule Bill which provides that all questions ..hat may arise as to whether certain laws that ..ay be passed by the proposed Irish Parliament ..re in excess of its authority are to be decided ..y the Judicial Committee of the Privy Council. ..he jurisdiction of hearing Irish Appeals is also ..o be transferred to the Privy Council. The work ..ontains the latest informations and is quite up-to-date with regard to Privy Council Rules of Practice both as regards the Colonies and British India.

Index to Imperial and Bengal Acts and to their Statements of Objects and Reasons. *Compiled by B. L. Sircar, Assistant Librarian, Bar Library, High Court of Judicature at Fort William in Bengal, Calcutta. Printed at the Valmiki Press, 11, Haldar Lane, Bowbazar. 1912. Price 8 As.*

The compiler's experience has suggested to him the preparation of this small book of 38 pages which gives separate lists of all the important Imperial Council and Bengal Council Acts, arranged alphabetically according to the names by which they are generally known, with the number and year of these Acts and subsequent enactments by which they have been amended, with a further reference to the pages of the respective issues of the India and Calcutta Gazettes where the Objects and Reasons of the enactments are to be found. This little booklet supplies a real want and it will, we feel sure, prove very useful for purposes of reference.

Outlines of English Constitutional Law. *By S. K. Bardan, M. A., B. L., Calcutta. Das Gupta & Co., 54-3, College Street. 1912. Price 10 As.*

This is a small book on English Constitutional Law. The general plan and arrangement of its contents have our approval. We also notice that the author has drawn his materials from some of the best books on the subject. We are, however, constrained to mention some shortcomings which we hope the author will rectify in another edition. When an Indian writer takes upon himself to write on English Constitutional Law, he has not the same excuse as an English writer to overlook India or the place India occupies in the English constitution. Some of the important subjects, such for instance as the Petition of Rights, are rather too briefly noticed, and at one or two places the author has made some very wide statements. The definition of "Constitutional Law" at page 3 is inaccurate if it is to embrace English Constitutional Law and then again it is not the law, as suggested at page 81, that for any illegal command of a Government Official carried out by an agent the latter alone is responsible but not the former. Constitutional Law is pre-eminently a subject which if treated briefly is apt to lead a writer into making statements in a more or less absolute form with the attendant risk of conveying erroneous impressions. This risk can only be avoided by dealing with the subject a little more fully than has been done in this book.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J., and N. R. CHATTERJEA, J. APPEAL FROM ORIGINAL ORDER No. 45 OF 1911. BABU SANT PERSHAD SINGH, Petitioner, Appellant *v.* BABU SHEO NARAYAN SINGH and others, Opposite Party, Respondents. Heard, 1st and 8th July. Judgment, 8th July 1912.

Civil Procedure Code (*Act V of 1908*), *Or. XXI, r. 90—Inadequacy of price—Substantial injury—Debt to the extent by which price fell short barred by limitation.*

The Appeal arose out of proceedings in execution. The application which initiated the present proceedings was one under Or. XXI, r. 90, to set aside a sale on the ground of irregularity. The following facts were found by the Court below (1) that the notice required by r. 66 had not been served: (2) that the proclamation had not been published: (3) that an inadequate price was stated in the proclamation: (4) that an inadequate price was in fact realized: (5) that the value of the properties would not exceed the amount under the decree: and (6) that the Defendant's liability under the decree had ceased.

Their Lordships observed that a debtor is entitled to have those steps taken for which provision is made by the Code for the purpose of ensuring that his property will realize an adequate price and to enable him to pay off his debt in money or money's worth. It is no answer to him to say it is quite true there have been irregularities and a consequent inadequacy of price which has prevented you from paying off your debt in full, but you have the satisfaction of a shelter behind the statute of limitation. That is not all the satisfaction an honest debtor desires. "We do not think that the argument and the considerations involved in it are sufficient to enable a decree-holder and purchaser in a case like the present to say that substantial injury has not been suffered simply because further remedies may be barred by some technical rule of law."

Held—That there was an inadequacy of price resulting from irregularities in the conduct of the sale and that that occasioned a substantial injury to the applicant which was not removed.

Babus Umakali Mukherjee and *Rajeshwar Pershad* for the Appellant.

Babus Mohendra Nath Roy and *Chandra Sekhar Prosad Singh* for the Respondents.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before SHAR[illegible]UDDIN and COXE, JJ. APPEAL FROM APP[illegible]LATE DECREE No. 2228 OF 1908. GANEN[illegible]DRA MOHAN CHOWDHURI AND ANOTHER Plaintiffs, Appellants. *v.* GYA PROSA[illegible] TEWARI AND ANOTHER, Respondents. 9t[illegible] July 1912.

Rent, suit for—Registered kabuliyat—Holdin[illegible] over—Letter agreeing to receive reduced rent-Admissibility in evidence—Contract, repudiation o[illegible] Guardians and Wards Act (*VIII of 1890*), *sec. 29*[illegible]

The Appeal arose out of a suit for rent. Th[illegible] Defendants, in Chaitra 1304, executed a registere[illegible] kabuliyat in favour of the Plaintiffs with respec[illegible] to the lands in suit. The term of this kabuliya[illegible] was from 1304 to 1309 inclusive. Subsequently in Assin 1310 the Defendants obtained a letter from the Plaintiffs' naib by which the rent was reduced from Rs. 87-8 as. to Rs. 37-3 as. on the ground tha[illegible] the entire land was not fit for cultivation. A condition was attached to this reduction of rent t[illegible] the effect that it was dependant on the paymen[illegible] of the current and back rents within a specifie[illegible] time. The suit was decreed by the Munsif at th[illegible] rate of Rs. 37-3 as. and the Plaintiffs' appeal to the District Judge was dismissed. The Plaintiffs then appealed to the High Court.

Held—That the letter which was very similar in its terms and reserved an annual rent came within the scope of the decision in *Durga Prasad Singh* v. *Rajendra Narain Bagchi* (I. L. R. 37 Cal. 293) and required registration under sec. 17 of the Registration Act and could not therefore under sec. 49 be received as evidence of any transactio[illegible] affecting the property.

Obiter—Nothing in the letter, supposing it t[illegible] be a valid contract, could debar the Defendan[illegible] from instituting a suit under sec. 38 of the Beng[illegible] Tenancy Act for the reduction of rent. But t[illegible] fact that the Defendants were entitled to bring suit under sec. 38 would not entitle them in t[illegible] present suit to repudiate the terms of the contra[illegible] which was freely entered into between them a[illegible] the Plaintiffs.

That the Plaintiffs' guardian was entitled [illegible] grant the letter which was in the nature of a lea[illegible] for a period not exceeding 5 years and such gra[illegible] was not forbidden by sec. 29 of the Guardians an[illegible] Wards Act.

Babus Jogesh Chandra Roy and *Mukunda Na[illegible] Roy* for the Appellants.

Babus Harendra Narain Mitra and *Rajend[illegible] Chandra Guha* for the Respondents.

A. T. M. *Appeal allowed.*

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD SHAW. SIR JOHN EDGE. MR. AMEER ALI. 1912, Heard, 8, 9 and 10, May. Judgment, 13, June.	MIRZA SAJJAD HUSAIN and anr., Appellants, *v.* NAWAB WAZIR ALI KHAN and others, Respondents.

Civil Procedure Code (Act XIV of 1882), sec. 596—Purdanashin *lady, deed executed by—Onus to prove intelligent execution not discharged—Concurrent findings of fact—Materials on which finding based if must all be set out in the judgment.*

Strongest and most satisfactory proof ought to be given by persons who claim under sale or gift from purdanashin *ladies that the transaction was a real and* bonâ fide *one and fully understood by the lady whose property was dealt with.*

TACOORDEEN TEWARRY *v.* NAWAB SYED ALI HUSAIN KHAN (1), SHAMBATI KOERI *v.* JAGO BIBI (2) *followed.*

Where a concurrent finding of fact was sought to be challenged before the Privy Council on the ground that the Court of first instance had misdirected itself inasmuch as in the course of a long judgment certain materials of a most elementary character for arriving at a conclusion had not been set out in the narrative which the judgment contained:

Held—*That there was no ground for the suggestion that the Court had not taken these circumstances into account.*

That it would be to misconstrue entirely the provisions of sec. 596 of Act XIV of 1882 as to concurrent findings of fact if the Judges of India were to have impliedly the duty laid upon them of making their narrative of the circumstances minutely and completely exhaustive, under the penalty that if they failed to do so, the absence from their mind of elementary considerations might be presumed.

(1) L. R. 1 I. A. 192, 206 (1874).

(2) L. R. 29 I. A. 181: s. c. 6 C. W. N. 682 (1902).

This was an Appeal from a judgment and decree, dated the 27th of March 1907, of the Court of the Judicial Commissioner of Oudh, which varied a decree of the Subordinate Judge of Lucknow, dated the 30th of March 1906.

The suit was brought by the Appellants, as Plaintiffs, to obtain a declaration that the property specified in three separate deeds was *wakf* (endowed property) and for separate possession of all the properties, as against the first Defendant Nawab Abid Husain Khan, or joint possession of them with him.

The claim of the Plaintiffs was dismissed by the Subordinate Judge, but on appeal, the Court of the Judicial Commissioner while upholding his decree as regards one of the deeds, dated November 13th, 1902, reversed it with respect to property included in the other two. The Appellants obtained leave from the Appellate Court to appeal against that portion of its judgment and decree, which affirmed the decree of the Subordinate Judge.

The circumstances out of which the present Appeal has arisen may be shortly stated as follows:—

One Madad Ali, deceased, erected a tomb in the City of Lucknow. On the 4th of December 1886, he executed a *wakfnama*, or deed of endowment, by which he dedicated the properties mentioned in lists A and B attached to the plaint, for the maintenance of the tomb and for other purposes. He also appointed two ladies, named Sardar Begam and Mehdi Begam, trustees of the property,

and gave them power to nominate their successors. The former died in December 1889, and the latter continued to manage the property alone.

On the 7th March 1898, Mehdi Begam executed a deed by which she added to the endowment the property specified in lists D1 to D3 attached to the plaint, and she appointed the first Plaintiff and the first Defendant to be the trustees of the whole of the endowed property.

On the 13th of November 1902, Mehdi Begam executed another document by which property valued at about Rs. 43,000 was added to the property already subject to the trust, and of this document the executant appointed herself and the first Plaintiff, and the first and second Defendants to be the trustees.

Mehdi Begam died in February 1903, and the first Defendant succeeded, as the brother of the deceased, in obtaining possession from the Revenue Court of all her property. On the 27th of April 1904, the second Plaintiff was appointed a trustee of the endowed property by the second Defendant, who retired from the trust.

On the 1st of April 1905, the Plaintiffs brought the present suit. The plaint stated the above and other facts, and asked for a declaration that the properties mentioned in the lists attached to the plaint were trust properties under the said three trust-deeds of 1886, 1898, and 1902. The Plaintiffs also prayed for separate possession of all the properties as against the first Defendant, or joint possession of them with him.

The substantial defence to the suit was contained in the written statement of the first Defendant. It is now necessary to refer to it only in so far as it relates to the deed of the 13th of November 1902, in regard to which the first Defendant pleaded that it was not executed by Mehdi Begam, and that she was at the time of the alleged execution by her, infirm and incapable of understanding it, and that she had had no independent advice.

Both parties put in documentary evidence and the Plaintiffs examined a number of witnesses. On the 30th March 1906, the Subordinate Judge made a decree by which he dismissed the suit with costs. He held that a valid *wakf* had not been created by the deed of the 7th of March 1898. With regard to the deed of the 13th November, he decided that though it had been executed by Mehdi Begam, it was not a document to be given effect to because its intelligent execution by her had not been proved.

The Plaintiffs appealed to the Court of the Judicial Commissioner from the decree of the Subordinate Judge, and their appeal was heard by two learned Judges (Chamier and Sanders, JJ) who, on the 27th March 1907, delivered their judgment and decree by which they modified the decree of the Subordinate Judge by allowing the appeal of the Plaintiffs as to the property detailed in the deeds of the 4th of December 1886 and the 7th of March 1898, but they confirmed that decree and dismissed the suit in respect of the property detailed in the deed of the 13th of November 1902. As regards the last-named deed they were of opinion that it had not been proved that when Mehdi Begam executed it she understood its provisions and its effect upon her interests.

Hence this appeal.

Sir E. Richards, K. C., and *Mr. Ross* for the Appellants.

Mr. L. DeGruyther, K. C., and *Mr. Cowell*, for the Respondents, contended

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that appeal was concluded by concurrent findings of fact of the Courts below. It was a pure question of fact whether or not the *purdanashin* lady intelligently executed the document. The onus lies upon the party relying upon the document to satisfy the Courts which they have failed to do. There was no evidence that the deed was explained to her or that she understood its terms or its effect upon her interests. Mere reading of a document is not enough. Reliance was placed on *Shambati Koeri* v. *Jago Bibi* (2), *Karuppanan* v. *Srinivasa* (3), *Allen* v. *Quebec Warehouse Co.* (4), *Ram Anugra Narain* v. *Chowdhry Hanuman* (5).

Sir E. Richards, K. C, replying on this point, submitted that the Subordinate Judge had misdirected himself in estimating the evidence. He did not take into consideration the position of the lady and the facts that she possessed great business capacity and always conducted her business and managed her affairs and that she herself was a trustee under the deed. He relied on *Mahomed Buksh Khan* v. *Hosseini Bibi* (6).

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an Appeal from a judgment and decree of the Court of the Judicial Commissioner for Oudh, dated the 27th March 1907, modifying a decree of the Subordinate Judge of Lucknow, dated the 30th March 1906. The suit was brought on the 1st April 1905.

It prayed for a declaration that all the property comprised in three deeds of endowment was *wakf*, that is to say, was endowed property, and the Plaintiffs (the present Appellants) as trustees under these deeds prayed for possession. The claim in short was, as stated, a "claim for possession of *wakf* property by right of trusteeship."

The claim of the Appellants was dismissed by the Subordinate Judge in its entirety. Upon appeal, the Appellate Court upheld this decree with respect to the property comprised in one of the three deeds of endowment, *viz*, that of 13th November 1902, and reversed it with respect to the property included in the other two deeds. That is to say the endowments under these two deeds were held good.

The only question raised in the present Appeal has reference to the last endowment, *viz.*, that constituted by the deed of 1902. The preceding deeds, one dated in 1886 and one in 1898, were somewhat limited in their character, and the Defendants' contention under which these deeds were attacked is not now further insisted on.

Many years ago a tomb, or, more properly speaking—as their Lordships are informed—a mausoleum, was erected in the city of Lucknow by one Madad Ali, now dead; and in 1886 he made a *wakf* of certain property for the upkeep of the the mausoleum and the performance of religious observances in connection therewith. By the deed of endowment Mehdi Begam was appointed one of two trustees, and upon the death of her co-trustee in 1899 she continued to manage the property alone. In March 1898 she executed a document whereby she purported to add to the endowment, and she appointed the first Plaintiff and her brother, the first Defendant, to be trustees of the original

(2) L. R. 29 I. A. 127, 130, 131: s. c. 6 C. W. N. 682 (1902).
(3) L. R. 29 I. A. 38, 39: s. c. 6 C. W. N. 241 (1901).
(4) 12 A. C. 101, 104 (1886).
(5) L. R. 30 I. A. 41, 48: s. c. 7 C. W. N. 225 (1902).
(6) L. R. 15 I. A. 81, 83 (1888).

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and added property. There appears to be no doubt that Mehdi Begam was much interested in the mausoleum and in its endowment, its upkeep, and its services. She died on the 4th February 1903, having on the previous 13th day of November executed another deed—that with regard to which the parties are now in contention.

Mehdi Begam was a *purdanashin* woman; she was separated from her husband, she was unable to read or write, and she was possessed, at the date of the deed which is questioned, of a fortune of about Rs. 50,000. It is not disputed that in the ordinary case of a deed granted by a *purdanashin* lady, it rests upon those founding upon the document to establish that she understood its effect and that the deed was intelligently and properly executed by her.

The *wakf* is undoubtedly of a comprehensive character. It proceeds upon the following narrative:—

"Whereas this world is unstable and no reliance can be placed on this borrowed life, and after death there remains no trace either of soul or body, and whosoever has come to this world from non-existence will be completely annihilated one day, according to the proverb 'all that lies over it is mortal'; but through good and charitable deeds, or from one's male issue, if he is good and obedient, the continuance of one'e name is possible, I, the declarant, have no issue of any kind from whom I may hope for the endurance of my name, consequently it seems proper to incline myself to the performance of good deeds."

The deed thereupon proceeds to endow:—

"With possession in the name of the undermentioned places in my lifetime in connection with the *Rousa* and for its maintenance, stability, and expenses, and also for sending people to Karbala and other holy places, as detailed below, my personal moveable and immoveable property, as specified hereafter, valued at Rs. 50,000.'

She constituted herself as *Mutawalli*, that is, as the manager of the religious endowment, and she appointed her brother and her general agent as trustees. Among the succeeding clauses the following appears to be important:—

"That the trustees shall in my lifetime, as well as after my death, continue to manage the undermentioned things just like myself, and the carrying out of the undermentioned things and of the above conditions shall also be binding and incumbent on me, as it is incumbent according to the *Imamia* law. And for my livelihood my *wasika* and pension are sufficient."

That pension amounted, as is admitted, to somewhere under Rs. 40 per month. Power is given for collection of the income of all property conveyed, such collection to rest only in the general agent, who was one of the trustees.

The document may be described shortly as an *inter vivos* conveyance, taking effect *de presenti* and stripping the lady of all her possessions, except to the extent of the reservation made to herself of her pension of Rs. 40 per month. It appears to their Lordships that the deed accordingly is of a character justifying a strict and careful application of the rule operating for the protection of *purdanashin* women and demanding affirmative proof on the subject of their intelligent understanding and execution of deeds attributed to them. This view is strengthened by the marked contrast which exists between this document of 1902 and the previous deed of endowment of 1898, which was limited in its scope, was purely testamentary, and expressly reserved powers of management of all the affairs of the endowed property to the lady herself, with power of amending and cancelling the endowment.

"According to the principles which have always guided the Courts in dealing with sales or gifts made by ladies in such a position (*purdanashin* ladies), the strongest and most satisfactory proof ought to be given by the person who claims under

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a sale or gift from them, that the transaction was a real and *bonâ fide* one and fully understood by the lady whose property is dealt with."

This is the language of Sir Montagu Smith in *Tacoordeen Tewarry* v. *Nawab Syed Ali Husain Khan* (1) and is still the law. In the words of Sir Andrew Scoble in *Shambati Koeri* v. *Jago Bibi* (2):—

"It is a well-known rule of this Committee that in the case of deeds and powers executed by *purdanashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they have been explained to and understood by those who executed them."

Accordingly, the one and only question in this case is:—the burden of proof being thus placed, has it been discharged by the party upon whom it rests? In their Lordships' opinion, Mr. DeGruyther was justified in founding upon the concurrent findings in fact of the Courts below. The Subordinate Judge, having heard the evidence, says:—

"It does not satisfy me that Mehdi Begam intelligently understood the deed on which she was placing her seal, and knew at the time its effects upon her rights as owner of the property comprised in the deed."

It is unnecessary to go into the details as to the alleged execution of the document in the zenana, as to whether certain witnesses knew the voice of the executant, as to whether the deed in point of fact was read in circumstances giving any indication of its appreciation by the grantor. The finding of the Subordinate Judge is as stated. In the judgment passed by the Court of the Judicial Commissioner of Oudh the opinion expressed was as follows:—

"It has not been proved that when Mehdi Begam executed the *wakfnama* she understood its provisions or its effects upon her interests."

(1) L. R. 1 I. A. 192, 206 (1874).

(2) L. R. 29 I. A. 131: s. c. 6 C. W. N. 682 (1902).

By sec. 596, of the Civil Procedure Code (Act XIV of 1882) it is specifically provided as follows with reference to Appeals to His Majesty the King in Council:—

"Where the decree appealed from affirms a decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law"

Their Lordships put to the learned Counsel for the Appellants what question of law was here involved, and it was replied that, while the findings of fact were concurrent, the judgment of the Subordinate Judge showed that he had misdirected himself. It turned out that this was rested upon the ground that in the course of a long judgment certain materials for arriving at a conclusion had not been set out in the narrative which the judgment contains. These materials were of the most elementary character; and their Lordships are of opinion that there is no ground for the suggestion that the Subordinate Judge had not taken them into account. It would be to misconstrue entirely the provisions as to concurrent findings in fact if the Judges of India were to have impliedly the duty laid upon them of making their narrative of the circumstances minutely and completely exhaustive, under the penalty that if they failed to do so, the absence from their mind of elementary considerations might be presumed.

The Courts below accordingly having concurrently found that the facts which it lay upon the Appellants to establish were not proved, it appears to their Lordships that this is to all intents and purposes a concurrent finding on a matter of fact, and that accordingly such a finding cannot be disturbed. The rule so clearly laid down by Lord Macnaghten in *Karuppanan*

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Servai v. *Srinivasa Chetti*. (3) should be followed.

Their Lordships will accordingly humbly advise His Majesty that the Appeal should be dismissed with costs.

Solicitors : *Messrs. W. W. Box & Co.* for the Appellants.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Respondents.

Appeal dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO. 586 OF 1910.

JENKINS, C. J. N. R CHATTERJEA, J. 1912, Heard, 24, June. Judgment, 15, July.	NARAYAN SAHU, and others, Decree-holders, Appellants, *v.* MOHANTH DAMODAR DAS, Judgment-debtor, Respondent.

Limitation Act (IX of 1908), sec. 18, Sch. I, Art. 166—Sale, application to set aside—Fraud employed to bring about sale, if may save bar of limitation—Fraudulent concealment, what amounts to—Fraud, plea of—Proof.

When an application to set aside an execution sale was made more than 30 days after the sale, but it was urged that sec. 18 of the Limitation Act applied to the case :

Held—***That the fraud which it is necessary to prove to bring the case within sec. 18 of the Limitation Act may have occurred prior to the sale—for fraud, at any rate of the nature generally employed in bringing about an illegal sale, is a continuing influence, and until that influence ends, it retains its power of mischief.***

PURNA CHANDRA MANDAL *v.* ANUKUL BISWAS (1) *explained.*

RAHIMBHOY HABIBHOY *v.* TURNER (2) *referred to.*

Fraud is not to be lightly charged or lightly found specially in cases of applications to set aside an execution sale, where this reserve is too often neglected.

Misstatement of value, even if it can be described as "fraud," does not constitute fraudulent concealment, and non-publication of sale-proclamation in the mofussil even if it exposes the sale to attack at the instance of the judgment-debtor would not by itself bring the case under sec. 18 of the Limitation Act, unless it is shown that the judgment-debtor has, by means of fraud of which the decree-holder was guilty or to which he was accessory, been kept from the knowledge of his right.

This was an Appeal preferred on the 9th of December 1910 against an order of Babu Charu Chandra Mukerji, Subordinate Judge of Darbhanga, dated the 24th of September 1910.

The Respondent judgment-debtor whose property had been sold in execution and purchased by the decree-holder for Rs. 11,000, on the 15th December 1909, applied on the 15th January 1910 to have the sale set aside on the ground of irregularity and fraud in publishing the sale. Being one day too late, he claimed that the case fell within the provisions of sec. 18 of the Limitation Act.

The Subordinate Judge on the evidence found (1) that the decree-holders in stating the value of the property to be Rs. 7,000 had made "an intentional misstatement amounting to fraud and irregularity," the real value of the pro-

(3) L. R. 29 I. A. 241 (1901). s. c. 6 C. W. N.

(1) I. L. R. 36 Cal. 654 (1909).
(2) I. L. R. 17 Bom. 341 (1892).

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perty being approximately Rs. 28,000; (2) that the sale was held within 30 days of the publication of the sale-proclamation in the Civil Court contrary to law and that the publication of the proclamation in the Collectorate preceded the publication in the mofussil, if the proclamation was published in the mofussil at all, instead of following it as required by Or. 21, r. 54, cl. (2); that in point of fact the sale-proclamation was not at all published in the mofussil; (3) that although on the 15th December 1909, the date of the sale, the judgment-debtor's dewan made payment in part of another decree of the same decree-holder then under execution, the decree-holder's agent who received the money did not inform the judgment-debtor's dewan of the sale, "as in all fairness he should have done." Upon these findings the Subordinate Judge came to the conclusion that there was fraud on the part of the decree-holder in publishing and conducting the sale and that there was material irregularity in publishing it and that the judgment-debtor had suffered substantial injury thereby.

With regard to the application of sec. 18 of the Limitation Act, the Subordinate Judge held as follows:—

"In this case the judgment-debtor has said in his evidence that he was kept from the knowledge of the sale by the fraud of the decree-holder, and from the facts disclosed in the case I find that allegation is true. The judgment-debtor therefore was entitled to come within 30 days from the day on which he came to know of the sale, *i.e.*, the 15th January 1910," when the decree-holder's agent first informed the judgment-debtor's dewan of the sale.

The Subordinate Judge accordingly allowed the application and set aside the sale.

The decree-holder thereupon preferred this appeal.

Dr. Rash Behary Ghosh and *Babu Shoroshi Churn Mitter* for the Appellants.

Babus Umakali Mukherjee and *Atul Chandra Dutt* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—The Appellant is a decree-holder and a purchaser in execution of his own decree. His complaint is that the sale in execution of this decree has been set aside on an application under r. 90 of Or. XXI of the Civil Procedure Code though that application was made after the expiration of the period allowed by the Limitation Act. He also maintains that the order was erroneous on its merits. The sale was on the 15th of December 1908; the application on the following 15th of January. Art. 166 of the Indian Limitation Act permits a period of 30 days only from the date of the sale for an application to set aside a sale in execution of a decree.

The application in this case was admittedly made beyond this period, and the only answer proposed to this objection is that sec. 18 of the Act gave the applicant an extended period. The sole question is whether this is made out.

The Subordinate Judge has decided in favour of the judgment-debtor. In opposition to this the Appellant maintains that to satisfy the terms of sec. 18, the fraud must have been subsequent to the sale, and no such fraud is alleged. Next he contends that even if a wider scope be ascribed to the section, no fraudulent concealment is proved.

In support of the first of these propositions, *Purna Chandra Mandal* v. *Anukul Biswas* (1) has been cited to us, and there,

(1) I. L. R. 36 Cal. 654 (1909).

no doubt, it was said in reference to conditions, not unlike the present, that "the question of limitation depends upon what has taken place after the date of the sale with regard to the knowledge of the judgment-debtor concerned." This passage is capable of a meaning to which no exception can be taken. At the same time it is at least equally open to a construction which would involve a doctrine difficult to reconcile with what was said by the Privy Council in *Rahimbhoy Habibhoy* v. *Turner* (2): this would be the case if by this passage is meant that what occurs prior to the sale can be wholly excluded from consideration, and a clean slate claimed. But it was a saying of an early Chancellor, that frost and fraud end in foul; and in this lies the truth of the matter. Fraud—at any rate the class of fraud with which we are here concerned,—is a continuing influence and until that influence ends, it retains its power of mischief. And so, it was said in the case to which I have referred that when a man has committed fraud and has got property thereby, it is for him to show that the person injured by the fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud at a time which is too remote to allow him to bring the suit. If, therefore, the Appellant's success depended on the first of his two propositions I should have hesitated to decide in his favour.

But he is on firmer ground when he takes up his stand on the second of his two contentions. Was there any fraudulent concealment of the execution proceedings on the part of the Appellants? It is not suggested that there was any beyond what is disclosed in the judgment under appeal; and the Respondent sought to support the order under appeal on that judgment and on that judgment alone: beyond that we were invited not to go. It is true that the word "fraud" is used in the judgment with some freedom; but that is not enough. Do the facts constitute fraudulent concealment? It is an enquiry that requires considerable care, for fraud is not to be lightly charged or lightly found. This cannot be too much emphasized, especially in cases of this class where this reserve is too often neglected. The language of the Subordinate Judge in some measure invites the criticism that he seems to treat fraud and irregularity almost as one, and yet they essentially differ.

The misstatement of the value in the execution petition is described as a "fraud and irregularity"; irregularity it may have been; and even assuming for the sake of argument that it was a fraud, still it does not constitute the fraudulent concealment necessary to save limitation. Even if the non-publication of the sale-proclamation in the mofussil exposed the sale to attack at the instance of the judgment-debtor, it is not shewn that he has by means of fraud, of which the decree-holder was guilty or to which he was accessory, been kept from the knowledge of his right. Nor can I find in the other facts on which the Subordinate Judge relies that which is necessary to bring the provisions of sec. 18 of the Limitation Act into play. And I desire to make it clear that the judgment-debtor requested us to decide this appeal on the materials contained in the judgment of the Subordinate Judge and on that alone. The appeal is therefore allowed with costs and the application dismissed with costs. We assess the costs of the Appeal at 5 gold

(2) I. L. R. 17 Bom. 341 (1892).

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mohurs. The money deposited will be refunded to the Respondent.

N. R. CHATTERJEA.—I agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 569 OF 1910.

CARNDUFF, J. CHAPMAN, J. 1912, Heard, 2, 7 and 8, May. Judgment, 21, May.

MOHADEO PROSAD SHAHU, Plaintiff, Appellant, *v.* GAJADHAR PROSAD SAHU and others, Defendants, Respondents.

Partnership accounts—Banking concern, joint——Deposit by a partner payable with interest—Suit to recover deposit if maintainable—Suit if maintainable when suit for dissolution and accounts previously instituted—Civil Procedure Code (Act V of 1908), sec. 10.

Where it was arranged between the mother and guardian of Plaintiff, a minor partner of a banking concern, and his co-partners that each of the partners would be entitled to draw a certain fixed monthly allowance from the bank for personal expenses, but the minor's allowance was by arrangement not taken out but permitted to accumulate with interest in the bank, and in a suit for dissolution and accounts by the Plaintiff he applied for an order on the Receiver appointed in the suit to pay the amount of the deposit with interest, but the decision of the Court being adverse, he instituted a fresh suit for the recovery of deposits with interest less one-third, the proportion recoverable from himself as a partner, but the suit was dismissed, and pending an appeal from the order of dismissal the Plaintiff obtained an order of the High Court in revision directing an account to be taken of the amount alleged to be in deposit if Plaintiff's appeal should fail:

Held—*That the suit was rightly dismissed as barred by the provisions of sec. 10 of the Civil Procedure Code, as the matter in issue in the suit was directly and substantially in issue in the previously instituted suit. To stay the suit according to the strict language of sec. 10 until by the decision of the previous suit the matter would be* res judicata *was needless.*

Obiter—*Though, on general principles, the claim of a partner against a joint banking concern must in course of winding up proceedings be postponed to those of outsiders, there may be cases in which the complete solvency of the bank is admitted and a partner might sue, like any other customer, for the taking separately of his private account as a customer and for the recovery of the balance found standing to his credit. Relief in such a case will only be refused when a partial account will work injustice to the other partners.*

LINDLAY ON PARTNERSHIP, P. 592 and KARRI VENKATA REDDI *v.* KOLLU NARASAYYA (3) *relied on.*

This was an Appeal preferred on the 15th of December 1910 against the decree of Babu Pankaja Kumar Chatterjee, Subordinate Judge of Zillah Mozufferpur, dated the 31st of August 1910.

The facts of the case will sufficiently appear from the judgment.

Dr. Rash Behary Ghosh, Babus Shoroshi Churn Mitter, Chandra Shekhar Banerjee and *Satish Chandra Mookerjee* for the Appellant.

Messrs. S. P. Sinha, S. K. Chakravarty and *Babu Lachmi Narain Singh* for the Respondents.

(3) I. L. R. 32 Mad. 76 at p. 80 (1908).

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The JUDGMENT OF THE COURT was as follows :—

This is an Appeal from the judgment and decree of the Subordinate Judge of Mozufferpur dimissing a suit brought by a partner in a banking business for the recovery from the other partners of a considerable sum of money said to have been deposited in the bank in circumstances which may be thus described.

The Plaintiff's father, Ganesh, and his uncles, Gajadhar (the father of the first Defendant) and Baldeo (the father of the second, third and fourth Defendants) were members of a joint Hindu family, which owned, *inter alia*, an ancestral bank. Ganesh died in 1886, and it was thereafter, in 1893 apparently, agreed that each of the three branches of the joint family should be entitled to draw a monthly allowance from the bank of Rs. 750 for personal expenses. The Plaintiff's allowances were, however, not required, and it was arranged through his mother, he being a minor at the time, that they should be permitted to accumulate with interest in the bank. In the meantime disputes in the management arose, and on the 5th April 1900 a suit was instituted on behalf of the Plaintiff against Baldeo and Gajadhar for partition of the family property and for an account. This suit was compromised on the 17th April 1901, the consent-decree dividing the moveable and immoveable properties of the family, discharging Baldeo and Gajadhar from further liability to account, and directing the appointment of a manager for the realization of the assets and outstandings, and the winding up of the banking business.

On the 17th July 1904, the Plaintiff brought another suit for the purpose of having the consent-decree of the 17th April 1901 set aside as inequitable and in fraud of his rights, for a fresh partition of the family property, and for a further account from Gajadhar and the sons of Baldeo who had died in the interval. Most of the points in controversy were once more amicably settled when the case came before the High Court on appeal in 1908, and a decree was made as to the division of the property in accordance with the terms of the compromise then arrived at. But the parties had been unable to agree as to the liability of Gajadhar and the sons of Baldeo to account, and on this portion of the case the High Court decided in favour of the Plaintiff. It was accordingly further ordered by the decree that, as the accounts of the joint family business had not been duly investigated by the Plaintiff's next friend and guardian *ad litem* in the suit of 1900, they should then be taken; and the case was remanded to the lower Court for that purpose and with the further direction that a receiver should realise the outstandings of the banking business and "divide the same, after satisfying the debts, if any, of the bank, between the parties according to their respective shares." The consent-decree of 1901 was thus entirely set aside and superseded.

In accordance, as it is said, with these directions the Plaintiff moved the District Judge by petition on the 10th December 1908 to order the receiver to pay to him the sum of Rs. 87,247, which, it was alleged, were shown by the books of the bank in the receiver's possession to be due to him on account of the moneys deposited on his behalf by his mother, with interest up to date. This petition was forwarded in original to the receiver for disposal, and the receiver decided that the request contained in it could

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not be complied with. He was of opinion apparently that the item of Rs. 87,247 referred to was inseparable from the whole account, and that the Plaintiff's right to it could be determined only by the Commissioner appointed to adjust the accounts of the partnership. The soundness of this decision was challenged by the Plaintiff in a petition which he presented to the District Judge on the 8th February 1909, and in which he urged that the sum claimed by him was a separate item in respect of which the bank and he stood in the relation of debtor and creditor, that the transaction out of which the claim arose was apart from and independent of his position as a co-sharer in the bank, and that he was entitled as an ordinary creditor to recover it from the hands of the receiver, as contemplated by the decree of the High Court, without having to wait for a final settlement of accounts between him and his partners. The District Judge, however, decided to await the Commissioner's report, and that was submitted by one Mr. Smith on the 23rd September 1909. In it the only passage that has any bearing on the claim now under consideration is that in which it is stated that it appeared from the books of the bank that each partner had, in accordance with the arrangement already alluded to, received and been duly paid an allowance of Rs. 750 *per mensem* from the year 1893 down to the year 1910. The Commissioner was silent as to any moneys banked by the Plaintiff, not *quâ* partner, but as an ordinary depositor or creditor, or, in other words, as to what may be called the Plaintiff's private account with the bank as opposed to the account between him and the other partners. The present claim was, therefore, not enquired into by the Commissioner; and yet the District Judge seems to have deemed it unnecessary to interfere, although it would appear from the concluding part of his order of the 24th December 1909, that he affirmed the view of the receiver that the claim could be settled by the Commissioner alone. Exception on this ground was evidently taken by the Plaintiff to the Commissioner's report; but the District Judge's order of the 29th June 1910, on a representation submitted by Gajadhar, indicates that it had been held to be out of time and rejected in consequence. The result, it is urged by the learned Vakil for the Appellant, was that the Plaintiff was forced to bring the present action, which he instituted on the 15th November 1909, for the recovery of his deposits, with interest, less one-third, the proportion recoverable from himself as a partner. The suit was dismissed by the Subordinate Judge on the 31st August 1910 and its failure seems to have driven the Plaintiff back to the proceedings in the suit for partition and accounts still pending before the District Judge who was on the 28th November 1910 moved, as Mr. Smith had left the country, to remit the matter to a second Commissioner, Rai Shib Chandra Chatterjee Bahadur, who had been appointed to deal with certain matters other than those referred to Mr. Smith, in order that the question of the Plaintiff's deposits in the bank might be enquired into and fully reported upon. To this prayer Gajadhar objected on several grounds. In the first place, the Plaintiff had intimated that it was his intention to appeal—as he at once did by preferring the present appeal on the 15th December 1910—against the dismissal of his suit for the recovery of his deposits directly from his co-partners; and it was

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argued that, in those circumstances, it was not open to him to ask, in other proceedings, for an order for accounts in connection with the same deposits. Next, it was asserted that the Commissioner, Mr. Smith, had in fact investigated the whole account and definitely found that the allowance of Rs. 750 a month had been regularly paid to the Plaintiff; and it was submitted that any claim on that score should have been made when Mr. Smith's report was presented in 1909, and could not be entertained simply because the Plaintiff's separate suit had failed. These objections prevailed with the learned District Judge who refused the application. Against this refusal the Plaintiff did not appeal; but he eventually moved this Court in revision and was successful in obtaining from it, on the 1st May 1911, an order setting it aside and remitting the case for reconsideration. We gather that Mookerjee and Teunon, JJ., were of opinion that a proper account of the transactions of the Plaintiff, *quâ* depositor, with the bank, had not been taken in the suit for partition and accounts, and ought in justice to be taken either in the proceedings ancillary to the High Court's decree of 1908 or in connection with the present suit. It was, therefore, ordered by those learned Judges that the proceedings in the earlier suit should be stayed pending the disposal of the present appeal, and that the Plaintiff's deposit account, so to speak, should be taken in the former unless, as the result of this appeal, such an account had to be taken in connection with the latter.

The position, therefore, is reduced to this, that the parties are now disputing before us regarding nothing more than the venial question whether the Plaintiff or the Respondents should bear the costs of the present appeal and of the suit out of which it has sprung. For the Plaintiff has, admittedly, secured by the revisional order of this Court passed on the 1st May 1911, all that he can want; and it is contended on behalf of the Defendants-Respondents by their learned Counsel, Mr. Sinha, that, whatever the result, his clients ought not to be required to pay for this unnecessary litigation. We have come to the conclusion that Mr. Sinha is right.

The suit before us now was dismissed by the Court below, *first*, because it was not maintainable at all, as being a suit by a partner for a partial account; and, *secondly*, because it was barred by reason of the provisions of sec. 10 of the Code of Civil Procedure, 1908.

The second, at least, of these demurrers must, in our opinion, succeed. Sec. 10 of the present Code lays it down that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties litigating under the same title, where such suit is pending in the same or any other Court having jurisdiction to grant the relief claimed. It was for a moment suggested that the Plaintiff is suing as a partner of the banking business in the partition suit and as an ordinary creditor in this, and cannot, therefore, be said to be litigating under the same title; but there is nothing in the suggestion, and it was not pressed. The provision is clearly applicable, and the only other answer attempted is that it contemplates merely a stay of the trial of the second suit, and not its dismissal as not maintainable. It is true that the words "proceed with the trial of" replace

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the word "try" in the corresponding sec. 12 of the Code of 1882, and the altered language of the new section thus removes all doubt as to its being possible to institute such a suit as, for example, that of *Raja Ranjit Sinha* v. *Bhagabatty Charan Roy* (1). But in the present instance there is no substance in the plea, since the only result of a stay would have been to keep this suit pending until the sole question at issue in it had been decided in the other suit and so become *res judicata.* The appeal must, therefore, fail on this ground.

The other point taken by the learned Subordinate Judge is one of considerable difficulty, and we are not sure that there are sufficient materials before us for a definite decision. For present purposes we must take the facts as alleged by the Plaintiff-Appellant : that is to say, we must take it that the moneys claimed were deposited by him in the bank, of which he was himself a proprietor to the extent of one-third. On his behalf it is contended that, *quoad* these deposits, he is in the position of an outside creditor ; that his transactions in this particular connection have nothing whatever to do with the partnership accounts ; that he is entitled to his money like any ordinary customer of the bank ; and that, by limiting his claim to two-thirds of it, he avoids the difficulty involved *primâ facie* in suing himself and being at once Plaintiff and Defendant in the same action. The law on the subject has, as Dr. Ghosh has shown by reference, in particular, to *Lindlay on Partnership*, Ed. 7, at pages 133, 299, 303, 497, 591, 592 and 595, and the judgment of Ameer Ali and Pratt, JJ., in *Durga Prossonno Bose* v. *Raghunath Dass* (2), considerably developed ; and, whatever doubts may at one time have been entertained in England as to the maintainability of an action by one partner against another under the old technical rules of English procedure, even the Courts there have latterly taken a more reasonable attitude towards disputes between partners. And here in India we ought to feel still less hampered, and should not hesitate to look to the substance rather than to the form. Regarding the matter from this standpoint we find that certain principles emerge which, at the outset, seem undoubtedly to stand in the Appellant's way. If the items in dispute are items in the partnership account, it would appear at first sight to be impossible to deal with them by themselves without taking a general account of the partnership business. Here, as the learned Doctor has frankly admitted in the course of argument, if the Appellant's allowances had never been drawn, but had been simply left to accumulate undrawn in the bank, it might be difficult to urge that the moneys so accumulated were not items in the partnership account. Does it, as has been argued, make any substantial difference that they were drawn and replaced as deposits, possibly by means of mere book transfers ? We are not prepared to say that it does. It is suggested that the deposits cannot be treated as "advances" to the firm by a partner in it ; but the Appellant must not be allowed to evade the fact that he was, after all, primarily a partner ; and does not that circumstance make a real difference in his position as a depositor and creditor ? We are inclined to think that it does, and that there is, at least, the difference recognised in England by sec. 44 of the Partnership Act, 1890 (53 and 54 Vict., C. 39), which

(1) 7 C. W. N. 720 (1903).
(2) I. L. R 26 Cal. 254 (1898).

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provides, in connection with the settling of accounts between partners after dissolution, for the satisfaction, *first*, of the debts and liabilities of a firm to persons other than the partners in it, and, then, for the payment to each partner rateably of what is due to him from the firm for advances, as distinguished from capital. No doubt, the statute referred to does not extend to British India, and there is in the Indian Contract Act, 1872, which purports to codify the law relating to partnerships, no provision corresponding with that just described. Still, it would seem clear that, on general principles, the claims of partners must in the course of winding-up be postponed to those of outsiders. This, however, does not, as it seems to us, conclude the matter. The law in this connection seems to be summed up by Lord Lindlay when, at page 592, he answers the question—when can an action be maintained between partners without taking a general account of all the partnership dealings and transactions ?—by saying that "each case must depend upon its own circumstances, and upon whether justice can really be done without taking such an account." In other words, which we quote from the judgment of White, C. J., and Rahim, J., in *Karri Venkata Reddi* v. *Kollu Narasayya* (3), "it may be taken generally that, if the account sought is in respect of a matter which, though arising out of the partnership business or connected with it, does not involve the taking of general accounts, the Court will, as a rule give the relief asked for, and will now-a-days refuse to interfere only in those cases in which a partial account would work injustice to the other partner." It seems to us that there may well be cases in which the complete solvency of a bank is admitted and a partner might sue, like any other customer, for the taking separately of his private account as a customer and for recovery of the balance found standing to his credit. This may be a case of that kind; and, indeed, judged by the pleadings, it would seem to be such a case. In the written statement it is nowhere suggested that the suit was not maintainable because the Plaintiff was a partner and his rights as against the Defendants could not be ascertained without an investigation of the whole of the accounts of the banking business. It was not pleaded that injustice might be done to the Defendant partners if the Plaintiff were given a decree for a substantial sum appearing from a partial account to be due to him as a depositor when it might transpire, on the taking of a general account of all the dealings of the partnership, that the assets were insufficient to go round. Every other imaginable defence was taken; but not this: nor was any issue raised on the point. It was maintained that the suit was bad by reason of the non-joinder of the receiver; that it was barred by limitation; that it was barred by sec. 10 of the Civil Procedure Code; that the Plaintiff was estopped by his conduct from pressing it; and even that the *hathchitta* on which it was based was not a genuine document. But, as we have said, it was never asserted that the circumstances were such that justice could not be done between the parties without the taking of a general account. We are, therefore, inclined to hold that, on the pleadings, the suit was maintainable, and that it ought not to have been thrown out *in limine* on the first of the grounds on which the Court below dismissed it. But whether or not a decree for the Plaintiff-Appellant ought to have

(3) I. L. R. 32 Mad. 76, 80 (1908).

followed, is quite another matter, the decision of which would have depended on all the circumstances and the justice of the case. So far then as this point is concerned, we are not prepared to support the judgment under appeal; and, had it not been for our decision on the other aspect of the case, we should have been constrained to direct a remand.

The question of costs remains; and, as we have already indicated, we are of opinion that they must be borne by the Appellant. He ought, when he was refused satisfaction in the general suit for partition and accounts, to have appealed; but he mistook his remedy altogether by omitting to do that and having recourse to a separate suit which, in our view, he was not justified in instituting. And, having failed in this second suit in the Court below, he at once harked back to the other suit, where he has at length succeeded with no other result than this, that the whole of the litigation, original and appellate, with which we are now concerned, is shown to have been supererogatory. For this he is surely bound to pay.

The Appeal is, therefore, dismissed with costs.

Appeal dismissed with costs.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 5977 OF 1911.

MOOKERJEE, J.
CARNDUFF, J.
1912.
12, April.

HARI MANDAL and others, Petitioners,
v.
KESHAB CHANDRA MANNA, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 195, sub-secs. (6) and (7)—Application to District Judge to revoke sanction to prosecute granted by Munsif—Transfer to Subordinate Judge, if valid—Civil Courts Act, (XII of 1887), sec. 22, cls. (1) and (4).

An application under sub-sec. (6) of sec. 195, Cr. P. C, is not an appeal within the meaning of sub sec. (2) of sec. 22 of the Bengal Civil Courts Act.

An application made to a District Judge for the revocation of a sanction to prosecute granted by a Munsif cannot therefore be transferred by him for disposal to a Subordinate Judge.

This was a Rule granted on the 1st of December 1911 against an order of Babu Ganendra Nath Mookerjee, Subordinate Judge of Midnapur, dated the 24th of August 1911, confirming on appeal the order of Babu G. C. Basu, Munsif of Tamluk, dated the 28th of January 1911, granting sanction to the Opposite Party for the prosecution of the Petitioners under secs. 193, 196, 463 and 471, I. P. C.

In this case it appears that in execution of a certain decree an application for full satisfaction of the decree was filed on behalf of the decree-holder and the execution case was disposed of on full satisfaction. Subsequently the decree-holder applied to have the order set aside on the ground that the application for full satisfaction was not filed by him or on his behalf. An enquiry was held in the matter in the presence of the decree-holder and the judgment-debtor in which it was found that the application was a forgery. The judgment-debtor preferred an appeal in which the judgment of the lower Court was upheld. Thereupon the decree-holder applied for sanction to prosecute the judgment-debtor and his witnesses. The lower Court granted sanction to prosecute the judgment-debtor under secs. 193, 196, 463 and 471, I. P. C., and

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his witnesses (Opposite Parties Nos. 5 to 8) under secs. 193, $\frac{471}{109}$, I. P. C.

There was an appeal from the said order of the Munsif to the District Judge of Midnapur who transferred the appeal to the file of Babu Jnanendra Nath Mukerjee, Subordinate Judge of Midnapur, for disposal.

The Subordinate Judge having dismissed the appeal, the present application for revision was made to the High Court.

Babu Monmatha Nath Mukherjee for the Plaintiff.

Babu Mohini Nath Bose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule raises the question whether when an application has been made to a Dis rict Judge under sec. 195, sub-sec. (6), Cr. P. C., the application can be transferred by him to a Subordinate Judge for disposal. Sub-sec. (6) provides that any sanction given or refused under the section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate. Sub-sec. (7) then provides that for the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie. Now sec. 21, sub-sec. (2) of the Bengal Civil Courts Act, 1887, provides that an appeal from an order of the Munsif lies to the District Judge. Consequently the District Judge is the authority competent under sub-sec. (6) of sec. 195, Cr. P. C., to revoke or grant a sanction which has been given or refused by a Munsif. The District Judge in our opinion is not competent under sec. 22, sub-sec. (1) of the Bengal Civil Courts Act, 1887, to transfer the application presented to him for disposal by the Subordinate Judge. That section provides that a District Judge may transfer to any Subordinate Judge under his administrative control any appeals pending before him from the decree or order of a Munsif. An application under sub-sec. 6 of sec. 195, Cr. P. C., is in our view not an appeal within the meaning of sub-sec. (1) of sec. 22 of the Bengal Civil Courts Act, 1887. It has not been suggested to us in this case that any order has been made by the High Court under sub-sec. (4) of sec. 21 of the Bengal Civil Courts Act, 1887, so as to constitute the Subordinate Judge the appellate authority over the Munsif. Consequently the order made by the Subordinate Judge was passed without jurisdiction. The Rule is therefore made absolute and the order assailed is discharged. The District Judge will now take up the matter and deal with it as early as practicable.

Since this order was passed, we have found that the view taken by us is in harmony with that adopted by D. Chatterjee, J., and N. R. Chatterjea, J., in *Ram Charan* v. *Tirupulla* (1), Rule No. 5426 of 1911, decided on the 4th March 1912.

Rule made absolute.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 300 OF 1911.

MOOKERJEE, J. CASPERSZ, J. 1911, Heard, 10, April. Judgment, 20, April.	DULHIN MATHURA DAS KOER, Objector, Petitioner, *v.* BANSIDHAR SINGH and anr., Judgment-debtors, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. XXI, r. 89—Execution sale, application to set aside, by deposit—Previous purchaser of property not affect-

(1) 16 C. W. N. 645 (1912).

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ed by the sale, if may apply to make deposit—Conditional deposit, if valid—Withdrawal of condition, effect of—Deposit not made on the last day owing to absence of Judge—Effect.

Where on the last day allowed by law to make a deposit under r. 89 of Or. XXI of the Civil Procedure Code for the purpose of setting aside a sale, the Petitioner, owing to the presiding officers having left the Court earlier than usual, was unable to make the required deposit:

Held—*That the petition and the deposit were properly received on the next day, as no act of the Court itself ought to be allowed to prejudice the position of the Petitioner.*

A conditional deposit is not a good deposit under r. 89, Or. XXI, but where the Petitioner withdrew the condition the moment the decree-holder auction-purchaser objected:

Held—*That there were no sufficient grounds under the circumstances to treat the deposit as invalid.*

R. 89, Or. XXI, does not confer a right to make a deposit to a person who had purchased the property sold so far back from the date of the sale and the execution proceedings that his interest was not affected by the sale.

This was a Rule granted on the 19th of January 1911 against an order of Babu Tarak Nath Dutt, Subordinate Judge of Patna, dated the 19th of December 1910.

The facts of the case will appear from the judgment.

Dr. Rash Behary Ghosh, Babus Chandra Sekhar Prosad Singh and *Nabin Chandra Bardolai* for the Petitioner.

Mr. B. C. Mitter, Babus Mohendra Nath Roy, Ganesh Dutt Singh and *Harendra Krishna Mookerjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

We are invited in this Rule to set aside an order, by which the Court below has dismissed an application for reversal of an execution sale under r. 89 of Or. XXI of the Civil Procedure Code of 1908. The circumstances under which the order in question has been made have not been disputed before this Court. The property in dispute is a house which admittedly belonged to one Naunidh Koer. The case for the Petitioner is that on the 5th November 1907 she purchased the house at a sale in execution of a certificate under the Public Demands Recovery Act issued against Naunidh Koer for recovery of arrears of road-cess. On the 21st September 1910, in execution of a money-decree held by one Bansidhari Singh against Naunidh Koer, the house was brought to sale and purchased by the decree-holder. The Court was closed from the 2nd October till the 3rd November 1910. On the 4th November, when the Court re-opened, one of the officers of the Petitioner took to the Court an application for reversal of the sale under r. 89 of Or. XXI of the Code of 1908. The presiding officer, it appears, had for some unexplained reason left the Court earlier than usual; and when the application was presented to the sheristadar, at 5 o'clock in the afternoon, he made a note upon it to the effect that it had been so presented, but refused to accept the money on the ground that he had no authority to receive it. On the next day, the petition was presented again and registered, and the money was also deposited.

The decree-holder auction-purchaser objected to the reversal of the sale on three grounds, namely, *first*, that the ap-

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plication had been presented beyond the time prescribed by the law, and was consequently of no avail to the Petitioner; *secondly*, that the deposit was not unconditional, and was consequently not a valid deposit within the meaning of the Rule, and, *thirdly*, that the Petitioner had no *locus standi* to make the application, because, upon her own allegation, her interest, if any, had accrued not only before the sale but so long before the execution proceedings commenced that it could not be affected thereby. The Subordinate Judge held that the first two objections taken by the decree-holder auction-purchaser were well-founded, but that the third could not be sustained. In this view, he dismissed the application for reversal of the sale. The Petitioner has now applied to this Court, and invited us to consider the legality of the order made by the Subordinate Judge. In our opinion the order must be affirmed, but not on the grounds stated by the Subordinate Judge.

In so far as the first objection taken by the decree-holder auction-purchaser is concerned, we are of opinion that there is no substance in it. Upon the facts stated, it is clear that the failure of the Petitioner to make the application accompanied by the deposit on the day the Court re-opened was due to an act of the Court itself. Consequently, upon the principle explained in the case of *Mahomed Akbar Zaman Khan* v. *Sukhdeo Pande* (1), the position of the Petitioner could not be prejudiced in any manner. She had done her best to comply with the requirements of the statute, and the difficulty which has arisen was occasioned, because the presiding officer had left the Court earlier than usual. Under such circumstances, the fresh presentation of the application and the deposit of the money on the day following would be sufficient compliance with the provisions of the law.

In so far as the second objection urged by the decree-holder auction-purchaser is concerned, it is in our opinion equally unsubstantial. It appears that the petition which accompanied the deposit contained a statement that the money was not to be paid out to the decree-holder auction-purchaser till the disposal of a suit which had been commenced by the Petitioner in another Court. Now, it is perfectly true that a deposit under r. 89 of Or. XXI, in order that it may be a valid deposit, must be unconditional, because the deposit is to be made for payment to the purchaser and the decree-holder. When, therefore, a deposit is made with a condition that the sum may not be drawn out at once but may be retained in Court until a certain event has happened, it is not a good deposit within the meaning of the Rule [see *Shakoti* v. *Jotindra Mohan* (2)]. The case of *Hanuman Singh* v. *Lachman Sahu* (3) is not opposed to this view. There the deposit when made was unconditional, and it was only subsequently that an infructuous attempt was made by the Petitioner to fasten a condition thereupon. The Court held that the deposit, if good when made, cannot be invalidated by a subsequent act on the part of the Petitioner not authorised by law. On this principle, it may well be contended that the deposit in this case ought not to be treated as valid, because a condition was annexed thereto. It appears, however, that the deposit was accepted by the Court without any question and as soon as objection was taken by the decree-

(1) 13 C. L. J. 467 (1911).

(2) 1 C. W. N. 182 (1896).

(3) 8 C. W. N. 355 (1904).

holder, the Petitioner withdrew the condition, so that the money became available for payment to the decree-holder before he had made any attempt to withdraw the money from Court. Under such circumstances, we are not prepared to hold that the deposit was invalid and not sufficient for reversal of the sale. The position might have been different if, upon objection taken by the decree-holder, the Petitioner had persisted in her effort to annex a condition to the deposit. The decree-holder was not prejudiced in any manner by the insertion of the prayer in the application of the Petitioner that the money should be retained in Court, and he was substantially in the same position in the end as if such prayer had never been made. We must consequently hold that there was substantially a valid deposit within the time limited by law, sufficient for reversal of the sale.

In so far, however, as the third objection taken by the decree-holder auction-purchaser is concerned, it was in our opinion erroneously overruled by the Subordinate Judge. As already stated, the case for the Petitioner is that so far back as the 5th November 1907 she had acquired, by purchase at the certificate sale, a good title to the property in question, in other words, that at the time when the property was sold on the 21st September 1910 as the property of Naunidh Koer, the latter had no subsisting interest therein. It is manifest, therefore, that the Petitioner has not been in any manner affected by the sale. Under these circumstances, the question arises whether she is entitled to make an application for reversal of the sale under r. 89 of Or. XXI. That Rule—we quote only so much of it as is relevant to our present purpose—provides as follows: "Where immoveable property has been sold in execution of a decree, any person either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside" on certain prescribed conditions. It may seem, at first sight, that the language of this Rule is comprehensive enough to include a person in the position of the Petitioner. It may be contended that here immoveable property has been sold in execution of a decree. The Petitioner is the person who owns such property by virtue of a title acquired long before the sale: she is consequently competent to apply to have the sale set aside. In our opinion, this construction, though it may be justified by the language of the Code, is not the right construction of the rule in question. R. 89 reproduces sec. 310A, which was inserted in the Code of 1882 by Act V of 1894. That section provided that any person whose immoveable property has been sold under Ch. XIX of the Code of 1882 may, at any time within 30 days from the date of sale, apply to have the sale set aside. Upon the construction of this section, it is well known, two questions arose upon which there was some divergence of judicial opinion. The first point which arose for consideration was whether a person who had acquired an interest in the property after the sale sought to be set aside had taken place was competent to avail himself of the benefit of the section: the question arose, for instance, whether a person to whom the judgment-debtor sold or mortgaged the property after the sale in execution was entitled to apply under the section. Upon this point, as we have already stated, the different High Courts were not agreed

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[see *Hazari Ram* v. *Badai Ram* (4), *Appaya* v. *Kunhati* (5) and *Manickka* v. *Rajagopala* (6), see also *Ram Chandra* v. *Rakhmabai* (7), *Mulchand* v. *Govind* (8), *Erode* v. *Pulhiedeth* (9) and *Kunja* v. *Bhupendra* (10)]. To settle this divergence of judicial opinion, the Legislature has introduced the words "by virtue of a title acquired before such sale." The second question which arose for consideration was, whether the person who sought to avail himself of the provisions of sec. 310A must have been full owner of the property sold, or whether it was sufficient that he should have an interest in the property affected by the sale [*Nityananda Patra* v. *Hira Lal Karmakar* (11), overruled by a Full Bench in *Paresh Nath* v. *Nabogopal* (12), *Mallikarjunadu* v. *Lingamurti* (13)]. In order to settle this divergence of judicial opinion, the Legislature has introduced the words "either owning such property or holding an interest therein." In order to give effect, however, to the policy of the Legislature upon the two points just mentioned, the rule appears to have been re-drafted with the result that the phraseology has been so altered as to lend some colour of support to the interpretation, that any person who owns the property or has an interest therein, is entitled to apply for reversal of the sale, even though his title is such as cannot be affected by the sale: in other words, the attempt to remove the two difficulties which had arisen under the old Code, has resulted in a new obscurity. It is plain, however, that a reasonable interpretation must be given to the provisions of the Statute, and it is useful in this connection to bear in mind the well-known canon of construction laid down in *Stradling* v. *Morgan* (14), and quoted with approval by Lord Halsbury, L. C., in *Cox* v. *Hakes* (15), and by this Court in the case of *Narendra Nath* v. *Nogendra Nath* (16). "The sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes, which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those, which include every person in the letter, they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

It would in our opinion be an obviously unreasonable interpretation of r. 89 to hold that any person might avail himself of the benefit thereof, even though admittedly he was in no way affected by the sale sought to be reversed. In a

(4) 1 C. W. N. 279 (1897).
(5) I. L. R. 30 Mad. 214 (1906).
(6) I. L. R. 30 Mad. 507 (1907).
(7) I. L. R. 23 Bom. 450 (1898).
(8) I. L. R. 30 Bom. 575 (1906).
(9) I. L. R. 26 Mad. 365 (1902).
(10) 12 C. W. N. 151 (1907).
(11) 5 C. W. N. 63 (1900).
(12) I. L. R. 29 Cal. 1 (1901).
(13) I. L. R. 26 Mad. 332 (1902).
(14) Plowden 197 (at 205 a) (1560).
(15) 15 A. C. 506 at p 518 (1890).
(16) 13 C. L. J. 471 at p. 475 (1911).

case of this description a reference to the history of the legislation on the subject is perfectly legitimate, as was done by the Judicial Committee in *Iswari Prosad* v. *Chatrapat* (17) and *Brown* v. *McLachlan* (18). The history of the legislation here shows conclusively that the extended construction put upon the Rule by the learned Subordinate Judge cannot be supported: we must after all take a rational view of the scope and object of the section, and cannot attribute to the Legislature any intention such as would be obviously unreasonable; but we need not for our present purposes determine the precise limits of the scope of the Rule or define the circumstances under which it may be applicable. The view we take as to the true interpretation of r. 89 is in accord with that taken by Stanley, C. J., and Banerjee, J., in *Mahamed Ahamadulla Khan* v. *Ahamed Said Khan* (19) [see also *Asmutunnissa* v. *Ashruff Ali* (20), which overruled the contrary view maintained by Mr. Justice Field in *Panye Chunder* v. *Hur Chunder* (21)]. As the Petitioner has carried back her title to a date so far anterior to the sale and the execution proceedings that she could not possibly be affected thereby, we must hold that she had no *locus standi* to make an application for reversal of the sale which according to her own case does not concern her in the least.

The result, therefore, is that although we disagree with the Subordinate Judge upon all the three points taken by the decree-holder auction-purchaser, we must affirm his order and discharge the Rule.

(17) 3 M. I. A. 100 at p. 130 (1842).
(18) L. R. 4 P. C. 543 at p. 550 (1872).
(19) 8 All. L. J. R. 356 (1911).
(20) I. L. R. 15 Cal. 488 (1888).
(21) I. L. R. 10 Cal. 496 at p. 500 (1884).

Under the circumstances, there will be no order as to costs in this Court.

Rule discharged.

CRIMINAL APPELLATE JURISDICTION.

APPEAL NO. 266 OF 1912.

HOLMWOOD, J.
IMAM, J.
1912,
12, June.

JAMIRUDDI BISWAS and other, Appellants,
v.
THE KING-EMPEROR.

Jury trial—Misdirection—Grievous hurt—Abetment by conspiracy—Sec. 326 read with sec. 114 of the Indian Penal Code (Act XLV of 1860)—Seisin by Jury—Re-trial—Jurisdiction.

Where there was evidence that certain persons conspired to eject the complainant from his land, or in other words, to commit criminal trespass, and the Judge said that if the jury found that those persons conspired with the first accused to commit criminal trespass then they would, if absent, be guilty of abetment, and being present they were guilty of the substantive offence:

Held—*That the omission to notice that the substantive offence for which the accused were being tried was not one of criminal trespass but of voluntarily causing grievous hurt constituted misdirection.*

Held, also, *that when the evidence against the co-accused was that they themselves came with the first accused and joined in beating the deceased, they could not be convicted of abetting the causing of grievous hurt by their presence because they would have been guilty of abetment had they been absent.*

If it be found that they all joined in the beating and that the specific act which caused the grievous hurt was not brought home to any particular individual, they would be held liable under sec. 34 of the Indian Penal Code; if they aided and abetted or abetted by intentionally aiding the

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first accused in beating the deceased then they would be liable under sec. 326 read with sec. 109 of the Indian Penal Code.

The jury have to give their verdict on the facts as against each man severally and they are not, like the Judge, in charge of the entire case as a whole.

When an accused is to be retried he must be placed before the jury upon all the charges which were framed against him and the High Court has no jurisdiction to uphold the conviction under one section and to order him to be retried under another.

This was an Appeal preferred on the 15th of April 1912 against the judgment and sentence of Mr. P. K. Chatterjee, Sessions Judge of Khulna, dated the 22nd of February 1912.

The facts material to the report will appear from the following portions of the "Heads of charge" to the jury :—

"The story told by the prosecution is that in the forenoon of the 13th of November last, Kasem Biswas since deceased and his son Lalu Biswas, a boy of twelve or thereabouts, went out to cut paddy on a plot of land to the north of their house. The four accused are the half brothers of the deceased Kasem Biswas. They soon followed him into the land, armed with thick bamboo lathis. Among them Jamiruddi Biswas, asked Kasem Biswas to stop cutting paddy. He did not agree to do so at his bidding. The accused, it seems, put forward some sort of a claim to the land. When Kasem Biswas paid no heed to Jamiruddi's protest, the latter dealt him a heavy blow on the head and he staggered in a few paces, when Afizuddi Biswas, one of the accused, strode up and struck him on the left ribs with lathi. Kasem Biswas fell down to the ground, covered with water as it was. His son Lalu Biwas ran off shouting for help. Two of his relatives, Fazel and Sadhoo Sheik, then came up and removed him to his house. His boy gave information to the police. On completion of the investigation by police, the four accused were sent up for trial. Kasem Biswas died, it seems, no sooner he reached Bagerhat in a boat. He was sent there from his home in Kushli by the police for medical examination.

. . . .

"His evidence, if you can believe it, lends considerable support to the prosecution. He not only speaks of the occurrence but of the antecedent preparation on the part of the accused also. He heard Jamiruddi, one of the accused, call the other three accused his half brothers, who live in huts round about his. They all responded to the call and met together on Jamiruddi's yard. Soon after they armed themselves with bamboo sticks which lay piled up near by for the erection of a hut and went away northward. Fazel asked them when they left home where were they bound to, but they gave no answer."

The following is the portion of the charge which was held to constitute misdirection :—

"Here there is, so far as I can see, no evidence either of instigation or intentional aiding. What I shall ask you to carefully consider is, did the three accused engage in a conspiracy to forcibly eject Kasem Biswas from the land shortly before they left their houses, armed with lathis? If you think that there is sufficient and credible evidence to hold that they did really enter into such a conspiracy, you may regard them as abettors but not otherwise. In order to render applicable sec. 114, I. P. C., you will have to find first that there was such a cons-

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piracy—that there were circumstances to constitute abetment, so that, if absent, the three accused would have been liable to be punished as abettors, and, secondly, that they were all present when the offence was committed (see I. L. R. 27 Cal. 566). Fazel alone speaks about the meeting of the accused and their simultaneous exit from Jamiruddi's house. There was also, it seems, a land dispute between them and the deceased Kasem Biswas. The accused all came straightway to the disputed land armed with lathis and there attacked Kasem Biswas. Jamiruddi dealt the fatal blow which caused the death of Kasem Biswas. If you think that the three accused (Samiruddi, Kalam and Afizuddi) were abettors—had entered into a conspiracy shortly before the occurrence which rendered them liable to punishment even if absent as abettors and that they were really present when the offence was committed, you may hold them guilty constructively of the same offence as Jamiruddi under sec. 114, I. P. C."

Babu Hemendra Chandra Sen for the Appellants.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal from the judgment and the sentence of the learned Sessions Judge of Khulna who agreeing with the unanimous verdict of the jury convicted one Jamiruddi of an affence under sec. 326 and sentenced him to five years' rigorous imprisonment, and they further unanimously found three persons, Samiruddi, Kalam and Afizuddi, guilty under sec. 326 read with 114, and Afizuddi further under sec. 323. Afizuddi was given four years under sec. 326 read with 114 and four months under sec. 323, the sentences to run concurrently. The other two, Samiruddi and Kalam, were given three years each under sec. 326 read with 114.

Now we have considered the charge to the jury and we find that the only point of misdirection is with regard to the law of abetment by conspiracy and that only applies to Appellants Nos. 2, 3 and 4.

The conviction of Jamiruddi is a right conviction and it is not based on any misdirection. We, therefore, have no power to alter it or interfere with it nor do we desire to do so. The appeal of Jamiruddi is dismissed.

A question might arise as to whether the jury had seisin of the case as a whole or whether they tried each prisoner personally and it appears clear that they took oath to try well and truly the case as between the Crown and the prisoner and they are not like the judge in charge of the entire case as a whole. They have to give their verdict on the facts as against each man severally, and in this case, curiously enough, there is an instance of the converse of the proposition we have just laid down.

The man Afizuddi has been convicted under sec. 326 read with 114 and under sec. 323. Now it is quite possible that the verdict of the jury under sec. 323 is correct and was not obtained by any misdirection, but because the man Afizuddi is to be retried he must be placed before the jury upon all the charges which were framed against him and we should have no jurisdiction to uphold the conviction under sec. 323 and to order him to be retried under sec. 326. The whole of his case must go back to the jury if the verdict was obtained by misdirection.

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Now it is perfectly clear that the verdict of the jury under sec. 326 read with 114 was obtained by misdirection. The learned Judge seems to have entirely misunderstood the law as applicable to the facts of this case. He says that there is evidence that these four persons conspired, or three persons Nos. 2, 3 and 4 conspired with No. 1 Jamiruddi, to eject the complainant from his land, or in other words, to commit criminal trespass, and he says that if the jury found that these three men conspired with the first accused to commit criminal trespass then they would, if absent, be guilty of abetment, and being present they are guilty of the substantive offence; but unfortunately he has omitted to notice that the substantive offence of which he told the jury they were guilty is not one of criminal trespass but of voluntarily causing grievous hurt, which on his own showing has nothing whatever to do with the alleged conspiracy. It is perfectly clear that these persons could not be convicted of abetting the causing of grievous hurt by their presence, because they would have been guilty of abetment had they been absent, when the evidence against them is that they themselves came with the accused No. 1 and joined in beating the deceased. It is because the evidence is that they joined in beating the deceased that we think there must be a retrial, and it is by reason of sec. 34, I. P. C., that they would be held liable if it be found that they all joined in the beating; and the specific act which caused the grievous hurt is not brought home to any particular individual, or they would be liable under sec. 326 read with 109 if they aided and abetted or abetted by intentionally aiding Jamiruddi in beating the deceased; or for any wound which any individual himself caused he would be guilty under the section of simple hurt or grievous hurt according to the nature of the injury he himself inflicted, but they cannot be convicted of grievous hurt by reason of conspiracy to commit criminal trespass.

The conviction and sentence passed on Samiruddi, Kalam and Afizuddi must be set aside and they will be admitted to bail to the satisfaction of the District Magistrate pending their retrial before another jury.

Appeal allowed in part:
Case sent for retrial.

THE

Calcutta Weekly Notes.

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Contents.

NOTES.

The constitution of Benches of the Calcutta High Court and the distribution of business amongst them from date will be as follows :—

THE PRIVY COUNCIL DEPARTMENT AND ORIGINAL SIDE APPEAL.—The Hon'ble the Chief Justice, and the Hon'ble Mr. Justice Woodroffe.

PRESIDENCY GROUP.—The Hon'ble Mr. Justice Brett and the Hon'ble Mr. Justice Chapman.

RAJSHAHI GROUP AND REGULAR APPEALS OF ALL THE GROUPS.—The Hon'ble Mr. Justice Chitty and the Hon'ble Mr. Justice Teunon.

PATNA GROUP.—The Hon'ble Mr. D. Chatterjee and the Hon'ble Mr. Justice Richardson.

BURDWAN GROUP.—The Hon'ble Mr. Justice Mookerjee and the Hon'ble Mr. Justice Holmwood.

CRIMINAL BUSINESS (other than undefended cases and defended admitted appeals and capital sentence cases) and the examination of sessions statement.—The Hon'ble Mr. Justice Carnduff and the Hon'ble Mr. Justice Imam.

DEFENDED ADMITTED CRIMINAL APPEALS AND CAPITAL SENTENCE.—The Hon'ble Mr. Justice Sharfuddin and the Hon'ble Mr. Justice Coxe.

SPECIAL APPEALS OF THE VALUE OF Rs. 1,000 AND UNDER.—The Hon'ble Mr. Justice N. R. Chatterjea.

ORIGINAL SIDE.—As before.

ON THE ORIGINAL SIDE OF THE HIGH COURT the cost of litigation is certainly more but the despatch of business is much greater than in any other Court. It is only when a case is referred for taking accounts that any considerable time is taken to bring it to a termination. But so far as contested cases and motions are concerned we know of no other tribunal in this country which can dispose of such a vast amount of work so satisfactorily and expeditiously as barrister Judges, who are familiar with the work on the Original Side, ordinarily do. If men of similar qualifications and ability can be secured for the City Court it would differ but little from the High Court except perhaps in name. But when it is difficult to get really efficient judges for the High Court, would it not be much more difficult to get the right sort of Judges for the City Court? Then again we cannot overlook the fact that high Indian judicial appointments are made at times in a haphazard manner which not unoften fail to give satisfaction to the public. Having regard to all these facts and considerations we think it would be exceedingly risky to invite Government to establish in the City an inferior Court presided over by judges in regard to whose appointment the Government may exercise even less care and discrimination.

FURTHER A CITY COURT WILL WITHOUT DOUBT bring in additional judicial revenue to Government, and were the Government asked to choose between a City Court and the Original Side of the High Court, it would not in all likelihood hesitate in course of time to displace altogether the Original Side by the City Court. Court-fees are unknown on the Original Side and suits of any value may be instituted in the High Court on the payment of only Rs. 10 at the filing of the plaint. We therefore think it would be much more to the advantage of the Calcutta public to move the Government for strengthening the High Court by the appointment of the best available men as Judges and taking steps for the cheapening of the legal procedure. The new rules for the taxation of costs on the Original Side published in the *Gazette of India* of Saturday, the 27th July last, and which would come in force on the re-opening of the High Court after the Poojah Vacation will go to reduce the cost of litigation

on the Original Side very materially. Should a City Court be established, it would hardly be possible to control Counsel's fees in a similar manner. The cry for a City Civil Court therefore seems to be highly injudicious and if acceded to will only bring about a deterioration in the quality of justice administered without any material saving in the costs of litigation in contested cases. It may be added that it is decidedly cheaper to institute uncontested cases in the Original Side as no *ad valorem* Court-fees have to be paid there.

We publish in another column an article from the *Times* of the 11th July last on the question of the strengthening of the Judicial Committee of the Privy Council. The occasion for the article certainly is the appointment of Lord Haldane as the Lord Chancellor. It is well-known that his Lordship has long entertained the desire of raising the Judicial Committee of the Privy Council to the rank of an Imperial Court of Appeal worthy of the British Empire. There can be no question that the constitution and prestige of the Judicial Committee have declined considerably in recent years. The *Times* therefore makes some suggestions as to how the prestige and efficiency of the Judicial Committee may be secured. Complaint is sometimes made in the Colonies that the members of the Judicial Committee are not well-acquainted with the laws that they have to administer. We quite agree with the *Times* that it is not practicable to import Colonial Judges to assist their Lordships of the Judicial Committee in their deliberations. It suggests therefore that "there might be added as members or as assessors in particular cases lawyers with special knowledge. There might be a rota or list, necessarily not long, of experts upon whose assistance in some form the tribunal could rely." We are not sure that such assessors would be readily available. In any event their services would not inspire confidence if they are not jurists of the rare type of Prof. Maitland or Sir Henry Maine whose names are mentioned by the *Times* in this connection.

So far as Indian Appeals are concerned, we do not think there is any necessity in these days to appoint or requisition the services of any assessors for helping the Judicial Committee. The Indian Appeals form the bulk of the business of the Board. If only the English Law Lords or eminent English Judges would sit on the Judicial Committee regularly they would soon acquire a sufficient familiarity with both the statutory and customary laws in India. As a matter of fact even the Hindu and Mahomedan laws as they are administered by our Courts in India to-day are chiefly based on the interpretations put on them by their Lordships of the Judicial Committee. It was much more difficult in the days of Lord Kingsdown to interpret Hindu and Mahomedan Laws than it is to-day. But now a long course of decisions, excellent text-books, authoritative treatises and reliable translations of original texts and commentaries which are readily available have made the task of the interpretation of the Indian customary law much easier than it was fifty years ago. The necessity for appointing any assessors for helping their Lordships of the Judicial Committee has further been obviated by the special knowledge of Indian law acquired by some eminent members of the English Bar who ordinarily practise before the Judicial Committee. If more attention is paid to Indian Appeals the Bar before the Judicial Committee will also gain in strength. A strong Bar is always of the greatest assistance to the Judges, much more than even expert assessors can be.

It is conceivable that occasions may arise when the services of expert assessors may be requisitioned in some cases from one or other of the Colonies from which an appeal or two may annually come up before the Board. But we have little doubt that the appointment of assessors to assist their Lordships in deciding Indian Appeals would rather detract from than add to the weight of the decisions of the Judicial Committee in India. It is not every day that we come across jurists of the celebrity of Sir Henry Maine and so we may dismiss the idea of ever getting men of his type to assist in the deliberations of the Judicial Committee as beyond the range of any practical and workable scheme. The people of India will be quite satisfied if the Law Lords sit in the Judicial Committee of the Privy Council in the same strength to hear Indian appeals as their Lordships do in cases of English appeals in the House of Lords. The high regard in which the decisions of the Judicial Committee have been held in India is chiefly due, in the words of the *Times*, to the "aloofness and detachment" with which their Lordships have ordinarily decided the issues before them. We might also mention that what the people of this country expect from their Lordships is not any technical interpretation of the law, but elucidation of principles and decisions based on broad considerations of equity and justice. The assistance that experts can render to their Lordships with regard to technicalities of the Indian law is of little value. The cases that the Judicial Committee have to decide being appeals from appellate judgments, their Lordships cannot possibly be at any pains to ascertain the technicalities of the law which are always suffi-

ciently dealt with in the judgments of the Courts below. What their Lordships are expected to decide is whether the law as applied and interpreted in India is in consonance with approved principles and is conducive to justice.

WITH REGARD TO THE QUESTION OF ASSOCIATING with their Lordships of the Judicial Committee, some Judge or Judges of the Colony from which appeal is preferred the *Times* does not consider any such arrangement practicable and proceeds to observe "Nor would such a system be altogether desirable." In this matter, we are happy to be able to say, that the opinion in India is quite at one with the views expressed in the *Times*. The reasons assigned are also precisely the same which may be advanced with even greater force against associating Judges of Indian experience in deciding questions which are taken to the Judicial Committee by Appellants from India in the expectation that they would be decided by eminent English Judges bringing altogether a fresh mind to bear on the cases. We thoroughly agree with the views of the *Times* of this being the chief recommendation of the Privy Council as the Court of final appeal for the Empire. The *Times* says :—"One merit of the present Court is a certain aloofness and detachment, with the result that questions are looked at with fresh eyes, and without local preconceptions."

IT IS NO USE DENYING THE FACT THAT THE JUDICIAL Committee has greatly suffered both in its prestige and in the weight of its decisions because of late eminent English Judges have been making themselves scarce on the Board and it is more often than not that the majority of the Board are composed of ex Indian Judges of not much distinction. The feeling of disappointment that the *Times* says is felt in the Colonies prevails even in a greater degree in India and precisely for the same reasons that have been so well put in the concluding lines of the article. The *Times* concludes by saying "It is useless trying to hide the fact that this tribunal is to-day exposed to more searching criticism than before. Apart from the existence of the Supreme Courts in the Dominions, the tendency is to look to the Judicial Committee, not merely for the right decision, but for a full and convincing statement of principles and reasons. The shortest way to decide a particular case is not always satisfactory. There is disappointment and perplexity when a dispute which has occupied the Colonial Courts for years, and which has been the subject of elaborate judgments, is disposed of in a few lines dexterously avoiding any elucidation of the principles involved. In regard to many doctrines still obscure and undeveloped, the Colonial Courts look for a lead to the Judicial Committee, and they miss what they want in a judgment which is timidly correct and modestly uninstructive."

WE HAVE RECEIVED A COPY OF A MEMORIAL submitted to His Excellency the Viceroy in Council from Manbhum for the inclusion of the District of Manbhum in the Presidency of Bengal. We are of opinion that a very strong case has been made out by the memorialists. The following extract from the memorial relating to the system of land-tenure and land-laws that have prevailed in Manbhum will be found of general interest.

That the land tenures of Manbhum are analogous to those of the neighbouring districts of Bengal and quite different from those of the other districts of Chotanagpur. The Putni Taluqs and Mokurari tenures of Manbhum are not to be found in the other districts of Chotanagpur. The Pachete Jaighirs and Barabhum Ghatwalis are peculiar to Manbhum only; while the incidents of Debutter and Brahmottar grants, whether Kheraj or Lakheraj, and of *khorposh* and other resumable tenures of Manbhum differ materially from those of grants and tenures of similar denomination existing in the other districts of Chotanagpur. And on the contrary, the special tenures and tenancies of the latter places, such as, Bhuinhari, Bhut-kheta Dali-Katari, Pahanai, Mahtoai, Korkar, Mundari-Khunt-katti, &c, are quite unknown in Manbhum.

That the rent law of Mahbum was different from that of the other districts of Chotanagpur. Act X of 1859 (with the Bengal Council Acts VI of 1862 and IV of 1867) was the Rent law of Manbhum up to December 1909; while the rent law of the other districts of Chotanagpur was to be found in Act I of 1879, B. C. (the Chotanagpur Landlord and Tenant Act) and Act IV, B. C of 1897, (the Chotanagpur Commutation Act) as amended by Act V, B. C. of 1903 and Act V of 1905. Even when all these Acts were repealed by the present Chotanagpur Tenancy Act VI, B C. of 1908, it did not come into force in Manbhum, but power was retained by the Local Government to extend by notification the whole or any portion of this Act to the district of Manbhum or to any part thereof.

That by notification No. 5335 of 1908 certain portion of the said Act VI of 1908 was extended to Parganas Barabhum and Patkum of the District of Manbhum and by Notification No. 4010 L. R. of the 16th December 1909 the whole Act was extended to the entire district of Manbhum.

That Manbum is in many respects "more closly assimilated to the neighbouring Bengal districts than to the rest of Chotanagpur division" and the said Act VI of 1908, which was enacted primarily for the rest of Chotanagpur, is not suited to the conditions of Manbhum.

That it was all along recognised by the local authorities that the conditions of Manbhum differed very considerably from the rest of Chotanagpur and ever since the passing of the Bengal Tenancy Act (VIII of 1885), the Bengal Government always contemplated the introduction of the said Act into Manbhum.

WE HAVE MUCH PLEASURE IN PUBLISHING ELSEwhere a very practical suggestion, which we welcome all the more as it has come from a solicitor's office, regarding the regulation of costs in all suits on the Original Side up to the value of Rs. 5,000 on a somewhat similar basis as for mortgage suits for Rs. 1,000, which if adopted would settle for good all questions relating to the establishment of a City Court in Calcutta.

THE STRENGTHENING OF THE JUDICIAL COMMITTEE.

The Times, 11th July 1912.

It is not improbable that we shall hear at no distant date of a new attempt to strengthen the Judicial Committee of the Privy Council. No one could be better qualified to undertake such a task than the present LORD CHANCELLOR. As counsel he had much experience in that Court, and in speeches and in writing he has repeatedly shown his desire to make it ever worthier of its unique position and to increase the confidence of the oversea Dominions in its decisions. He will have to consider a great variety of wishes and criticisms, good and bad, practicable and impracticable. One wish, often expressed and much debated at the last Imperial Conference, is that, instead of two final Courts of Appeal as at present—one, the House of Lords, for the United Kingdom, and the other, the Judicial Committee, for the oversea Dominions—there should be a strong single Court. Instead of two Courts, guided to some degree by different rules, there should be a Court of the Empire with uniformity of procedure. Many Colonial lawyers are not satisfied with the practice of the Judicial Committee, which delivers one judgment They prefer that of the House of Lords, which permits of individual judgments and which reveals dissent, if any exists among its members. A more serious criticism relates to the composition of the final Court or Courts of Appeal. There are from time to time complaints that cases turning upon particular systems of law may be determined by Judges unacquainted with them. It is suggested, for example, that the complex land system of New Zealand founded upon statutes hard to unravel, has been misunderstood by the Judicial Committee. The difficulty is to suggest a feasible improvement. Is a New Zealand Judge to come over to hear, it may be, one or two cases? If he is to hear others originating, say, in Canada, will he be better qualified than an English-trained Judge to deal with Canadian cases? LORD DE VILLIERS and certain Colonial Judges, members of the Privy Council, have from time to time sat on the Judicial Committee, but we dispair of seeing established any system under which there shall be present at every appeal a Judge specially conversant with the law administered by the Courts from which comes the case under review. It is impossible for no other reason than the small number of appeals from certain Colonies. Nor would such a system be altogether desirable. One merit of the present Court is a certain aloofness and detachment, with the result that questions are looked at with fresh eyes and without local preconceptions. To take two questions which will fall to be decided by the Judicial Committee at an early date —one as to the rights, if any, of the Indians in the soil of certain territories, the other as to the effect, if any, of the *Ne Temere* decree upon the marriage law of Canada; there is an advantage in these matters coming before a tribunal which cannot be suspected of even unconscious partiality.

But it may be possible to strengthen the Judicial Committee by the infusion of elements in which it is now deficient. It must be mainly composed of those who have been Judges; there could with safety be no great departure from that principle. But there might well be a limited introduction of other elements. In modern times no one did more to sustain the reputation of the Court than LORD KINGSDOWN, who had not the usual judicial experience. There might be added as members of the Court or as assessors in particular cases lawyers with special knowledge. There might be a rota or list, necessarily not long, of experts upon whose assistance in some form the tribunal could rely. To speak with frankness, none of the able present members of the Court are acknowledged authorities in, say, Canon law or International law or Roman-Dutch law. Why should they not have the assistance of the best authorities upon these subjects? The House of Lords was once accustomed to seek aid and advice from the Judges, who, in answering the questions put to them, acted as assessors. Why should not the Judicial Committee in certain cases take a similar course? Who would have spoken upon certain subjects with more authority than SIR HENRY MAINE or PROFESSOR MAITLAND?

It is useless trying to hide the fact that this tribunal is to-day exposed to more searching criticism than before. Apart from the existence of Supreme Courts in the Dominions, the tendency is to look to the Judicial Committee, not merely for a right decision, but for a full and convincing statement of principles and reasons. The shortest way to decide a particular case is not always satisfactory. There is disappointment and perplexity when a dispute which has occupied the Colonial Courts for years, and which has been the subject of elaborate judgments, is disposed of in a few lines dexterously avoiding any elucidation of the principles involved. In regard to many doctrines still obscure or undeveloped, the Colonial Courts look for a lead to the Judicial Committee; and they miss what they want in a judgment which is timidly correct and modestly uninstructive. The LORD CHANCELLOR has a great opportunity within his reach, and it is satisfactory to think that no one is better able than he to make full use of it.

Review.

THE ALL-INDIA DIGEST. Sec. II (Civil) 1811—1911. *By T. V. Sanjiva Row, with the help of P. Ramanatha Iyer and P. Hari Rao. Vol. II. Madras: Published by T. A. Venkataswamy Row and T. S. Krishnasawmy Row.*

This volume brings down the Digest to "Civil Procedure Code." It is of the same character as its predecessor and we are glad to find that in it the editors have sustained the same standard of excellence. The reports digested embrace all official and non-official reports of India and the work is as comprehensive and well digested as in its predecessor. The get-up and printing of the work is neat and its binding substantial.

Notes of Cases.

PRIVY COUNCIL.

[APPEAL FROM BRITISH COLUMBIA.]

LORD MACNAGHTEN. LORD ATKINSON. LORD SHAW. 1912, Heard, 16, May. Judgment, 18, June.	RICHARD J. KIRBY *v.* JOHN J. COWDEROY.

Possession by payment of taxes on land—Conveyance, extrinsic evidence to prove transaction mortgage.

The action out of which the appeal arose was commenced on the 8th April 1910, by a writ of summons in the Supreme Court of British Columbia, by the Respondent, who was the Plaintiff, against the Appellant, the Defendant. The action was for the redemption of certain land situated in the district of New Westminster. On the 26th January 1911, Chief Justice Hunter dismissed

the action with costs. On the 6th June thereafter the Court of Appeal of British Columbia reversed that dismissal. The present appeal was accordingly brought by the Defendant. The real and only point of the case was as to the application of the British Columbia Statute of Limitations, cap. 123, R. S. B. C. 1897.

The facts were as follows: Before July 1889, the Appellant, Mr. Kirby, had lent to the Respondent, Mr. Cowderoy, certain sums of money, and offered security over certain small parcels or tracts of land in the district of New Westminster. The security took the shape of an absolute conveyance.

The date of the conveyance was the 1st July 1889, and it was presumably in the ordinary form of indenture, with the usual clause "to have and to hold unto the said grantee . . . to and for his sole and only use for ever," with a covenant for quiet possession. Nothwithstanding the form of this deed, it was established by letters passing between the parties, that the deed was meant to be a security only. But so far as the point in the present case was concerned, it was of no importance whether the deed were treated as an absolute conveyance or merely as a mortgage, for under secs. 16 and 36 of the Statute of Limitation, an action by any person claiming any land or rent in equity for recovery of the same might be brought only within twenty years, and by sec. 40, when a mortgagee has obtained possession, "the mortgagor or any person claiming through him shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor . . in writing." The latter portion of this section does not apply as there was no written acknowledgment in this case, and the whole question was as to the running of the period of twenty years from the date of obtaining possession of the land. And this question in the present case really depended on another, namely, whether in the circumstances of this case the Appellant, Mr. Kirby, ever had possession under the deed of July 1889.

The Respondent admitted that the land "was simply wild land; no one was in possession of it," and that at the period when the deed was granted, "it never had a value"; that he had got his loan and had granted his conveyance under a promise to pay interest periodically and compound interest but had never made any payment whatsoever and that he left the property severely alone. The Appellant, on the other hand, became liable, since the date of the deed conveying the property to him, *viz.*, 1st July 1889, to pay as owner thereof the taxes imposed upon it.

THEIR LORDSHIPS found upon the evidence, that (1) for over 20 years before the institution of this suit the Appellant had, so far as this wild land was concerned, performed the only act of possession of which it appeared to be capable, namely, he had paid all the taxation upon it; whereas (2) the Respondent was aware that this was being done by the Appellant, and he (the Respondent), so far from having anything even remotely akin to adverse possession, had washed his hands of all connection with the property. In these circumstances, their Lordships were of opinion that the Statute of Limitation applied, and that it is not open to the Respondent thereafter—when, as is the case here, the patch of land appeared to have suddenly become of some marketable value—to bring this action to redeem.

LORD SHAW, in delivering the judgment of the Board, stated the law on the subject in the following terms:—"On the general subject of possession, the language of Lord O'Hagan in *The Lord Advocate* v. *Lord Lovat* (5 A. C. 288)—language cited with approval by Lord Macnaghten in *Johnston* v. *O'Neill* (1911, A. C. 583)—appears to be applicable to the present case. Possession 'must be considered in every case with reference to the peculiar circumstances . . . the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession.' In this view of the law

Their Lordships *held* that possession of the land was, during the years in question, with the Appellant, and no possession of any kind with the Respondent, and that the suit was barred by limitation.

The order of their Lordships accordingly was that the Appeal should be allowed, and the judgment of Hunter, C. J., dismissing the action, should be restored with the further costs incurred in both Courts since the date of that judgment, the Respondent being also directed to pay the costs of the Appeal.

B. D. *Appeal allowed with costs.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CARNDUFF AND IMAM, JJ. CRIMINAL REVISION No. 837 OF 1912. SASADHAR SANYAL, Petitioner *v.* SOSHEE BHUSHAN CHOWDHURY, Opposite Party. 1st August 1912.

Criminal Procedure Code, secs. 437, 203—Dismissal of complaint—Application by complainant for further enquiry—Complaint disclosing no offence—Right of accused to oppose application for further enquiry.

The Opposite Party brought a case of criminal breach of trust against the Petitioner. On the representation of the Opposite Party that he would not proceed with the case against the Petitioner and would not institute any further criminal case against him provided the Petitioner paid him Rs. 3,000, this amount was paid by the Petitioner to the Opposite Party. Subsequently, the Opposite Party brought another case of criminal breach of trust against the Petitioner who thereupon filed a complaint against the Opposite Party charging him with cheating, before Babu K. K. Mookherji, Deputy Magistrate, who examined the Petitioner on his complaint. Later on, in the absence of Babu K. K. Mookherji, another Magistrate, Mr. Bainbridge, who was at the station dismissed the complaint under sec. 203. The Petitioner after having made an unsuccessful application for further enquiry before the Sessions Judge moved the High Court for further enquiry with the result that a Rule was issued calling upon the District Magistrate to show cause why the order dismissing the complaint should not be set aside on the ground that the Magistrate who made the order acted without jurisdiction.

On the Rule coming on for hearing a preliminary objection was taken on behalf of the Petitioner that the Opposite Party had no *locus standi* to oppose the Rule inasmuch as the present case was one of dismissal of complaint under sec. 203, Cr. P. C., and not one of discharge of the accused. Reliance was placed on the Full Bench decision in *Haridas Sanyal* v. *Saritulla*, I. L. R. 15 Cal. 608. Their Lordships however heard the Opposite Party.

It was contended on behalf of the Opposite Party that he could not be prosecuted for not doing what the law did not allow him to do, the case of criminal breach of trust brought by him against the Petitioner not being compoundable, and thus there being no case against him no order of further enquiry could be made.

Their Lordships after hearing both sides observed that as the case referred to by the Petitioner was not compoundable the Rule should be discharged.

Babus Dasarathi Sanyal and *Debendra Narain Bhattacharya* for the Petitioner.

Mr. Jackson with *Babu Hemendro Nath Sen* for the Opposite Party.

S. C. M. *Rule discharged.*

CIVIL REVISIONAL JURISDICTION. BEFORE CARNDUFF and IMAM, JJ. CIVIL REVISION CASE UNDER SEC. 195, CR. P. C., No. 2 OF 1912 RAMJAN ALI, Petitioner *v.* BHAGABAN CHANDRA PAL AND OTHERS, Opposite Party. 1st August 1912.

Criminal Procedure Code, sec. 195—Application for sanction, delay in making—Proceedings stayed pending appeal in High Court—Revival after disposal thereof—Suppression of facts in petition upon which Rule obtained.

In 1908, the Opposite Party and others brought a rent suit in the Court of the Subordinate Judge of Chittagong against one Khalil Rahaman and others. The Petitioner was subsequently made a party to this suit as a Defendant and he filed certain rent receipts in support of his defence. The suit was decreed by the Subordinate Judge on the 21st May 1909 against the principal Defendants and there was an appeal to the District Judge who on the 1st March 1910 dismissed the appeal and found that the rent receipts filed by the Petitioner before the Subordinate Judge were forged. Against this decision of the District Judge an appeal was filed in the High Court. In neither of the Appellate Courts was the Petitioner made a party, but when on the 5th July 1910 the Opposite Party applied to the District Judge for sanction to prosecute the Petitioner, the Petitioner on the 22nd July 1910 filed his objectio and on the 5th August 1910 prayed for stay proceedings pending the hearing of the appe in the High Court, and on the 6th August 1910 the Opposite Party was allowed to withdraw the application for sanction with liberty to bring fresh proceeding after the disposal of the appe in the High Court. On the 5th September 191 the appeal in the High Court was admitted und Or. 41, r. 11 of the Civil Procedure Code, but on the 11th July 1911 the Appellants unconditionally withdrew the said appeal. On the 4th Decembe 1911, the Opposite Party applied to the then District Judge for sanction to prosecute the Petitioner and the learned District Judge by his order, dated the 9th January 1912, granted the sanction prayed for.

Against this order granting sanction the Petitioner moved the High Court and obtained a Rule calling upon the Opposite Party to show cause why the said order of the District Judge granting

sanction should not be revoked on the ground that undue delay had been made in making the application for sanction.

In his petition in the High Court the Petitioner did not however state that the Opposite Party had first applied for sanction on the 5th July 1910, and that on the application of the Petitioner himself for stay of proceedings on the ground that an appeal was pending in the High Court, the Opposite Party was allowed to withdraw his application for sanction with liberty to bring a fresh proceeding and that the said appeal in the High Court was disposed of on the 11th July 1911.

At the hearing of the Rule the Vakil for the Petitioner intimating that he had no instructions as to the facts which were not stated in the petition, their Lordships after hearing both sides discharged the Rule with costs, five gold mohurs, both on the ground of suppression of facts which ought to have been stated in the petition and on the ground that the delay complained of had been explained.

Babu Khitish Chandra Sen for the Petitioner.

Babu Dasarathi Sanyal for *Babu Mohendro Nath Roy* and *Babu D. L. Khastagir* for the Opposite Party.

S. C. M. *Rule discharged with costs.*

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE AND HOLMWOOD, JJ. CIVIL RULE No. 2586 OF 1912. DWARKA NATH KUNDU, Petitioner *v.* MOHENDRA NATH ROY, Opposite Party. 22nd July 1912.

Contribution suit, decree in payment in execution of—Subsequent title suit, decree in, declaring Defendant not liable to contribute—Defendant if may sue for recovery of money paid before contribution decree is set aside.

One Fakeer Chundra Dutt obtained a rent decree against Beni Madhab Kundu and put the holding to sale and Mohendra Nath Roy, who was the purchaser of a half share of the holding deposited the money and then sued Dwarka Nath Kundu for contribution alleging that he was the owner of the other half share of the holding and obtained a decree after contest and in execution of that decree realized the money. The landlord again sued for arrears of rent against Beni Madhab and obtained a decree for subsequent rent, and in execution of this decree the holding was sold and purchased by Mohendra Nath Roy in the name of his son. The Petitioner, Dwarka Nath Kundu, then brought a title suit alleging that the 2nd decree obtained by the landlord against Beni was fraudulent and that he was not the tenant under Fakeer Dutt and not bound by the decree and by the sale of the holding in execution of that second rent decree and the suit was decreed. Dwarka Nath thereupon brought the present suit in the Small Cause Court for recovery of the money he paid to Mohendra Nath Roy in execution of his decree for contribution alleging that as in the title-suit it was declared that he was not the tenant of Fakeer Dutt he was not bound to contribute. The Munsif dismissed the suit holding that so long as the 1st rent decree and the contribution decree stood the Plaintiff was not entitled to any relief. Against that order the Petitioner obtained the Rule.

Held—That the decree in the contribution suit not having been set aside the Plaintiff was not entitled to succeed. I. L. R. 3 Cal. 30 distinguished. 10 Moore I. Appeal 203 at p. 211 referred to and followed.

Babu Bepin Behary Ghose, senior, for the Petitioner.

Babus Kshetra Mohun Sen and *Karunamoy Bose* for the Opposite Party.

A. T. M. *Rule discharged.*

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and COXE, JJ. APPEAL FROM APPELLATE DECREE No. 1362 OF 1909. SHIDESHARI DASYA AND ANOTHER, Plaintiffs, Appellants *v.* SHASI BHUSAN CHOWDHURY AND OTHERS, Respondents. 25th July 1912.

Burden of proof—Dried up bheels, *reformations of diluviated land in—'Waste'—Waste land within area—Adverse possession—Proof necessary.*

The Appeal arose out of a suit for recovery of possession. Both the lower Courts dismissed the Plaintiffs' suit on the ground of limitation and also on the ground that the Plaintiffs failed to establish their title to the lands in suit.

There were two mouzahs, Mouzah Bejalbari and Mouzah Shukandighi, the former belonging to the Plaintiffs and the latter to the Defendants. The question before the lower Courts was whether the area in dispute appertained to Mouzah Bejalbari or to Mouzah Shukandighi.

The Defendants purchased an eight-anna share of Mouzah Shukandighi in 1288 at a private sale and the remaining eight annas at a revenue sale in 1293. Some portion of the disputed land was settled with tenants by the Defendants. The Defendants treated the disputed lands after their purchase as their own since 1292-93.

There were small plots of waste lands within the disputed area.

Held—That in cases of dried up *bheels*, reformations of diluviated lands not brought under the plough, and lands covered with jungle, the Plaintiff must prove his title; if he succeeds in proving his title and that the land probably remained unfit for occupation until a period within 12 years of suit, it was then for the Defendant to prove that

the Plaintiff had not been in possession within that period.

Mahomed Ali v. *Khaja Abdul Gunny* (I. L. R. 9 Cal. 744) referred to.

Waste is a more comprehensive term than jungle. In the case of waste land within the disputed area what was necessary for a person claiming lands by adverse possession was to show that he had all along claimed the lands as his own and treated them as such and it was not necessary on his part to prove that he had been exercising acts of possession over every inch of the lands adversely to the Opposite Party.

Sivasubramanya v. *Secretary of State for India* (I. L. R. 9 Mad. 285) referred to.

Babus Nilmadhub Bose, *Mohini Mohan Chuckerbutty* and *Krishna Kamal Maitra* for the Appellants.

Mr. B. Chakravarty and *Babu Hurrish Chandra Roy* for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and COXE, JJ. APPEAL FROM APPELLATE DECREE NO. 3138 OF 1909. MANE MAHAMMED NOSYA AND ANOTHER, Defendants, Appellants *v.* DHANI MUHAMMED AND OTHERS, Plaintiffs, Respondents. Heard, 16th July. Judgment, 30th July 1912.

Res judicata—Rent suit—Former decision on material point.

The suit was brought for establishment of Plaintiffs' title to six plots of land and also for *khas* possession of those plots. There was also a prayer in the alternative to recover rent for those plots.

The Plaintiffs' case was that the Defendants were holding six plots and one Subratu was holding another six plots of land under them. It was alleged that Subratu abandoned his holding and went away to Bhutan Duars and that since then the Defendants held all the twelve plots under a consolidated jama of Rs. 30 a year. They further urged that they instituted Suit No. 461 of 1905 for rent against the present Defendants in which the Defendants denied holding Subratu's jama and contended that their jama was only Rs. 16 per year and that that suit was decreed at the admitted rate. On the above facts the Plaintiffs brought the present suit.

The Defendants' main contention was that the question of the amount of rent payable having been finally decided in the rent suit of 1905, and the six plots of land included in the suit being included in the eight plots of the previous rent suit, this suit was barred by the rule of *res judicata*.

The first Court dismissed the suit on the ground that the findings of the previous rent suit operated as *res judicata* in the present suit. On appeal the Subordinate Judge held relying on the cases of *Shahadeb Dhali* v. *Ram Rudra Haldar* (10 C. W. N. 820) and *Rajendra Nath Ghosh* v. *Tarangini Dassi* (1 C. L. J. 248) that the suit was not barred by the rule of *res judicata*. The Defendants appealed to the High Court.

Held—That in all such suits what was necessary to see was whether the decision in the former rent suit was given on an incidental point or on a question that went to the very root of the case. A decision on a matter in a previous rent suit operates as *res judicata* in a subsequent suit if the matter in question is directly and substantially in issue in both the suits. Cases on the point reviewed.

Babu Hara Prosad Chatterjee for the Appellants.

Babu Brojo Lal Chakraverti for the Respondents.

A. T. M. *Appeal allowed.*

Notifications.

Government of India, Home Department.

PUBLIC.

Simla, the 1st August 1912.

No. 1626.—In pursuance of sec. 5 of the Government of India Act, 1912 (2 & 3 Geo. 5, c. 6), the Governor-General in Council is pleased, with the approval of Secretary of State in Council, to appoint the 1st August 1912 as the day of which the said Act shall come into operation.

No. 1627.—In exercise of the power conferred by the proviso (*a*) to sub-sec. (1) of sec. 1 of the Government of India Act, 1912 (2 & 3 Geo. 5, c. 6), the Governor-General in Council is pleased to reserve to himself all powers now exercisable by him in relation to the High Court of Judicature at Fort William in Bengal.

Correspondence.

[TO THE EDITOR, "CALCUTTA WEEKLY NOTES."]

SIR,—People may not be aware that the rules of the Original Side provide for a fixed scale at a very moderate rate for mortgage suits below Rs. 1,000 beyond which the costs are not allowed to exceed, and this principle—the framing of a special scale of costs at reasonably low rates may be extended to all suits of value, say, less than Rs. 5,000 and the effect will be that poor litigants will be relieved and at the same time get cheap but effective justice and this of good quality. I have no hesitation in commending this proposal to the litigant public with the greatest confidence.

I remain,

Yours faithfully,

"UNBIASSED."

[PRIVY COUNCIL.]

[APPEAL FROM ALLAHABAD.]

LORD SHAW. LORD ROBSON. SIR JOHN EDGE. MR. AMEER ALI. 1912, Heard, 31, January and 1, February. Judgment, 21, February.	MUSAMMAT PARBATI & anr., Defendants, Appellants, *v.* SAIYID MUHAMMAD MUZAFFAR ALI KHAN and others, Plaintiffs, Respondents.

Hindu Law—Mitakshara—Joint family—Mortgage of property given to father and son—Subsequent purchase of portion of property by grandson who was separate in mess and business out of his self-acquisition—Adverse possession—Purchase of remaining share by mortgagee at execution sale had by another creditor—Extinction of mortgagor's title.

Some time after a mortgage had been executed of immoveable properties in favour of R. and S., father and son, members of a joint Hindu family governed by the Mitakshara, a widow of the mortgagor sold such right and title, if any, as she had in half of the property of the mortgagor to B., son of S., who was joint with R. and S. at the time of the mortgage but who prior to his purchase had ceased to be joint in food and business with S., though there was no partition, and having received a present of a considerable sum of money from his grandmother had been carrying on money-lending business on his own account and had found the purchase-money out of his separate self-acquired property. B. got possession after his purchase and continued in possession for considerably over 12 years.

Held—*That the possession of the property by B. was not that of a mortgagee but adverse to that of the mortgagee and the title of the mortgagor's representatives to redeem was lost by adverse possession.*

The remaining half share was sold in execution of a decree obtained by another creditor of the mortgagor in a suit brought against his representatives and purchased by S. and passed by succession to B.'s heirs:

Held—*That the Plaintiffs who claimed through the mortgagee had failed to establish any title by way of redemption or otherwise to any interest in the mortgaged property and his suit should be dismissed.*

These were two consolidated Appeals from a judgment and a decree, dated the 13th of June 1907, passed by the High Court for the North-Western Provinces at Allahabad, which partly affirmed and partly reversed a judgment and decree, dated the 14th July 1904, of the Subordinate Judge of Saharanpur who had dismissed the Plaintiffs' suit.

The principal question for determination on the Appeals was whether a mortgage of the property in dispute executed by one Mehdi Ali on the 22nd July 1846, was still subsisting, and was redeemable by the Plaintiffs.

The facts of the case shortly stated were:—

Mehdi Ali, a Shia Muslim, was owner of 20 biswa of Mauza Lohari. On the 22nd July 1846, he executed a usufructuary mortgage of ⅔rd share of the said village in favour of Sita Ram and his son Sheo Lal, and put the mortgagees in possession. The mortgage was redeemable after the expiry of two years. Mehdi Ali died about 1850, leaving children and two widows, Ashrafunnisa and Umda. Umda had three daughters, Piari, Husaini and Askari. The Defendants' case was that Ashrafunnisa had a daughter who survived Mehdi Ali, which the Plaintiffs denied.

On Mehdi Ali's death, Ashrafunnisa purported to hold one-half, *i.e.*, 10 biswa of Mauza Lohari under what title it was not clear. Umda, with her daughters, suc-

ceeded to the remaining half. Mutation of names in the revenué papers was effected accordingly.

Mehdi Ali was heavily involved in debt. The creditors instituted suits against Ashrafunnisa and other heirs and obtained decrees. Among others the said Sheo Lal obtained a simple money decree on the 10th September 1852, and in execution put up for sale the 20 biswa of the said Mauza Lohari. The Court fixed the 20th June 1853 for auction. On the 19th May 1853, it was represented to the Court that the judgment-debtors wished to pay up the decree money by a private sale of the said village and the Court accordingly discharged the attachment of the village to facilitate the sale. On the same date Ashrafunnisa appointed an agent to sell her share of the village, and on the 27th May 1853 her agent sold the 10 biswa share of Mauza Lohari to Baldeo Sahai, son of the said mortgagee, Sheo Lal. It was stated in the sale deed that the sale was held "in order to satisfy the decrees held by, and debts due to Sheo Lal, for the payment of which" Mehdi Ali was liable. Out of the consideration money, Rs. 2,000 were left with the vendee to redeem the mortgage, dated the 22nd July 1846, to the extent of one-half. The said Baldeo Sahai was put in possession of a portion only of the property sold, but shortly after he succeeded in redeeming the mortgage, and obtained complete possession over the 10 biswa of Mauza Lohari. At the Revenue Settlement of 1863, he was recorded proprietor of that share of the village in all the papers. He and his heirs, the present Appellants, continued in possession as proprietors.

The remaining 10 biswa of Mauza Lohari was sold by the Court in execution of decrees against Mehdi Ali's heirs, and was purchaed by the said Sheo Lal on the 20th March 1854. In the sale proceedings it was said that "the 10 biswa share of Umda" was sold. The decrees were obtained by the several creditors of Mehdi Ali against Ashrafunnisa, and Umda for self and as guardian of Piari, Husaini and Askari. Umda raised objections to the sale, but they were disallowed by the Court. Sheo Lal thus became owner of the said 10 biswa of Mauza Lohari, and was so recorded in all the revenue papers.

The said Sheo Lal succeeded Sita Ram, and on the death of Sheo Lal in 1869, Baldeo Sahai, who was living and carrying on business separately from his father, succeeded him. Baldeo Sahai died in 1895, leaving two widows, the present Appellants as his heirs.

On the 1st September 1903, the present suit was instituted by Ishtiak Husain, Plaintiff No. 3, and Musammat Zindi Begum, Plaintiff No. 4, and the other Plaintiffs to whom they conveyed a moiety of the said Mauza Lohari by a sale, dated the 3rd June 1903. They alleged in their plaint that on the death of Mehdi Ali his widow Ashrafunnisa was childless, and therefore did not inherit his landed estate; that the whole landed estate devolved upon Umda and her daughters; that after the death of Umda, Piari and Husaini, the landed estate came to Askari, who was succeeded by Plaintiffs Nos. 3 and 4, son and daughter of Askari. They further alleged that proceedings which resulted in the private sale, dated the 27th May 1853, and the Court sale, dated the 20th March 1854, were purely fictitious and did not pass any title to the vendees. Hence they claimed to recover the entire mortgaged property by redemption of the mortgage, dated the 22nd July 1846, and mesne profits.

MUSAMMAT PARBATI *v.* SAIYID MUHAMMAD MUZAFFAR ALI KHAN.

Musammats Parbati and Sunder filed a written statement and defended the suit. They pleaded *inter alia* that Ashrafunnisa had a daughter who survived Mehdi Ali, that Ashrafunnisa was competent to sell the property, that the village was sold in order to pay the debts of Mehdi Ali, that both Sheo Lal and Baldeo Sahai were in possession in equal shares as proprietors for over fifty years, and that the suit was barred by time. They denied that the mortgage, dated the 22nd July 1846, subsisted on the date of suit.

The Subordinate Judge of Saharunpur after fixing the necessary issues, and recording evidence, both oral and documentary, produced by the parties came to the conclusion that Ashrafunnisa had a daughter who survived Mehdi Ali; that she inherited $\frac{9}{32}$nd part of Mauza Lohari on her own behalf and through her daughter, and that in selling the excess, *i.e*, $\frac{7}{32}$nd part of the village, she acted as a trespasser; that the sale, dated the 27th May 1853, to Baldeo Sahai was genuine and *bonâ fide*, and was effected by her to pay her husband's debts; that Baldeo Sahai was separate from his father Sheo Lal, and that his possession was adverse for over 40 years; and that the auction sale to Sheo Lal was not of Umda's share alone but of her daughter's shares as well and that it was perfectly valid. He held that the mortgage sought to be redeemed ceased to subsist more than 40 years ago, and accordingly delivered his judgment and made a decree on the 14th July 1904, dismissing the suit with costs.

The Plaintiffs thereupon appealed against the said decree to the High Court, which delivered its judgment on the 13th June 1907. The learned Judges (Sir G. Knox, A. C. J., and Dillon, J.) of the High Court affirmed the finding of the Subordinate Judge that the auction sale of 10 biswa of Mauza Lohari, dated the 20th March 1854, was valid and binding on the Plaintiffs.

As regards the rest of the claim, they found that Ashrafunnisa had no daughter who survived Mehdi Ali, and she did not inherit any share in his landed estates. They therefore held that no title passed to Baldeo Sahai under the sale, dated the 27th May 1853. They further held that Baldeo Sahai was joint with Sheo Lal, and that the possession of the former was that of a mortgagee only. In the result the High Court allowed the appeal in part, and passed a decree in favour of the Plaintiffs declaring them entitled to redeem a $\frac{2}{3}$ share of the 10 biswas purchased by Baldeo Sahai. The High Court remanded the suit to the Court of the Subordinate Judge for trial on the merits.

Hence these appeals by both parties.

Sir R. Finlay, K. C., and *Mr. Bhugwandin Dubé* for the Defendants.—There was sufficient evidence to show that Ashrafunnissa had a daughter that survived Mehdi Ali, and the Subordinate Judge who heard and saw the witnesses believed it. It was a fact that Ashrafunnisa was put in possession of a 10 biswa, and mutation of names was effected in her favour. This would have been impossible if she had no legal right. She could not possibly have sold the 10 biswa in lieu of dower debt. In any case we have had adverse possession of the property for over 40 years. Baldeo Sahai purchased the property in 1853 for himself. The vendor left money with the vendee (Baldeo Sahai) to redeem the mortgage from his own father. There was evidence which established that Baldeo Sahai separated in food and business from his father, and carried on business on his own account

up to the date of his father's death. Baldeo Sahai's possession was not the possession of a mortgagee. As regards the remaining 10 biswa both Courts had found that the auction sale to Sheo Lal was valid. It was not only Umda's share that was sold although her name alone was mentioned in the sale proceedings, but the 10 biswa share of Mauza Lohari, *i.e.*, the shares of Umda and her three daughters were sold.

Mr. Bhugwandin Dubé followed.—He submitted that the evidence established that Baldeo Sahai purchased the property out of his separate self-acquired moneys. His purchase was self-acquisition as against the joint family and his possession was that of a stranger. It was not necessary to prove that Baldeo Sahai had separated after a complete partition of the joint family. A member of a joint family can hold separate property.

Mr. L. DeGruyther, K. C., and *Mr. Cowell* for the Plaintiffs.—The mortgage was made in 1846, when Baldeo Sahai was admittedly a member of the joint family. Although the mortgage was made in the name of Sita Ram and Sheo Lal, it was made on behalf of the joint family and Baldeo Sahai got possession of the mortgaged property as a mortgagee. Baldeo Sahai could not by any act of his own convert his possession into an adverse possession. The Defendants had failed to prove that Baldeo Sahai ever ceased to be a member of the joint family. The joint family property was worth several lakhs of rupees, and it was impossible that Baldeo Sahai should have renounced all claims to it when he is said to have left his father's home. The case now being set up—namely, that he purchased the property out of his separate self-acquired money—is a new one.

At the earliest Baldeo Sahai left his father's home in 1848, without any partition of the joint family. His original possession which began in 1846, as a mortgagee was never changed. A mortgagee cannot convert his title into adverse possession by purchasing the mortgaged property from a person who has no title. Ashrafunnisa was not entitled to inheritance. She was a childless widow and the evidence produced by the Defendants to prove the contrary was tutored and false. As regards the cross-appeal, the sale proceedings distinctly show that the "10 biswa share of Umda" was sold. As Lord Hobhouse remarked "it is the instrument which confers title on the purchaser." *Simbhunath Panday* v. *Golab Singh* (1). It is not proved that the rights and interests of Umda's daughters were sold.

Sir R. Finlay, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—These are consolidated Appeals from a decree of the High Court of Judicature for the North-Western Provinces at Allahabad, dated the 13th June 1907, which partly affirmed and partly reversed a decree of the Subordinate Judge of Saharanpur, dated the 14th July 1904, by which the suit had been dismissed.

The suit was brought on the 1st September 1903 to obtain proprietary possession of 13 biswas, 6 biswansis, 3 tanwansis, 6½ kachwansis and a fraction of the 20 biswas of Mauza Lohari. The Plaintiffs' case briefly was that one Mehdi Ali, whose representatives in title they alleged themselves to be, had in 1846 mortgaged the shares in Mauza Lohari, possession of which they claimed, to Sita

(1) L. R. 14 I. A. 77, 88 (1887).

Ram and his son Sheo Lal; that the mortgage debt had been discharged by the usufruct; and that the Defendants were the representatives of the mortgagees and still held possession under no other title; and the Plaintiffs claimed a decree for proprietary possession and for mesne profits. The case of the Defendants was that they held possession not under the mortgage of 1846, but under a private sale of the 27th of May 1853, of 10 biswas of Mauza Lohari, and under an auction sale of the 20th March 1854 of the remaining 10 biswas of Mauza Lohari, which sales they alleged were made in order to discharge debts which had been contracted by Mehdi Ali. In effect the Defendants' case was that by reason of the sales of 1853 and 1854 the equity of redemption in the shares which were mortgaged in 1846 passed to those through whom they claimed title. It was also contended on behalf of the Defendants that they were not precluded from setting up a title by adverse possession by the fact that possession of the shares in suit had been originally obtained under the mortgage of 1846.

The facts as found by the Board are briefly as follows:—

On the 22nd July 1846 Mehdi Ali, who owned the whole 10 biswas of Mauza Lohari, borrowed Rs. 4,000 from Sita Ram and his son Sheo Lal, and executed in their favour a mortgage for the term of two years of the shares which are the subject of this suit. The mortgage was usufructuary and the mortgagees were put in possession under it. Incidentally it may be mentioned that the Subordinate Judge found as a fact that the mortgage debt had been discharged by the usufruct before 1863. If it were necessary in this appeal to decide that issue their Lordships would probably not be prepared to dissent from that finding of the Subordinate Judge.

Mehdi Ali, who was a Shia Muhammadan, died on the 9th January 1852, and left surviving him two widows, Ashrafunnisa and Umda Begum, and certainly three daughters who had been born to him by Umda Begum. Through one of those daughters, Askari, who subsequently married and left issue, the Plaintiffs claim title. It has been contended on behalf of the Defendants that Mehdi Ali also left surviving him a daughter born to him by Ashrafunnisa. On behalf of the Plaintiffs it has been contended that Mehdi Ali left surviving him no daughter by Ashrafunnisa, and that Ashrafunnisa was a childless widow. In the view which their Lordships take of this case it is immaterial whether Mehdi Ali left, or did not leave, a daughter surviving him by Ashrafunnisa. It may, however, be mentioned that after Mehdi Ali's death, for some reason which the evidence does not explain, 10 biswas of Mauza Lohari were treated as the share of Ashrafunnisa, and the remaining 10 biswas were treated as the share of Umda Begum and her three daughters.

Mehdi Ail died heavily in debt, and after his death in 1852 suits to recover debts which were due by him were brought by his creditors against Ashrafunnisa, Umda Begum, and her three daughters, as the representatives of Mehdi Ali, and money decrees were obtained in those suits. One of those suits was brought by Sheo Lal on the 8th July 1852, on a bond payable on demand, to recover with interest Rs. 2,000 which Sheo Lal had lent to Mehdi Ali on the 29th May 1849. In that suit Sheo Lal obtained a decree for Rs. 2,786-5-6 prin-

cipal and interest, against Ashrafunnisa, Umda Begum, and the three daughters of Umda Begum, all of whom were sued as the heirs of Mehdi Ali. Under that decree the 20 biswas of Mauza Lohari were attached. On the 5th of May 1853, a sale proclamation was made fixing the 20th of June 1853 as the date for the auction sa'e of the 20 biswas in execution of the money decree. On the 19th of May 1853, Sheo Lal, through his pleader, applied to the Court to remove the attachment in order to enable the Defendants in that suit to pay the decree money by a private sale of the estate of Mehdi Ali deceased. On that application the Court removed the attachment. On the 27th May 1853, Inaet Husain, acting under a power-of-attorney, which had been executed for that purpose by Ashrafunnisa and had been duly registered, executed on her behalf a sale deed of 10 biswas of Mauza Lohari in favour of Baldeo Sahai, son of Sheo Lal, the consideration being Rs. 7,500. In that sale deed it was stated that two-thirds of three suls of the 20 biswas of Mauza Lohari had been from the 22nd of January 1846 in the exclusive possession of Sita Ram and Sheo Lal under the mortgage for Rs. 4,000 of 1846 from Mehdi Ali to them, and it was stated that Mehdi Ali had died, and had left a considerable amount of debt unpaid, that Ashrafunnisa had remained the heir of half the estate of Mehdi Ali in lieu of her dower debt; and in order to satisfy the decrees held by, and the debts due to, Sheo Lal she made an absolute sale of the 10 biswas share to Baldeo Sahai. It was by the sale deed agreed that Rs. 2,000 of the purchase money should be left with Baldeo Sahai, and that he should have power to pay the Rs. 2,000 to the mortgagee and to redeem the subject of the sale. In the sale deed the 10 biswas were described as Ashrafunnisa's share. After that sale the 10 biswas were entered in the revenue papers as Baldeo Sahai's share by private sale. Baldeo Sahai obtained possession of the 10 biswas share and held possession of the share until he died in 1895, when the Defendants as his representatives obtained possession.

It has been contended on behalf of the Plaintiffs, *first*, that Ashrafunnissa had no title to the 10 biswas share in Mauza Lohari, and, consequently had no title which she was capable of passing by the sale deed, and, *secondly*, that Baldeo Sahai was a member with his father Sheo Lal of a joint Hindu family, and that the family held possession as mortgagees and could not set up a claim of adverse possession against the representatives in title of Mehdi Ali, the mortgagee of 1846.

It has not been suggested that Ashrafunnisa had any interest in Mauza Lohari which she could sell other than such interest, if any, in the immoveable property of Mehdi Ali as she obtained under the Shia law as his widow. Her right to dower did not confer upon her a saleable estate in Mauza Lohari. If she had not borne to Mehdi Ali a daughter who survived him, Ashrafunnisa as his widow took no title to any share in Mauza Lohari. If on the other hand, as the Defendants have contended, Ashrafunnisa had borne to Mehdi Ali a daughter who survived him for a few months, Ashrafunnisa's share as his widow, and the share of his daughter, which on that contention came to her on the daughter's death, did not together amount to a 10 biswas share in the Mauza. If Ashrafunnisa had any other title in 1853 to the 10 biswas share which she purported

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to sell to Baldeo Sahai, it has not been shown what it was or how she had obtained it. But it is not necessary to consider what title, if any, Ashrafunnisa had to the 10 biswas share, as by the sale deed of the 27th May 1853 Ashrafunnisa sold to Baldeo Sahai such interests, if any, as she had in the 10 biswas of Mauza Lohari, and Baldeo Sahai got possession of the 10 biswas, and in course of time obtained a title by adverse possession to the whole 10 biswas or any portion of that share which Ashrafunnisa may not have been empowered to sell to him, and that title became indefeasable unless he or the Defendants who claim under him were precluded from setting up a title of adverse possession.

The High Court found as a fact that Baldeo Sahai was in 1846, and continued to be, a member of the joint Hindu family, of which his father Sheo Lal had been a member, and on that finding of fact decided that Baldeo Sahai's possession and the possession of the Defendants as his representatives had always been that of mortgagees, and consequently that Baldeo Sahai and those who claim under him were precluded from setting up any title of adverse possession to any portion of the share which was mortgaged in 1846 to Sita Ram and Sheo Lal. Their Lordships are unable to agree with the findings of fact of the High Court upon which that decision was based. At the date of the mortgage of 1846 Baldeo Sahai was undoubtedly a member of the joint Hindu family, of which Sita Ram and Sheo Lal were members, and that family was governed by the law of the Benares School of the Mitakshara. Their Lordships, however, find on evidence, which they consider is unimpeachable, that in 1847 or 1848, owing to disputes in the family, Baldeo Sahai ceased to be joint in food and joint in business with Sheo Lal, but no partition of the family property was then made, and thenceforward during their lives Baldeo Sahai and Sheo Lal had been separate in food and in business. Their Lordships also find that when Sheo Lal and Baldeo Sahai ceased to be joint in food and in business Baldeo Sahai received a present of a considerable sum of money from his grandmother, with which he carried on the business of a money-lender on his own account, and that out of his separate self-acquired property he found the purchase money of Rs. 7,500 of the sale deed of the 27th of May 1853. The oral evidence showing a separation is in their Lordships' opinion confirmed by the terms of that deed. Ashrafunnisa purported to sell the 10 biswas to Baldeo Sahai as a person who was not a mortgagee under the mortgage of 1846. So far as the 10 biswas which Ashrafunnisa purported to sell to Baldeo Sahai on the 27th of May 1853, their Lordships find that a title at least of adverse possession has been established and that the Defendants are not precluded from setting up that defence.

Their Lordships concur with the finding of the Subordinate Judge and the finding of the High Court that the remaining 10 biswas share in Mauza Lohari was sold to Sheo Lal, on the 20th of March 1854, at an auction sale held in execution of a decree for money which had been obtained by a creditor of Mehdi Ali in a suit brought against Umda Begum and her three daughters as the heirs and representatives of Mehdi Ali, and Sheo Lal obtained possession and held it until he died, when his interest passed to his son Baldeo Sahai as his heir.

The Plaintiffs failed to establish any

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title by way of redemption or otherwise to any interest in Mauza Lohari, and their suit was rightly dismissed by the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the Appeal of the representatives in title of Baldeo Sahai be allowed with costs and the decree of the High Court be varied by dismissing the Appeal to that Court with costs, and that the Appeal of Saiyid Muzaffar Ali Khan and other Plaintiffs to His Majesty in Council be dismissed with costs.

Solicitors : *Messrs. Barrow, Rogers and Nevill* for the Defendants.

Solicitors : *Messrs. Ranken Ford, Ford and Chester* for the Plaintiffs.

Defendants' appeal allowed and Plaintiffs' appeal dismissed with costs.

B. D.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL No. 6 OF 1910.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
18, March.

PANCHANAN GHOSH, Plaintiff, (Appellant in 2nd Appeal), Appellant,
v.
MIR ABDUL MOLIK and ors., Defendants, Respondents.

Occupancy holding, mortgage by raiyat—Subsequent transfer to stranger—Collusive suit by landlord for ejectment and recovery of possession—Landlord if in possession under paramount title—Suit on mortgage—Landlord if necessary party—Transfer of Property Act (IV of 1882), sec. 85.

When it is found that a landlord obtained possession of an occupancy holding, alleged to be non-transferable, by bringing a collusive suit for ejectment against a transferee from the raiyat :

Held—*That in a suit by a mortgagee of the holding on his mortgage, the landlord would be a proper party, his possession of the holding resting on acquisition from the transferee and not on a paramount title.*

JOGGESWAR DUTT *v.* BHUBAN MOHAN MITRA (1) *distinguished.*

This was an Appeal preferred on the 24th of January 1910 against the decree of the Hon'ble Charles Peter Caspersz, one of the Judges of this Court, dated the 22nd of December 1909, in Appeal from Appellate Decree No. 1130 of 1908, preferred on the 1st of June 1908 against the decree of E. P. Chapman, Esq., Distaict Judge of 24-Pergunnahs, dated the 25th of November 1907, modifying the decree of Babu Jogendra Nath Mukerjee, Subordinate Judge, 2nd Court at Alipur, dated the 30th of June 1906.

The material facts will appear from the judgment of CASPERSZ, J., which was as follows :—

CASPERSZ, J.—The Defendant No. 1 mortgaged five properties to Mathura Nath Ghose whose estate is now represented by the Plaintiff as executor. Subsequent to that event, the Defendant No. 2 purchased two of those properties at a sale in execution of a money-decree against the mortgagor the Defendant No. 1. Then in the year 1904, the Defendant No. 3 brought an action in ejectment against the Defendant No. 2, and obtained a decree for *khas* possession of the one property (ka) which is the subject-matter of the present appeal.

The Plaintiff brought his suit for foreclosure making the three Defendants parties thereto. In para. 5 of the plaint, a case was set up of collusion between the Defendants Nos. 2 and 3, and it was

(1) I. L. R. 33 Cal. 425 (1903).

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stated that they were both entitled to redeem the mortgage on the property (ka).

The Defendant No. 3 pleaded that he was the landlord, or superior malik, of the Jama of Rs. 24 annas 12 within which the property (ka) was comprised, that the jama was a non-transferable raiyati jote, and that, on all the grounds set forth, he was not a necessary party to this suit.

This last-mentioned plea appears to have been implied in the 4th issue of the Court of first instance, namely, "Is the jama of Rs. 24 annas 12 mortgaged in the deed transferable, and is such mortgage valid and binding against Defendant No. 3"? The Subordinate Judge found that the jama was transferable, and that it was binding on the Defendant No. 3, the present landlord. The Subordinate Judge, also, found that there had been collusion between the Defendants Nos. 2 and 3 in the suit of 1904.

On appeal by the Defendant No. 3, the District Judge has discharged that Defendant from the suit on the preliminary contention that he should not have been made a party inasmuch as he claimed by a paramount title of landlord. The District Judge was inclined to think otherwise, but, accepting the decision of this Court in *Joggeswar Dutt* v. *Bhuban Mohan Mitra* (1), he was constrained to hold that the Defendant No. 3, landlord, was not a necessary party.

In second appeal, the learned Vakil for the Plaintiff-Appellant has urged, *first*, that the lower Appellate Court should not have allowed the Defendant No. 3 to take such an objection before it, and, *secondly*, that the Defendant No. 3 is a necessary party to this litigation.

Now, the general proposition admits of no doubt that, when a person has assumed the position of being a proper and necessary party, he cannot, after being cast in the suit, change front and insist that he ought not to have been made a party Defendant :—[See *Bhaju Chowdhury* v. *Chuni Lal Marwari* (2)].

It is true that the Defendant No. 3 did not cause a specific issue to be framed, similar to the 8th issue, raising the question whether he had been improperly made a party to the Plaintiff's foreclosure suit; but, as I have already mentioned, he did advance that plea in the 9th paragraph of his written statement, and the plea, I take it, was impliedly put in issue between the parties in the 4th issue framed, namely, "Is the jama of Rs. 24 annas 12 mortgaged in the deed transferable, and is such mortgage valid and binding against Defendant No. 3"? The question of transferability raised the question whether the mortgage was valid and binding on the Defendant No. 3. If he is regarded as a landlord, his interest will be to deny that the property was transferable without his consent; if, on the other hand, he is regarded as a subsequent purchaser of any portion of the property, his position will be diametrically opposite to that of a landlord, and it will be his interest to say that the tenure was transferable, otherwise, he could not have purchased any equity of redemption. Consequently, the question of the Defendant No. 3 being a necessary party was raised in the 4th issue of the first Court, and by reason of the Subordinate Judge holding that the jama was transferable, it was held by implication that the Defendant No. 3 was necessary party in his capacity as a sub-

(1) I. L. R. 33 Cal. 425 (1903).

(2) 11 C. W. N. 284 at p. 293 (1906).

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sequent transferee of the interest of the mortgagor. It was, therefore, open to the Defendant No. 3 to appeal to the District Judge, and to challenge the decision of the first Court on this point.

Coming then to the second contention, whether the Defendant No. 3 is a necessary party, it appears to me that the case turns upon the finding of the lower Courts that he is, in point of fact, the landlord of the land. That is a very clear finding and the effect of it remains for consideration. As landlord, his interest would be to plead that the property of the Defendant No. 1 was not a permanent *jama*, and that the mortgage of the same was void *ab initio*. That was a plea raised in the 5th paragraph of the written statement of the Defendant No. 3. The general rule is indicated in *Joggeswar Dutt* v. *Bhuban Mahan Mitra* (1) which is the case relied upon by the District Judge, where the words of sec. 85 of the Transfer of Property Act—"all persons having an interest in the property"—were interpreted to mean that the only proper parties to a mortgage suit are the mortgagor and the mortgagee. That decision sets forth the general rule to which there are exceptions; and the case of *Bhaju Chowdhury* v. *Chuni Lal Marwari* (2) discusses two of the exceptions.

I think the case under appeal falls within the general rule for the reason that the Defendant No. 3 does, as a matter of fact, question the validity of the mortgage at its very inception. He was bound to do that as landlord, and his position as landlord prior to the mortgage would be unaffected by any subsequent decision in a mortgage suit to the effect that the mortgage was valid. There are certain observations at page 292 of the Report which have been impressed upon me, but if those observations be carefully perused, they are not really authority in support of the proposition contended for by the Plaintiff. It would be intolerable to hold that the Defendant No. 3, who has been found to be a landlord, is to be precluded from denying the right of the Defendant No. 1 to mortgage his property, and yet, if Defendant No. 3 is interested in the equity of redemption, he can only affirm that right, and so he is placed in an altogether inconsistent position. I do not think that he is a necessary or proper party to this suit.

(1) I. L. R. 33 Cal. 425 (1903).
(2) 11 C. W. N. 284 at p. 291 (1906).

This appeal is, therefore, dismissed with costs.

[Plaintiff preferred this further appeal under sec. 15 of the Letters Patent.]

Babu Sarat Chandra Roy Chowdhuri for the Appellant.

Moulvi Nuruddin Ahmed for *Babu Girija Prosanna Roy Chowdhuri* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This appeal arises out of a suit on a mortgage. The Plaintiff is unquestionably the mortgagee. He has made as Defendants, the original mortgagor Defendant No. 1, Defendant No. 2 who claims to be a purchaser in execution of a money-decree obtained against Defendant No. 1, and Defendant No. 3 who claims to be in possession of the land and to be in possession as a landlord who ejected Defendant No. 2 on the ground that the transfer in execution to Defendant No. 2 was void and of no effect, and worked a forfeiture of the tenant's interest. The Plaintiff, however, maintains that Defendant No. 1 had a permanent trans-

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ferable interest, and that the decree obtained by Defendant No. 3 against Defendant No. 2 was improper and collusive. The Subordinate Judge has decided both these points in favour of the Plaintiff. The result then is that if that be correct, —and it must be taken to be correct for the present purpose—the Defendant No. 3 though he may be the landlord of this piece of land, is not in possession by virtue of a paramount title, but by virtue of a title improperly and collusively obtained by an arrangement between him and Defendant No. 2. In other words, his possession, on the findings of the Subordinate Judge, must be taken to rest on acquisition from Defendant No. 2 and not on any paramount title. In this view of the case, it is obvious that the decision in *Joggeswar Dutt* v. *Bhuban Mohan Mitra* (1) has no application, and the judgment of Mr. Justice Caspersz supporting that of the District Judge must be set aside. The case is sent back for rehearing of the appeal in the lower Appellate Court, it being open to the parties to discuss the propriety of the findings of the Munsif. But, as I have already said, until those findings be set aside, they must be taken to be conclusive of the rights of the parties at this present stage.

The Appellant is entitled to the costs of the lower Appellate Court and of the High Court.

Appeal allowed:
Case remanded.

(1) I. L. R. 33 Cal. 425 (1903).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO. 480 OF 1910.

MOOKERJEE, J.
CARNDUFF, J.
1911,
Heard, 1, June.
Judgment, 2, June.

BIROO GORAIN and others, Judgment-debtors, Appellants,
v.
MUSSTT. JAIMURAT KOER, Decree-holder, Respondent.

Civil Procedure Code (Act V of 1908), Or. 21, r. 2, cls. (1) and (3)—Adjustment of decree, not certified through alleged fraud of decree-holder—Remedy of judgment-debtor—Execution Court, if may recognise adjustment.

It is not open to the Court of execution to enquire into the fact of a payment or adjustment of a decree which has not been certified or recorded as provided in cl. (1) of r. 2, of Or. 21, C. P. C., even when the conduct of the decree-holder is alleged to have been fraudulent.

GADADHAR PANDA *v.* SHYAM CHURN NAIK (1), RAMAYYAR *v.* RAMAYYAR (2), TRIMBAK RAM KRISHNA RANADE *v.* HARI LAXMAN RANADE (3) *referred to.*

Semble—*It is open to the judgment-debtor to institute a suit for damages for fraud,* [POROMANAND KHASNABISH *v.* KHEPOO PARAMANIK (10) *referred to*] *and the decree-holder also renders himself liable to proceeding under the criminal law.* MADHUB *v.* NOVODEEP (11), R. *v.* BAPUJI (12), R. *v.* MUTHURAMAN (13), R. *v.* PILLALA (14) *referred to.*

Where the judgment-debtor having appealed against the decree sought to be

(1) 12 C. W. N. 485 (1908).
(2) I. L. R. 21 Mad. 356 (1897).
(3) I. L. R. 34 Bom. 575; 12 Bom. L. R. 686 (1910).
(10) I. L. R. 10 Cal. 354 (1884).
(11) I. L. R. 16 Cal. 126 (1888).
(12) I. L. R. 10 Bom. 288 (1886)
(13) I. L. R. 4 Mad. 325 (1881).
(14) I. L. R. 9 Mad. 101 (1885).

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executed withdrew the appeal upon an adjustment come to with the decree-holder, and the fact of such adjustment was stated before the Appellate Court and was recorded in its order :

Held—*That an application by the judgment-debtor to the Court in which execution was subsequently applied for by the decree-holder praying for an investigation as to the facts of the adjustment was in substance one in continuation of the application before the Appellate Court and the two applications together constituted a sufficient compliance with the provisions of Or. 21, r. 2, cl. (1), and the fact of the payment should have been enquired into by the Court.*

This was an Appeal preferred on the 19th of September 1910 against the order of Moulvi J. Ahmad, Subordinate Judge, 3rd Court of Zillah Patna, dated the 6th of August 1910.

The facts of the case will appear from the judgment.

Babu Karunamoy Bose for the Appellants.

Babus Dwarka Nath Chuckerbutty, Lalit Mohan Banerji and *Smritish Chandra Ghose* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

We are invited in this Appeal to set aside an order by which the Court below has summarily refused to entertain an objection of the judgment-debtors that the decree under execution has been completely adjusted out of Court. The circumstances under which this objection was taken are patent on the face of the record. The decree under execution was made in a suit for rent on the 24th of September 1908. An appeal was preferred to this Court on the 8th January 1909. Three days later, the Appellants applied for a Rule to stay proceedings in the execution which had already been commenced in the Court below. The Rule was granted and an *ad interim* stay was directed. On the 5th February 1909, the Appellants presented an application to this Court in which it was stated that the matter in difference between the parties had been adjusted and that in pursuance thereof they had agreed to withdraw the appeal. This application was directed to be heard on the 8th of February. On that date in the presence of the Vakil for the Appellants and the Vakil for the Respondent the Court granted the application. The appeal was dismissed and the Rule discharged ; the Respondent also waived her right to the costs of the proceedings in this Court. On the 22nd of February, the Vakil for the Respondent addressed a letter to the Deputy Registrar in which he prayed that as the appeal had been withdrawn, the order of this Court might be sent down to the Court below as the records were required for the purpose of another case. Five days later, the order of this Court was communicated to the Court below and the records were also returned. In the order which was drawn up, it was stated that the Appellants had intimated to the Court that the matter in difference between the parties had been adjusted and on that footing the appeal had been dismissed without costs.

On the 2nd March 1909, the Court below recorded an order to the effect that the record had been received back and directed the decree-holder to take proper steps. On the 8th March the application for execution was dismissed as no steps had been taken in that behalf by the decree-holder. In this manner the application for execution which had been pre-

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sented on the 4th November 1908 was disposed of by the Court below. It now transpires that on the 18th March 1909 the decree-holder presented a second application for execution, but it was dismissed for non-prosecution on the 11th May following. On the 6th of June 1910, the decree-holder presented the application on the basis of which the proceedings now before us were initiated. The decree-holder ignored the settlement alleged by the judgment-debtors in their application to this Court on the 5th February 1909, and prayed that execution might proceed on the footing of the application of the 4th November 1908. Notice was served upon the judgment-debtors who promptly preferred objections on the 25th of July 1910. These objections were of a two-fold character, namely, *first*, that the execution could not proceed because the decree had been adjusted in full; and, *secondly*, that if the execution could proceed, the decree-holder was bound to proceed against the properties mentioned in the prayer clause of the plaint before she could be allowed to proceed against the other properties of the judgment-debtors. The Subordinate Judge overruled these contentions and held that as the alleged adjustment had not been certified, it was not competent to the Court to take notice of it. The Subordinate Judge further held that upon the face of the objections the adjustment, if true, was between the decree-holder and persons who were not parties to the execution proceedings, and consequently the adjustment could not be of any value to the judgment-debtors. The Subordinate Judge also held that the discretion of the decree-holder to proceed in execution of her decree in any manner she chose, was not restricted by the facts stated in the prayer clause of the plaint.

The judgment-debtors have now appealed to this Court. On their behalf the decision of the Subordinate Judge has been attacked substantially on three grounds, namely, *first*, that although the adjustment has not been certified in the manner contemplated by r. 2 of Or. 21 of the Code of 1908, as the conduct of the decree-holder is fraudulent, it is open to the Court to investigate the allegations of fraud under sec. 47 of the Code of 1908; *secondly*, that the provisions of r. 2 of Or. XXI of the Code have in substance been complied with; and, *thirdly*, that if it is open to the decree-holder to proceed with the execution, she cannot sell the properties of the judgment-debtors in any manner she chooses, but must proceed first against the properties mentioned in the prayer clause of the plaint.

In so far as the first of these objections is concerned, reliance has been placed upon the cases of *Gadadhar Panda* v. *Shyam Churn Naik* (1), *Ramayyar* v. *Ramayyar* (2) and *Trimbak Ram Krishna Ranade* v. *Hari Laxman Ranade* (3). In our opinion, there is no foundation for this contention. Or. 21, r. 2 of the Code provides in cl. (3) that "a payment, which has not been certified or recorded as aforesaid, *i.e.*, as explained in cls. 1 or 2 at the instance of either the decree-holder or the judgment-debtor shall not be recognized by any Court executing the decree." The contention of the learned Vakil for the Appellants in substance is that in cases where the conduct of the decree-holder is fraudulent, it is open to the Court, in fact it is incumbent on the Court, to investigate the allegation of fraud under sec. 47 of the Code of 1908,

(1) 12 C. W. N. 485 (1908).
(2) I. L. R. 21 Mad. 356 (1897).
(3) I. L. R. 34 Bom. 575; 12 Bom. L. R. 686 (1910).

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notwithstanding the clear and specific provisions of cl. (*e*) of r. 2 of Or. 21. This argument is obviously fallacious. A proceeding under r. 2, Or. 21 is a proceeding under sec. 47 of the Code, inasmuch as it decides a question between the parties to the suit and relating to the execution, satisfaction or discharge of the decree made in the suit. If the contention advanced on behalf of the Appellants were to prevail, in all cases where fraud is imputed to the decree-holder, the provisions of cl. (3) of r. 2, Or. 21 would become nugatory; in other words, the provisions of r. 2 would be superseded by the wider provisions of sec. 47. We are, therefore, unable, upon the clear provisions of statutory law, to give effect to the contention of the learned Vakil for the Appellants.

As regards judicial decisions to which our attention has been drawn, *Gadadhar Panda* v. *Shyam Churn Naik* (1) does not, when analysed, support the contention of the Appellants. No doubt there are isolated expressions in that judgment which would support the view that it is competent to the Court to deal with a case under sec. 244 of the Code of 1882 when an allegation of fraud is made in relation to a case of payment or adjustment of a decree. But it is worthy of note that no question of limitation arose in that case. It cannot be held that the learned Judges intended to lay down that although the period of limitation within which an application by the judgment-debtor under cl. (2) of r. 2 of Or. 21 is to be presented to the Court has expired, it is still open to him to secure an investigation of the very same matter by an application under sec. 47 of the Code of 1908. The only case which supports the contention of the Appellants is the decision in *Ramayyar* v. *Ramayyar* (2). It is sufficient, however, to point out that a contrary view was taken by the learned Judges of the Madras High Court in *Periathambi* v. *Vellaya* (4) and the decision in *Ramayyar* v. *Ramayyar* (2) was expressly dissented from in *Ganapatty* v. *Chenga* (5). On the other hand, a series of decisions of this Court amongst which may be mentioned, *Kamini Debi* v. *Aghore Nath* (6), *Nistarini Dasi* v. *Kazim Ali* (7), *Monmohan Karmokar* v. *Dwarka Nath Karmokar* (8) and *Heramony Biswas* v. *Musa Khan* (9), show conclusively that the contention of the Appellants ought not to prevail. The authorities on the subject were fully reviewed in the case of *Monmohan Karmokar* v. *Dwarka Nath Karmokar* (8), where it was pointed out that in a case in which an application under cl. (2) of r. 2 of Or. 21 would be successfully met by the objection of limitation, the judgment-debtor was not entitled, under the colour of sec. 47 of the Code of 1908, to obtain an investigation of the objection that the decree had been satisfied or adjusted out of Court. We adhere to the view taken in that case. We are also clearly of opinion that the decision in *Trimbak Ram Krishna Ranade* v. *Hari Laxman Ranade* (3) is of no assistance to the Appellants. We may further point out that even if it is established that the conduct of the decree-holders is fraudulent the judgment-debtor is not entitled to

(1) 12 C. W. N. 485 (1908).

(2) I. L. R. 21 Mad. 356 (1897).
(3) I. L. R. 34 Bom 575; 12 Bom. L. R. 686 (1910).
(4) I. L. R. 21 Mad. 409 (1897).
(5) I. L. R. 29 Mad. 312 (1905).
(6) 11 C. L. J. 91: s. c. 14 C. W. N. 357 (1909).
(7) 12 C. L. J. 65 (1910).
(8) 12 C. L. J. 312 (1910).
(9) 7 Indian Cases 625 (1910).

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obtain an extension of the time within which an application is to be made to the Court under cl. (2) of r. 2 of Or. 21. Sec. 18 of the Limitation Act which deals with the effect of fraud, is clearly of no avail to the Appellants. That section provides that "when any person having a right to make an application has by means of fraud been kept from the knowledge of such right or of the title on which it is founded or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for making an application against the person guilty of the fraud or accessory thereto shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or in the case of the concealed document, when he first had the means of producing it or compelling its production." It is not suggested on behalf of the Appellants that they were kept by means of fraud from the knowledge of their right to make the application mentioned in cl. (2) of r. 2 of Or. 21. Their grievance is that they have been kept by means of fraud from the exercise of their right to make this application; consequently, if we were to accede to the contention of the Appellants, we should have to substitute for the phrase "from the knowledge of such right," the phrase "from the exercise of such right." But clearly the knowledge of a right and the exercise thereof are fundamentally distinct things. We are, therefore, of opinion that in so far as the first contention of the Appellants is concerned it must fail notwithstanding the earnest appeal which the learned Vakil for the Appellants made to us that the view we propose to take might involve considerable hardship to innocent persons. But if the judgment-debtor, notwithstanding the express provisions of cl. 2, r. 2, Or. 21, still enters into an adjustment with the decree-holder out of Court and omits to take the neces sary precaution of making an application within the time allowed by law, he has no just ground of complaint when the decree-holder takes advantage of his omission to seek the protection of the law. Further, it is not by any means clear that the judgment-debtor in a case of this description is really without any remedy, because it is well settled, as pointed out in the case of *Poromanand Khasnabish* v. *Khepoo Paramanik* (10), that it is open to the judgment-debtor who has been defrauded in this manner to institute a suit for damages for the fraud. It is also clear as laid down in *Madhub* v. *Novodeep* (11), *R.* v. *Bapuji* (12), *R.* v. *Muthuraman* (13) and *R.* v. *Pillala* (14), that the decree holder who has recourse to such a fraudulent act, renders himself liable to proceedings under the criminal law. In the present case, therefore, even if the Appellants were to fail in their contention, they would not be wholly without a remedy. The first contention of the Appellants therefore fails.

In so far as the second contention is concerned, it raises the question whether the judgment-debtor has not in substance complied with the requirements of cl. 2, r. 2, Or. 21. The learned Vakil for the Appellants has contended that the petition of objection presented to the Court below on the 25th of July 1910 may be treated as in continuation of the application made to this Court on the 5th of

(10) I. L. R. 10 Cal. 354 (1884).
(11) I. L. R. 16 Cal. 126 (1888).
(12) I. L. R. 10 Bom. 288 (1886).
(13) I. L. R. 4 Mad. 325 (1881).
(14) I. L. R. 9 Mad. 101 (1885).

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February 1909 in which the fact of the alleged adjustment was notified to the Court. In our opinion, this contention is well-founded and must prevail. No doubt an application under cl. 2, r. 2, Or. 21, ought to be presented to the Court in which the decree is under execution; and it ought to call upon the Court to issue a notice to the decree-holder to show cause why the adjustment should not be recorded as certified. Tested from this point of view the application of the 5th February 1909 might, at first sight, be deemed open to objection. But the circumstances of this case are of a very special character. No doubt an application for execution of the decree of the Court below was pending before the Subordinate Judge, but the decree itself was under appeal to this Court; and the only decree which could ultimately be enforced by the decree-holder against the judgment-debtor would be the decree of this Court, whether that decree be one of affirmance, reversal or modification. Consequently when the judgment-debtors notified to this Court that the decree had been adjusted, it could not be said that they had not acted in accordance with law. No doubt that application did not call upon the decree-holder to certify the alleged adjustment; but it was not necessary to take such a step at that stage. In fact, although the allegation of adjustment was made, it was not repudiated by the learned Vakil for the decree-holder Respondent. On the other hand, the Vakil for the Respondent gave up his cost not only in the Rule but also in the appeal. This fact undoubtedly points to the conclusion that there must have been some arrangement between the parties. It is also inconceivable that if no arrangement had been entered into between the parties, the judgment-debtor after having paid Rs. 365 as Court-fees on the memorandum of appeal presented on the 8th of January 1909, should have voluntarily asked for leave to withdraw the appeal on the 5th of February 1909. It was only after the decree-holder had applied to the Court on the 6th June 1910 to execute the decree, ignoring the alleged adjustment, that it became necessary for the judgment-debtor to apply to the Court to compel the decree-holder to certify the adjustment in question. We therefore hold, under the circumstances of this case, that, treating the application of the 5th February 1909 presented to this Court and the petition of objection presented to the Court below on the 25th July 1910 as parts of the same transaction, there was sufficient compliance with the provisions of the law. The Court is never astute to impose a technical bar so as to give effect to a scheme of fraud, and it would be lamentable if we were constrained to hold that the application of the 5th February 1909 in which the allegation of adjustment was made, was of no avail to the judgment-debtor for the purpose of proceedings under cl. 2, r. 2, Or. 21. In our opinion, the Subordinate Judge ought to have entertained the objection taken in the application of the 25th July 1910 and investigated it on the merits. The second contention of the Appellants must, therefore, prevail.

In so far as the third contention is concerned, it is not necessary for us to determine whether it is well-founded. But we must point out that the decree now under execution is a perfect specimen of the mode in which a decree ought never to be drawn up. The decree as it stands is unintelligible and cannot be executed without reference to the judg-

ment, possibly also without reference to the pleadings. If the question arises later on as to whether, in the event of execution of the decree, the decree-holder is in any way fettered as to the manner in which she should proceed against the properties of the judgment-debtors, the question must be re-investigated by the lower Court with reference to all the proceedings in the suit. This question, therefore, will be left open for future investigation.

The result, therefore, is that this appeal is allowed, the order of the Subordinate Judge set aside, and the case remanded to him in order that the objections taken by the judgment-debtors in their application of the 25th July 1910 may be investigated on evidence.

We must add that the Subordinate Judge took a very narrow view of his duties in this matter, when he held that as upon the face of the pleadings the alleged adjustment purported to have been entered into between the judgment-debtors on the one hand, and persons who are strangers to the proceedings, on the other, the adjustment could not be of any avail to the judgment-debtors. But the allegation of the judgment-debtors is that the adjustment was entered into, for the benefit of the decree-holder, with her husband and her father-in-law. If this be so, the Court will discover the real nature of the transaction, and not impose technical bars to effectuate a scheme of fraud; that is, in a matter of this description, the Court is bound to look to the substance and not to the mere form of the transactions placed before it.

The Appellants are entitled to their costs in this Court. We assess the hearing-fee at 5 (five) gold mohurs.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1379 OF 1910.

STEPHEN, J.
RICHARDSON, J.
1912,
3, May.

AMAN GAZI, Defendant, Appellant,
v.
MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR, Plaintiff, Respondent.

Landlord and tenant—Settlement proceedings, tenant setting up rent-free title in—Tenant entered as settled raiyat in Record of Rights as finally published—Suit to have rent assessed—Limitation.

Where more than 12 years before the landlord's suit for assessment of rent the tenant in the course of settlement proceedings set up a title to hold the land rent-free, but no actual decision of the question by the Settlement Officer was proved, though the record-of-rights, which was finally published within 12 years of the suit, shewed that the tenant was entered as a settled raiyat in the village :

Held—*That it was open to the landlord to rely upon the entry in the record-of-rights as a tacit recognition of his right to have rent assessed, at any rate within 12 years of the date of final publication, and the suit therefore was not barred by limitation.*

MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR v. ROSAN (1) *distinguished.*

This was an Appeal preferred on the 8th of April 1910 against the judgment and decree of Mr. G N. Roy, District Judge of Zillah Tipperah, dated the 28th of August 1909, modifying the decree of Babu Amulya Gopal Roy, Munsif at Comillah, dated the 1st of March 1909.

(1) 15 C. L. J. 203 : s. c. 16 C. W. N. 931n (1912).

AMAN GAZI v. MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR.

The material facts will appear from the judgment.

Babu Sashadhar Roy for the Appellant.—The subject-matter in dispute is one of a large number of tanks in respect of which the Maharaja of Tipperah brought numerous suits for *khas* possession or in the alternative for assessment of rent. In the recently decided test case of *Rajah Birendra Kishore Manikya Bahadur* v. *Akram Ali* (2), it has been held that these grants of licenses for the excavation of tanks are not and cannot be revoked or disturbed so long as there is water in them. In the present case, therefore, the Plaintiff has no cause of action as the tank has not yet silted up. Besides, the claim is barred by limitation as the suit has been brought more than 12 years after the dispute before the Settlement Officer in the course of which the Defendant set up a rent-free right in respect of the disputed tank to the knowledge of the Plaintiff. It has been held that the period of limitation in such a case must run from the date of such dispute and not from the final publication of the record-of-rights. See *Maharaja Birendra Kishore Manikya Bahadur* v. *Rosan* (1).

The entry in the settlement record is no doubt in Plaintiff's favour, but it can not help him as the Settlement Officer had no jurisdiction, under the law as it then stood, to enquire into the validity or otherwise of rent-free rights. *Secretary of State* v. *Nitye Singh* (3).

Babu Dwarka Nath Chuckerbutty (with him *Babus Gobinda Chandra De Roy* and *Romesh Chandra Sen*) for the Respondent.—The Defendant has not proved any rent-free grant. The only fact proved is that rent has not been paid hitherto. The disputed lands are admittedly within the ambit of the Plaintiff's zemindari and are mal lands. The Defendant's assertion of a rent-free title before the Settlement Officer was negatived. It has been recorded that he is a "settled raiyat" (স্থিতিবান) of the village and that "rent has not yet been assessed" (এই চই দাগের খাজানা ধার্য্য নাই). The entry recorded an existing tenancy and therefore the landlord had no ground for complaint. That entry has not been questioned by the Defendant and he must therefore be taken to have been holding the land as a tenant. No question of limitation can therefore arise. The Plaintiff's right to receive rent cannot be barred although his right to *khas* possession is. Limitation, if any, ran in this case against the tenant and ought to be counted from the final publication of the record-of-rights. The entries made by a Settlement Officer before the final publication of the record-of-rights are provisional entries only, liable to be varied at any time before the final publication. The case of *Maharaja Birendra Kishore Manikya Bahadur* v. *Rosan* (1) is distinguishable. The legal effect of an entry in the record-of-rights like the one here was not considered in that case. In the present case, the legal presumption arising from the settlement entry stands in landlord's favour and is unrebutted. The two judgments which were delivered in that case proceed upon different grounds. Mr. Justice Caspersz's judgment was based mainly on the ground that the tank was not assessable at all so long as there was water therein and his

(1) 15 C. L. J. 203 : s. c. 16 C. W. N. 931n (1912).

(2) 15 C. L. J. 194 : s. c. 16 C. W. N. 304 (1912).

(3) I. L. R. 21 Cal. 38 (1893).

(1) 15 C. L. J. 203 : s. c. 16 C. W. N. 931n (1912).

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Lordship relied on the judgment in the case of *Rajah Birendra Kishore Manikya Bahadur* v. *Akram Ali* (2), but that case is clearly distinguishable. That was a case in which a title based upon a contract was set up. The Settlement Officer had jurisdiction to enquire into the validly or otherwise of a rent-free title set up before him. It is only as regards lakhiraj titles that he was not competent to do so. See the case of *Secretary of State* v. *Nitye Singh* (3) and the observations of Mr. Justice Ghose. The head-note of the report is somewhat misleading.

The JUDGMENT OF THE COURT was as follows :—

This is one of the numerous suits brought by the Maharajah of Tipperah in which he seeks for a declaration of his title to as zemindar and for *khas* possession of the lands in dispute or in the alternative for assessment of rent.

The District Judge in the Court below has considered the question of limitation and has held that the suit is not barred under the provisions of the Statute. The facts are that the Defendant on the 11th February 1895 set up a title before the Settlement Officer according to which he claimed to hold the lands in question rent-free. No actual decision by the Settlement Officer was brought to our notice: but the record-of-rights which was finally published on the 9th of July 1896 contains entries to the effect that the Defendant was a settled raiyat in the village and that no rent had been assessed in respect of the lands in question. If the time when the tenant first made his claim is considered as the starting point of the period of limitation the suit is barred, but it is not barred if we count the period from the date of the publication of the record-of-rights. The lower Court has held that the latter date is the one from which limitation must be counted and we consider that this is right. The claim made by the tenant cannot be said to have been allowed by the Settlement Officer. It may perhaps not be said to have failed as the question it raised was allowed to be left open for future determination. But on looking into the facts of the case we cannot but consider that on the publication of the record-of-rights it was open to the Maharajah to rely upon the entries therein as a tacit recognition of his right to have rent assessed at any rate within twelve years of this date. We have been referred to a recent decision in the case of *Maharaja Birendra Kishore Manikya* v. *Rosan.** As regards that case there does

(2) 15 C. L. J. 194 : s. c. 16 C. W. N. 304 (1912).

(3) I. L. R. 21 Cal. 88 (1893).

* [CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2523 OF 1910

CASPERSZ, J.	
D. CHATTERJEE, J.	MAHARAJA BIRENDRA
1911,	KISHORE MANIKYA BAHADUR,
Heard,	Plaintiff, Appellant,
30, November.	
1912,	ROSAN and another,
Judgment,	Defendants, Respondents.
4, January.	

This was an appeal preferred on the 2nd of August 1910 against the decree of Babu Asutosh Banerjee, Subordinate Judge, first Court of Tipperah, dated the 28th of April 1910, reversing the decree of Babu Sarat Chunder Bose, Munsif, fourth Court of Comillah, dated the 14th of June 1909.

Babu Gobinda Chandra Dey Roy for the Appellant.

No one appeared for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

CASPERSZ, J.—This is one of the numerous appeals involving the same question, the right claimed by the Plaintiff, the Maharaja of Hill Tipperah, to assess the *niskar* (rent-free) tanks

not appear to have been any question raised as to the effect of any entries in the record-of-rights. We therefore do not consider ourselves bound by that decision.

It is argued before us that the Settlement Officer had no jurisdiction to deal with a claim to hold land free of rent. As to this it is enough to say that on the materials before us the entries in the record-of-rights as finally published were made by a competent authority.

The result is that this appeal fails and is dismissed with costs.

situated in his Chakla Roshanabad. We have heard the arguments in this appeal and in A. A. D. Nos. 1270, 1963, and 2515 of 1910, which may be regarded as test cases The Plaintiff's suits have been dismissed in A. A. D. Nos. 1270 and 1963 of 1910 in which judgment† has just been delivered and this appeal, also, must fail. The Subordinate Judge has held the suit to be barred because it was brought more than twelve years after the Defendants' assertion of adverse title before the Settlement Officer on the 26th February 1896. In the opinions already expressed, the Plaintiff's suit is not maintainable because his right to assess rent on the *niskar* tanks has not accrued. In the present case (which corresponds with Suit No. 399 of 1908 of the first Court) no *sanad chiti* was produced or set up by the Defendants, their claim was to hold the tank rent-free, in virtue of their ancestral title. In so far as that claim is concerned it has been found to be hostile and it must be deemed hostile so long as the tank is used as such. The appeal is dismissed, but without costs, as the Respondents do not appear.

D. CHATTERJEE, J.—In this case the Defendants pleaded old ancestral rent-free title and also title by adverse possession. The Defendant No. 1 however stated in his deposition that his ancestor had got this *lakhiraj* on payment of *gun* which is translated as the capitalized value of probable rent. The Courts below have held that the payment of *gun* had not been made out but that the plea of the payment implies the land was at one time *mal*. That it was once the *mal* of the Plaintiff is not denied and if the payment of *gun* is not proved, the land is still *mal* unless any title by adverse possession or otherwise has arisen in favour of the Defendant. The finding is that the Defendant and his predecessors have been in possession without paying any rent for over 12 years: that by itself is not sufficient for basing a valid title in bar of the Plaintiff's suit as there is no finding as to who dug the tank and when and under whose order. There is however the settlement *khatyan* shewing that about the 26th February 1896, the Defendant No. 1 claimed the land as rent-free and the Plaintiff's agent denied the claim. There was thus a clear claim of *niskar* title unqualified by reference to any document and a clear denial of the same by the Plaintiff's agent A complete hostile right was claimed to the knowledge of the Plaintiff and no suit was brought until more than 12 years after. I think that this suit, as framed, is clearly barred by limitation and has been rightly dismissed.

I agree, therefore, in dismissing the appeal without costs.

† Reported at 16 C. W. N. 804.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 4122 OF 1911.

COXE, J. IMAM, J. 1912. 8, March.

KAILASH CHANDRA KAR, and another, Plaintiffs, Appellants,
v.
HARADHAN CHATTERJEA, Defendant, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. XXXIII, r. 1—Withdrawal, application for—Pleader's authority—Vakalatnama—Plaintiff if may object to order as made on insufficient grounds.

A vakalatnama executed by the Plaintiffs which authorised their Pleader "to choose arbitrators, prefer objections to awards, file **solenamah** ***or*** **rafanamah** ***when necessary and do all necessary acts in connection with the suit that will be for our benefit" gave the pleader authority to make an application under Or. XXIII, r. 1 for the withdrawal of the suit.***

KAILASH CHANDRA KAR *v.* HARADHAN CHATTERJEA.

Quere: *Whether it is open to the Plaintiff to take exception to an order permitting him to withdraw a suit with liberty to bring a fresh suit on the ground that the grounds set out in the application for withdrawal were insufficient.*

This was a Rule granted on the 22nd of July 1911 against an order of Babu M. M. Dutt, Subordinate Judge of Bankura, dated the 14th of June 1911.

The material facts will appear from the judgment.

Dr. Rash Behary Ghosh, *Babus Dasarathi Sanyal* and *Debendra Nath Bhuttacharya* for the Petitioners.

Babus Hirendra Nath Ganguly and *Suresh Chunder Mukerjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This application arises out of a suit that was brought by one Keshab Chandra Kar and his widowed sister-in-law Sasimukhi Dasya. They were represented by a pleader named Kuloda Prosad Mukerjee. On the 14th June 1911, an application was filed by this gentleman for permission to withdraw the suit with leave to sue again. The application was heard by the learned Subordinate Judge and was not opposed, the dispute before him being confined to the question of costs, and ultimately the petition was granted.

The Plaintiffs then obtained a Rule from this Court on the Opposite Party to show cause why this order should not be set aside and it was argued on their behalf that the order was bad, *firstly*, because Sasimukhi did not join in it, *secondly*, because Kuloda Prosad Mukerjee was not authorised by the vakalatnama to file such a petition, and, *thirdly*, on the ground that the reasons stated in the petition were not sufficient to justify its being granted.

We do not think that in the circumstances of the present case, we ought to exercise our revisional powers in setting aside the order. The vakalatnama authorised the pleader "to choose arbitrators, prefer objections to awards, file *solenamah* or *rafanamah* when necessary and do all necessary acts in connection with the suit that will be for our benefit and the said acts will be deemed as done by ourselves." When such wide powers were specifically given to the pleader, we are inclined to think that the words "all necessary acts" should legitimately be construed as including an application under Or. XXIII, r. 1.

As to the contention that Sasimukhi did not consent to this application, it is stated in the affidavit that has been filed by the Opposite Party that on the 13th June 1911, Babu Kuloda Prosad wanted a day's time to enable him to obtain the consent of the Plaintiffs and that on the next day the said pleader intimated to the Court that he had obtained the necessary consent. The learned Subordinate Judge describes the petition as being filed by the Plaintiffs in the plural and clearly it was understood by all the parties at the time that this petition was on behalf of the Plaintiffs generally. We are not prepared to assume that Sasimukhi's consent was not obtained within the meaning of Or. XXIII, r. 1, sub-r. 4.

As to the contention that the grounds given for this application were not sufficient to justify it, we have been referred to one or two cases; but in our opinion they are wholly inapplicable. Those were cases in which the objections to the order were filed by the Defendants and not, as in this case, by the Plaintiffs. It is

KAILASH CHANDRA KAR *v.* HARADHAN CHATTERJEA.

obvious that objections to an order of this kind which might be perfectly reasonable in the mouth of the Defendants are wholly out of place in the mouth of the parties who obtained the order. We think, therefore, that whether the order of the learned Subordinate Judge be strictly regular or not, it is not an order with which we should interfere in the exercise of our revisional jurisdiction.

The Rule will accordingly be discharged with costs. Two gold mohurs to Defendant No. 2.

Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REVS. NOS. 746 AND 747 OF 1912.

HOLMWOOD, J.
IMAM, J.
1912,
21, June.

RASUL BUKHSH, Petitioner,
v.
MUNICIPAL BOARD OF CHAPRA, Opposite Party.

Bengal Municipal Act (III of 1884, B. C.), sec. 353—Municipal offence, prosecution for—Consent of the Commissioners to prosecution, how to be evidenced—Sanction of prosecution by public authority, if should be in writing signed and sealed by the authority.

The only evidence of sanction of prosecution of a public authority is a writing under the seal and signature of that authority.

Where the Vice-Chairman of a Municipality in starting two prosecutions against the accused under sec. 217 of the Bengal Municipal Act and Municipal Bye-law No. 50 respectively, merely signed two "Forms" called "Forms of prosecution," in the remarks column of one of which was written "I have seen myself" and in that of other "prosecute :"

Held—*That neither of these documents disclosed any authority written or otherwise showing the consent of the Commissioners or the Vice-Chairman on their behalf to a prosecution.*

Rules granted on the 31st of May 1912 against the order of Moulvi Syed Hamiduddin Ahmed, Deputy Magistrate of Chapra, dated the 19th of January 1912, which order was on appeal dismissed by Mr. H. Foster, Sessions Judge of Sarun, on the 20th of April 1912.

The Petitioner had been convicted on the 19th January 1912 of two offences in two cases separately tried under sec. 217 of the Bengal Municipal Act and under Municipal Bye-law No. 50 respectively by Moulvi Syed Hamiduddin Ahmed, Deputy Magistrate with second class powers—the former conviction being subsequently altered on appeal by the Sessions Judge to one under sec. 273 of the Act—and sentenced to pay a fine of Rs. 30 and Rs. 5 respectively in the two cases. The Petitioner moved the High Court for setting aside the conviction and other reliefs upon the following allegations amongst others :—

That on the 16th October 1911, the Vice-Chairman of the Chapra Municipality, Babu Shama Charan Ghose, prosecuted the Petitioner under sec. 217 (5), Bengal Municipal Act, alleging that the Petitioner had made a long Chabutra (platform) in front of his house encroaching upon the public road ; that on the 25th October 1911, the said Vice-Chairman again prosecuted the Petitioner under sec. 51, Municipal Bye-law, alleging that the Petitioner had thrown earth on the public road ; that both the said cases were made over to Moulvi Syed Hamiduddin Ahmed, a Deputy Magistrate with second class powers, for trial ; that the Petitioner's defence *inter alia* was that the land in question belonged to him and that he had not built any Chabutra and that he

had not in any way encroached on the public road, and he put in a written statement of his defence in the case; that on application of the Petitioner, the said Deputy Magistrate, on 10th January 1912, made a local enquiry in the presence of the Petitioner's nephew Abdur Rahim and Sub-Overseer Abdul Ghafoor and several other respectable persons.

The Petitioner further alleged facts purporting to show that there were subsequent negotiations between the Municipality and the Petitioner which led him to believe that the prosecutions would be withdrawn and that in consequence he was unable to adduce evidence or to make a proper defence, that on 19th January 1912 the learned Deputy Magistrate without giving the Petitioner notice of the fact that the Municipality had declined to withdraw the prosecution and without giving him an opportunity to properly make his defence delivered his judgment in both the cases and convicted and sentenced the Petitioner as stated above.

Against the said conviction and sentence the Petitioner preferred an appeal to the Sessions Judge of Sarun and put in in support thereof two affidavits stating the facts set forth above, but the learned Sessions Judge while altering the conviction from one under sec. 217 (5) to one under sec. 273, Bengal Municipal Act, dismissed the appeals; the Petitioner further contended that the Vice-Chairman who had ordered the prosecution of the Petitioner and who was practically the complainant in the cases was not examined either before or after the issue of process, and that as a matter of fact nobody was examined on oath before the issue of process against the Petitioner.

Under the above circumstances the Petitioner moved the High Court *inter alia* on the grounds that the learned Sessions Judge should have held that the proceedings taken against the Petitioner were without jurisdiction inasmuch as there was no legal complaint and the Magistrate who took cognisance of the case was not empowered to take cognisance under sec. 190, cl. (*c*), and that the prosecution of the Petitioner was illegal inasmuch as it was started without the consent or order of the Municipal Commissioners.

The High Court issued a Rule in each case to show cause why the convictions and sentences should not be set aside on the ground *inter alia* that the "sanctions and consents to criminal prosecution which are imposed by any Statute must be clearly proved by writing under the hand of the authority which has power to sanction or consent as a condition precedent to any prosecution."

The trying Magistrate in the course of his explanation submitted that the prosecution was not *ultra vires* and *ab initio* illegal as it was started by the Vice-Chairman to whom the Chairman had delegated the powers to prosecute or sanction prosecution under sec. 45 of the Municipal Act, and that sec. 200 (*a*), Cr. P. C., did not require a Magistrate to examine the complainant when the complaint was made in writing and it could not be urged that the application for prosecution filed by the Municipality was not a petition of complaint.

Mr. Huq, *Babus Monmatha Nath Mukherjee*, *Chundra Sekhar Banerji* and *Moulvi Nuruddin Ahmed* for the Petitioner.

The JUDGMENT OF THE COURT was as follows:—

No. 746 of 1912.

We are of opinion that this Rule must

RASUL BUKHSH *v.* MUNICIPAL BOARD OF CHAPRA.

be made absolute on the first ground on which it was issued. It was not necessary for the learned Magistrate to put forward the plea that the powers of the Chairman had been delegated to the Vice-Chairman because that was not the point on which the Rule was issued. But if he did put forward such a plea he should have stated having regard to the ruling in *Khiroda Proshad* v. *The Chairman of the Howrah Municipality* (1) that this delegation had been lawfully made in writing ; possibly as the first ground of the Rule had to do with the sanction in writing he may have meant that this delegation was made according to law. However the Rule did not call upon him to show cause on that ground.

The point in this case is that supposing the Vice-Chairman to have authority, we have no reason to suppose he has not, he must sanction the prosecution in writing ; and there is no such sanction on the record. The only evidence of sanction of prosecution by a public authority is a writing under the seal and signature of of that authority. We are wholly unaware of any procedure by which the complainant can come before a Magistrate and say, I have got the sanction of the public authority for this prosecution and not be required to produce any writing showing that such sanction has been given. Here there is a tabular form which is called the "Form of prosecution." There is the name, whether of the accused or the complainant is not shown ; the second head "Prosecute," presumably the charge which is laid against the man ; "the cause" ; "names of the witnesses" ; "the date" ; and "column of remarks" ; the "Chairman or Vice-Chairman" ; and in this column of remarks are the words, "I have seen myself," signed Shama Charan Ghosh. Who Shama Charan Ghosh is we do not know and we do not wish to enquire. But this certainly is not authority written or otherwise showing the consent of the Commissioners or the Vice-Chairman on their behalf to a prosecution.

On this ground the order of the lower Court must be discharged. The fine if paid must be refunded.

In Rule No. 747 the order of Shama Charan Ghose is different. Instead of saying "I have seen myself" he says, "prosecute." This does not seem to meet the law any more than the other. The authority which he has is to convey the sanction of the Commissioners and not to pass any order of any kind, and he must convey that sanction under his own sea and signature to the Magistrate.

This Rule will also be made absolute on the same ground. The fines if paid will be refunded.

Rules made absolute.

(1) I. L. R. 20 Cal. 448 (1893).

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Contents.

NOTES.

THE FOURTH CRIMINAL SESSIONS WILL COMMENCE from date, Mr. Justice Richardson presiding.

THE CONTROVERSY THAT IS NOW BEING CARRIED on in the public press over the relative merits of the Original Side of the High Court and the phantom of a City Court is giving occupation to some on whom time is hanging heavily and causing amusement to others who are on the look out for some sort of diversion in this silly season. It would be cruel to disillusionise those who have been seeing visions behind which, we are sorry to say, there is no substance. The Original Jurisdiction of the High Court rests on such solid and well-consolidated foundations that it is not likely to be shaken in the slightest by even what its stoutest critics consider to be their strongest argument. We have read with much amusement the figures which have been fished out of the Howrah Munsifs' Courts and flung at the High Court with a view to demolish its Original Jurisdiction. Before seriously considering them we must say, that we can well understand how people who have lost all sense of proportion over the controversy would rashly resort to such glaringly fallacious arguments but we are at a loss to find how reasonable people with any sense of humour can really be misled by them.

NEED WE TELL THOSE WHO HAVE TAKEN TO comparing the Howrah Munsif's Court with the Original Side of the High Court that the fundamental fallacy of such comparison lies in the fact that the jurisdiction of the two Courts furnishes no basis of comparison? It is only petty suits that are tried before Munsif's Courts. The maximum jurisdiction of such Courts is ordinarily limited to Rs. 1,000 and the bulk of the suits tried there are below Rs. 100 in value. It would not even be fair to compare such Courts with the Presidency Small Cause Court which has a jurisdiction extending to Rs. 2,000. So nothing can be more absurd than to argue that because only 1,200 suits were instituted on the Original Side during a year in the place of 2,000 in the three Munsifs' Courts at Howrah it is conclusive that people fight shy of the Original Side.

THE IMMENSE POPULARITY OF THE ORIGINAL Side, judged from this point of view, would be at once apparent to those who would care to look at judicial statistics with some amount of care, patience and intelligence. For purposes of comparison we shall take the latest judicial figures from Eastern Bengal and Assam with a population of over 33 millions and compare them with the figures of the Original Side. It is a matter of common knowledge that it is only Courts of Subordinate Judges in the mofussil who enjoy a jurisdiction which would in money value bear some comparison with that of the Original Side of the High Court. We find that in 1911 all the Subordinate Judges of Eastern Bengal and Assam taken together disposed of 11,090 original suits. Of these 9,356 suits were under the Small Cause Court procedure and only 1,734 suits were disposed of under ordinary procedure. Suits of a Small Cause Court nature in the mofussil cannot be of any higher value than Rs. 1,000 and most of them are of the value of Rs. 500 or less.

THUS IT IS EVIDENT THAT OF THE 1,734 ORIGINAL suits that were disposed of in the whole of Eastern Bengal and Assam during 1911 a great many must have been of the value varying between Rs. 1,000 and Rs. 2,000. The exact number of suits of these values are not given in the Report of the Administration of Civil Justice for 1911. But it may be stated as a general proposition that suits of a lower value are always far in excess of those of a higher value. It may therefore be presumed that by far the largest number of these 1,734 suits

in the whole of Eastern Bengal and Assam were of value varying between Rs. 1,000 and Rs. 2,000. Now, against this there were on the Original Side alone 1,200 suits of the value of over Rs. 2,000 and generally much more and these were disposed of by only two or three judges. It is a well-known fact, which is borne out by the figures, that in point of efficiency and expeditious work, hardly any Court of Original Jurisdiction in India can show a better record compared to the Original Side of the Calcutta High Court for the same class of work. People who have substantial claims to recover always prefer this Court to a mofussil Court and for that reason in contracts and deeds provisions are often made for entitling them to sue on the Original Side of the High Court.

WE HAVE SAID BEFORE, THAT BESIDES JUDICIAL efficiency and expedition, the citizens of Calcutta enjoy on the Original Side the unique privilege of being exempt from the payment of *ad valorem* Court-fees on the value of suits. The energy of those who are interesting themselves in judicial reform will be better directed if instead of seeking to deprive them of this privilege they would move for relieving the people in the mofussil from the heavy burden imposed on them when they have the misfortune of resorting to Courts of Justice for relief. We find from the Report of the Administration of Civil Justice in Eastern Bengal and Assam for 1911 that in that year alone the Government made a nett profit out of civil litigation of more than 45½ lakhs of rupees. The gross revenue derived from litigation in that province during 1911 amounted to more than 70⅓ lakhs. Of this the Government spent only a little over 23½ lakhs in defraying all expenses connected with law Courts. Compared with the previous year the Government increased its profits by nearly 3 lakhs and still curtailed expenditure by Rs. 1,401.

IT HAS BEEN A COMPLAINT OF LONG STANDING that the Government is very loth to spend anything to make the life of Munsifs and ministerial officers a little more comfortable. It is a principle recognised by all civilized governments that the State ought not to make any profit out of the law Courts. We have often urged in these columns before that a part of this enormous surplus should be spent in improving the pay and prospects of Munsifs and ministerial officers and even after so doing a very substantial balance would be left which should be appropriated in reducing the *ad valorem* stamp duty. The scale on which such duty is charged in India is much higher than it is in any European country except England. England is the richest country in the world and India is the poorest. The English scale is therefore obviously unsuited for India. The public have therefore a very good case for moving the Government for affording the poor litigants in the mofussil a very just relief in this respect. We insert below an extract from the Report above referred to, which would speak for itself.

Receipts and Charges.—The receipts of the civil courts in Eastern Bengal and Assam for the year under review amounted to Rs. 70,36,326, an increase of 2,99,071 on those of the previous year, and the charges to Rs, 23,63,487, a decrease of Rs. 1,401 on those of 1910. Including the amount of Rs. 1,16,091 realised on account of duty on probates, etc, there was a profit to the Government from civil litigation of Rs. 46,72,839, or more by Rs. 3,00,472 than the profit of 1910; and exclusive of the item referred to the surplus amounted to Rs. 45,56,748.

FROM THE FOLLOWING BALANCE SHEET THE DISpensation of justice in Eastern Bengal, looked at from a business point of view, would appear to be one of the most profitable concerns on the face of the earth. The Government of India not only take from litigants more than double the amount that they actually require for maintaining the law Courts but they also levy by way of process fees nearly 17¼ lakhs of rupees. Further, in supplying copies of records they realise from litigants nearly a lakh more than it costs them to get the copies made. If they paid the poor clerks and apprentices on a more liberal scale, the public would not, perhaps, object much on this last count. But in any view of the matter the public have an obvious right to be relieved of the inequitable taxation on law suits which leaves a surplus of nearly half a crore over actual expenditure.

RECEIPTS.		Rs.
In stamps	Process fees	17,23,604
	Other „	49,30,307
In cash or special stamps.	Fines	3,165
	Copying and comparing fees ...	3,06,175
	Other receipts	73,075
	TOTAL ...	70,36,326

CHARGES.		Rs.
Salaries of judicial officers ...		8,93,004
Establishment	Process servers	3,53,271
	Others	6,89,995
Copyists' fees		2,17,391
Contingencies and refunds		2,09,826
	TOTAL ...	23,63,487

IN THE CASE OF *Moosa Goolam Ariff* v. *Ebrahim Goolam Ariff*, which we report in this issue at p. 937, the Judicial Committee of the Privy Council have very properly held that when a limited liability Company has been registered and a certificate has been given by the Registrar of such registration the certificate of incorporation is conclusive of all previous requisites having been complied with and that it is not competent for the law Courts to go behind such certificate and enquire into the regularity of the prior proceedings or of due registration. In this matter

Lord Macnaghten followed the decisions of some eminent English Judges, which have also been confirmed by recent legislation relating to limited liability Companies in England. We are glad to note that the Company Law which is being amended in this country, in cl. 23, brings the law in this respect in line with the English law. The reason why Courts should not go behind such certificates of registration is obvious. The object of registration is notoriety. When a Company has once come to be known as a limited liability Company in consequence of its registration as such, it would be preposterous to expect the public to go behind the fact of registration and satisfy themselves if it has been properly registered before they have anything to do with it; or if any defect in its registration is subsequently discovered to make the interests of the public suffer in consequence.

THE SAME MAY BE SAID WITH REGARD TO the registration of deeds and assurances. When a deed of sale or mortgage or a lease or other conveyance or document bears the Registrar's or Sub Registrar's certificate of its having being duly registered in the above view, it would not be competent for the law Courts to go behind the certificate and to question "the regularity of the prior proceedings as to its due registration." It is not uncommon to find the law Courts in this country, at the instance of a party challenging the due registration of document in the course of suits based upon such documents, engaging themselves in an enquiry into the side issue as to the regularity of the registration proceedings. As we have said before, to do so is to deprive the public of the security that the law of registration purports to afford them. When a deed or document appears on the face of it to be duly registered it is no more the duty of a private person than of a Court to go behind it and question the regularity of any prior proceedings. The certificate of registration ought to be treated as final and conclusive on the question. The fact that the expression "in accordance with the provisions of this Act" which occurred in the Registration Acts of 1877, 1871 and the previous Acts has now been omitted by the Legislature in the Act of 1908, after the word "registration" and, further that sec. 60 of the Act expressly provides that the certificate of registration is enough to prove that a document has been duly registered, both go to show that the certificate must be treated as conclusive and final on all questions of due registration.

CURRENT CRIMINAL CASES.

January to June 1912.

I.—CRIMINAL PROCEDURE CODE.

Sec. 4, cl. (i)—European British subject.

(Held by the Punjab Chief Court.)

The mere fact that the accused the son of an Indian subject of His Majesty was born at Constantinople does not make him an European British subject when it is not proved that the accused or his father or grandfather was domiciled in the United Kingdom or in any of the European, American or Australian Colonies or possessions of His Majesty.

ALEXANDER RUFFE, 14 Indian Cases 197.

Sec. 35—Aggregate sentence—Appeal.

Under cl. 3 of sec. 35 for the purpose of appeal the aggregate sentence of one month under each of two sections is to be taken to be a single sentence of two months though the sentences may be ordered to run concurrently.

BEPIN BEHARY DE, 15 C. L. J. 82.

Sec. 100—Search warrant—Printed form.

A search warrant under sec. 100 drawn up in the absence of a printed form thereunder on a printed form used under sec. 98 with the necessary alterations is not illegal.

GORA MIAN, I. L. R. 39 Cal. 403: S. C. 16 C. W. N. 336.

Sec. 107—Land dispute—Magistrate's jurisdiction.

The fact that there is a dispute concerning land likely to cause a breach of the peace does not deprive a Magistrate of jurisdiction under sec. 107. The competence of the Magistrate to proceed under sec. 107 against persons not in possession must depend upon whether as against those persons the conditions specified in the section have been established.

EMPEROR *v.* ABBAS, (F. B.) I. L. R. 39 Cal. 150: S. C. 16 C. W. N. 83: S. C. 14 C. L. J. 429.

Order on vague apprehension.

Where there is no evidence of a breach of the peace or disturbance of the public tranquility an order under sec. 107 cannot be passed merely on a vague apprehension. The Magistrate should use his power to protect persons seeking to exercise their rights allowed by law and to restrain persons threatening to disturb the exercise of such rights.

GURUSAWMI NADAN, 1 Mad. W. N. 1912, p. 47.

Order against person likely to induce another to break the peace.

(Held by the Punjab Chief Court.)

Security for keeping the peace under the section should not be taken from a person who is not likely to commit a breach of the peace himself but is likely to induce another person to do so.

DEWAT SING, 13 Indian Cases 782.

Sec. 109—Concealment not with intent to commit offence.

The concealment referred to in cl. (*a*) of the section must be with a view to commit some offence. A person cannot be called on to furnish security under the section in respect of an alleged temporary concealment in his father's house unconnected with any intent to commit an offence nor for any previous concealment outside the Magistrate's jurisdiction.

SATISH CHANDRA SIRCAR, I. L. R. 39 Cal. 456: S. C. 16 C. W. N. 499: S C. 15 C. L J. 396.

Sec. 133—Common Nuisance.

(Held by the Allahabad High Court.)

A common nuisance cannot be excused on the ground

that it causes some convenience or advantage to the person guilty of it.

BHASORA PATAK, 13 Indian Cases 999.

Sec. 145—Order under the section after binding down one party to keep the peace.

The Magistrate has jurisdiction to take proceedings under sec. 145 after an order under sec. 107 binding down one of the parties to keep the peace where the circumstances so require.

BAISNAB CHANDRA MANJHI, I. L. R. 39 Cal. 469: S. C. 16 C. W. N. 384.

Offerings to a deity, dispute about—Not within section.

A dispute regarding offerings to a deity is a dispute regarding moveable property and does not come within sec. 145 or 147, Cr. P. C.

RAM SARAN PATHAK, I. L. R. 38 Cal. 387: S. C. 16 C. W. N. 574: S. C. 13 C. L. J. 445.

Landlords claiming on each side through tenants.

An order passed in favour of one set of tenants as against other persons setting up their tenancy is a good and valid order. When one set of landlords claims exclusive possession of land through their tenants and a similar rival claim is set up by a different set of landlords through their tenants the dispute is one which comes properly within sec. 145.

SRISH CHANDRA BOSE, 15 C. L. J. 184.

Sec. 147—Section not confined to easements.

The section is by its very wording not confined to mere easements. The erection of a *bund* on the boundary of the village belonging to another party is an infringement of the natural right of the neighbouring landholder and this is therefore a fit case for the exercise of jurisdiction under sec. 147.

DAWLAT KOER, 15 C. L. J. 267: S. C. 16 C. W. N.

Local inspection.

The rule that in criminal cases a Court is only justified in holding a local inspection in order to explain the facts appearing in the evidence does not apply to a case under sec. 147, Cr. P. C.; special provision is made in the Code for local investigation in these cases and in a case where levels and the fall of water are concerned a local inspection is eminently necessary.

DAWLAT KOER, 15 C. L. J. 267: S. C. 16 C. W. N.

Directions on police to execute order.

A Magistrate has jurisdiction to direct the police to assist a party in removing an obstruction under an order made under sec. 147, Cr. P. C.

DAWLAT KOER, 15 C. L. J. 267: S. C. 16 C. W. N.

Sec. 148—Local inspection by trying Magistrate himself.

Although the section empowers a Court to depute some other person to make investigation under the section and although as a rule it is better to have such an investigation made by some other person there is nothing in law to prevent the presiding Magistrate from making the investigation himself provided he records what he saw and does not act upon hearsay evidence.

DAWLAT KOER, 15 C. L. J. 267; S. C. 16 C. W. N.

Order for costs.

An order for costs must be made by the same Magistrate; it must be made within a reasonable time and it must be made after due notice to the party against whom it is to be made but there is no law that the particular moment at which it is to be made is when the Court is giving its decision and that does not appear to be capable of being read into the section itself.

DAWLAT KOER, 15 C. L. J. 267: S. C. 16 C. W. N.

Sec. 195—Order by successor in office.

A sanction granted by the successor of the Magistrate before whom a forged document was used is good in law.

RATI JHA, I. L. R. 39 Cal. 463: S. C. 16 C. W. N. 623: S. C. 15 C. L. J. 509.

Sanction to agent.

Sanction granted to the agent of the landlord whose seal was forged is valid though neither was a party to the criminal case in which the forged document was used.

RATI JHA, I. L. R. 39 Cal. 463: S. C. 16 C. W. N. 623: S. C. 15 C. L. J. 509.

Subordinate Judge not the ordinary Appellate Court of Munsif.

A Subordinate Judge cannot grant or revoke a sanction to prosecute refused or granted by a Munsif as he is not the Court to which appeals from the decision of the Munsif ordinarily lie [*Vide* Civil Courts Act XII of 1887, sec. 21, cl. (2)].

RAM CHARAN CHANDRA, 16 C. W. N. 645.

Offence under sec. 468, I. P. C., comes within the section.

An offence under sec. 463, I. P. C, mentioned in cl (c) of sec. 195 covers an offence under sec. 468, I. P. C, the object of mentioning sec. 463 in the section being to include all cases of forgery, whatever the nature of the fraudulent intention may be.

ASSISTANT SESSIONS JUDGE OF NORTH ARCOT *v.* RAMANIAMMAL AND OTHERS, 22 MAD. L. J. 141: S. C. 1 MAD. W. N. 1912, p. 3.

Order refusing to revoke sanction.

An order refusing to revoke a sanction is one "granting a sanction" and it is open to a party dissatisfied with the order to apply to a superior Court under cl. 6 of sec. 195.

BAPU *alias* ANDIMULAM PILLAI, 22 Mad. L. J. 419: (F. B.) S. C. 1 Mad. W. N. 1912, p. 499.

Sanction not based on legal evidence.

A sanction in cases falling under cls. (b) and (c) of sec. 195 not based on legal evidence is illegal.

Per *Sundara Ayar, J.*, in BAPU (*ante*).

Complaint by person other than holder of sanction.

(Held by the Madras High Court.)

It is open to a Court to entertain a complaint on a sanction granted to a party other than the complainant under sec. 195, Cr. P. C., and it does not matter whether the sanction is accorded to a particular person or is concluded in general terms.

In re MALLIPADDI GAPAYA, 14 Indian Cases, 206.

Jurisdiction of High Court—sec. 429 or 439 does not apply when Judges differ.

The power conferred upon the High Court by sec. 195, cl. 6, is not a part of the Appellate and Revisional Jurisdiction of the High Court. It is a special power conferred by sec. 195 and when the Judges of the Division Bench hearing a case under cl. 6, sec. 195, are equally divided in opinion the case is governed by sec. 36 of the Letters Patent and not by sec. 429 or 439 Cr. P. C.

BAPU *alias* ANDIMULAM PILLAI, F. B. (*ante*).

Sec. 200—Omission to examine complainant.

An omission by a Presidency Magistrate to examine the complainant before dismissing a complaint under sec. 203, Cr. P. C., is at the most an irregularity within the meaning of sec. 537, Cr. P. C., even assuming that a Magistrate should do so.

In re v. VELU NATHAN, 22 Mad. L. J. 155.

Secs. 202, 203—After sec. 200 is followed Magistrate should at once proceed under sec. 202 or 203.

After the examination of the complainant the Magistrate should dismiss the complaint at once or proceed to hold enquiry under sec. 202 before issuing process.

Where the Magistrate examined the complainant on the 28th April and without dismissing the complaint then and there adjourned the case to the 26th May and then on that date after making certain enquiries from the solicitor of the accused and looking into some papers which had been filed by the defence before the police, dismissed the complaint, it was held, that the procedure adopted by the Magistrate was irregular and that having virtually elected to hold an enquiry under sec. 202, Cr. P. C., he should not have dismissed the complaint without giving an opportunity to the complainant to adduce evidence in support of his case.

H. P. SANDYAL, 16 C. W. N. 143.

Sec. 222—Vague charge.

If a charge of dacoity does not set out or indicate which particular dacoity the accused is tried for the conviction on such a charge must be set aside.

MANDI GHASSI, 1 Mad W. N. 1912, p. 49.

Secs. 226, 227—Amendment of charge by Sessions Court before hearing evidence.

Where the accused were committed to the Court of Sessions on a charge of dacoity and the Sessions Judge without assigning any reason at the commencement of the trial amended the charge to one of robbery, it was held that it was improper for the Sessions Judge to thus alter the character of the charge before hearing evidence.

PAIMULLA, 16 C. W. N. 238.

Sec. 234—Misappropriation of an amount made up of more than three items.

Where a person receives money for the express purpose of using it for his master's benefit in a particular way his appropriation of it to himself amounts to criminal breach of trust and a conviction for criminal breach of trust committed by misappropriation of a large sum of money made up of various items (more than three in number) is not illegal.

In re THEOPHILUS RAMAPPA, 22 Mad. L. J. 112.

Sec. 239—Where the section does not apply.

Where in a case more than one person were jointly charged with the offence of criminal breach of trust under sec. 408, I. P. C., with respect to a sum of money, it was held that there was a misjoinder of charges. The wording of sec. 222 refers to a single accused and it must be so because it is impossible to hold that two persons can be guilty of misappropriation of the same parcel of money and sec. 239 therefore has no application to such a case.

GIRWAR NARAIN, 16 C. W. N. 600.

Joint trial of principal and abettor.

Sec. 239 allows an abettor to be tried in the same trial as the principal.

PRYANATH BISAI, 15 C. L. J. 692.

Sec. 250—Power of Appellate Court to make order.

An Appellate Court has no power to order compensation under sec. 250, Cr. P. C.

MEHI SING, (F. B.) I. L. R. 39 Cal. 157 : S. C. 16 C. W. 10 : S. C. 14 C. L. J. 437.

Order against guardian of minor complainant.

A guardian or next friend of a minor complainant cannot be ordered to pay compensation to the accused under the section.

ISA, 1 PUNJ. W. R. 1912.

Sec. 260—Case under Act XIII of 1859.

(Held by the Punjab Chief Court.)

A case under the Workman's Breach of Contract Act is not triable summarily.

EMPEROR *v.* HAR LAL, 14 Indian Cases 194.

Sec. 263—Summary trial—Specification of offence.

Although in a summary trial the Magistrate need not frame a formal charge still he must specify the offence charged in such a way as will give sufficient notice to the accused.

JHARU SHAKH, 16 C. W. N. 696.

Sec. 288—Statements not coming within the section.

The testimony of a witness given before the committing Magistrate may by the special provisions of sec. 288 be accepted as substantive evidence if he is examined at the trial before the Sessions Court and may be preferred to the statement made by him at the trial, but a statement made on any other occasion by him cannot be used except to corroborate or contradict the evidence given by him at the trial.

BASRUR VENKATA ROW, 1 Mad. W. N. 1912, p. 125.

Sec. 349—Powers of Magistrate to whom reference is made—Final orders.

Cl. 2 of sec. 349 means that the Magistrate to whom a reference is made may pass such final orders as he thinks fit. He cannot in his turn dispose of the case by sending it back to another.

N. PONNUSAWMY NADAN, 1 Mad. W. N. 1912, p. 16.

Sec. 364—Questions to accused eliciting confessional statement.

All that a Court has the right to do under the section is to ask the accused person to explain the circumstances which appear in evidence against him. Where questions were put to the accused person which elicited a statement of a confessional nature it was held that such examination though purporting to have been made under sec. 364, Cr. P. C., was wholly inadmissible.

TUFANI SHEKH, 15 C. L. J. 323.

Sec. 423—Retrial when proper.

In order to justify an order for retrial it is necessary that the Appellate Court should come to the conclusion that the trial was not held properly for some reason or other.

Per *Phillips and Benson, JJ.* JEREMIAH *v.* VAS, 22 Mad. L. J. 73.

The power to direct a retrial is not confined to cases where the trial was held by a Court having no jurisdiction. A retrial may be ordered where the trial is held to be illegal on the ground of misjoinder of charges; where evidence is improperly rejected by the lower Court or where though the accused was rightly acquitted of an offence the Appellate Court comes to the conclusion that he ought to have been tried for another offence and in every case of irregularity in the trial such as where persons who ought not to have been tried together have been so tried.

Per *Sundara Ayar, J.* JEREMIAH *v.* VAS, 22 Mad. L. J. 73.

Powers of Appellate Court to alter conviction.

The Appellate Court can under sec. 423 in an appeal from a conviction alter the finding of the lower Court

and find the Appellant guilty of an offence of which the lower Court has declined to convict him.

EM. *v.* SARDAR AND OTHERS, I. L. R. 34 All. 115.

(Held by the Madras High Court.)

Where an accused person is charged with and convicted only of theft it is illegal for the Appellate Court while quashing the conviction of theft to alter the conviction into one of abetment of theft under sec. 379 read with sec. 109, I. P. C.

In re VARAYAL KRISHNA NAIR, 14 Indian cases 319.

Sec. 428—When further evidence may be taken.

Sec. 428 merely says that evidence may be taken when 'necessary' and in each case the necessity must be determined on the particular facts of the case. Where the Court itself was mistaken as to the sufficiency of the evidence on record and framed a charge in the opinion that a *primâ facie* case of publication was made out it is a proper case to direct additional evidence being taken. It is not enough that the prosecution by its own negligence failed to produce evidence which it was the duty of the prosecution to do.

Per *Phillips and Benson, JJ.* JEREMIAH *v.* VAS, 22 Mad. L. J. 73

The language of sec. 428 seems to indicate cases where there being already evidence on the record the Court considers it to be unsatisfactory or where the evidence on the record leaves the Court in such a state of doubt that it considers necessary to enable it to decide the case to have further evidence. It does not appear to be applicable where the prosecution had ample opportunities to produce evidence and had failed to do so.

Per *Sundara Ayar, J.* JEREMIAH *v.* VAS, 22 Mad. L. J. 73.

Sec. 437—Meaning of "further enquiry,"

Further enquiry does not mean proceeding on the evidence already taken. Evidence or other evidence, if there be any, should be taken *de novo* by the Magistrate who holds the further enquiry.

RAM DIAL, 9 All. L. J. 310.

Notice to accused.

An order under sec. 437 made without notice to the accused is bad in law.

AMBAR ALI, I. L. R. 39 Cal. 238

No order against person not complained against and not before Court.

Further enquiry cannot be directed in respect of a person who was not named in the complaint and against whom no regular process has been issued.

AMBAR ALI, I. L. R. 39 Cal. 238.

Sec. 476—Order by Revenue Court—Jurisdiction of High Court.

(Held by the Allahabad High Court.)

The High Court has no jurisdiction under sec. 439, Cr. P. C., in the matter of an order under sec. 476, Cr. P. C., made by an Assistant Collector.

In re ABDUL GHAFOOR, 13 Indian Cases 829.

Enquiry under Legal Practitioners Act.

For the purposes of sec. 476, Cr. P. C., a Magistrate holding an enquiry under sec. 23 of the Legal Practitioners Act is a Court.

GOURI SHANKAR LAL, 9 All. L. J. 156.

Premature order before cross-examination of prosecution witness.

Action taken by a Magistrate under sec. 476, Cr. P. C., based on the truth of the prosecution evidence before the witnesses for the prosecution had been cross-examined is premature and wrong as the untrustworthiness of the prosecution evidence might have been proved in cross-examination by other evidence.

In re KOLLI APPIAH, 1 Mad. W. N. 1912, p. 400.

Sec. 491—Directions in the nature of a habeas corpus.

There is nothing in the Indian Extradition Act which takes away the power of the High Court under sec. 491, Cr. P. C When a person appears before the High Court and says that he is illegally detained the High Court can enquire whether the warrant for his custody was validly issued in the extradition proceedings. If the provisions of the Legislature have not been carried out the High Court can interfere notwithstanding that the warrant has been given in extradition proceedings.

RUDOLPH STALLMAN, I. L. R. 39 Cal. 164 : S. C. 15 C. W. N. 1053 : S. C. 14 C. L. J. 375.

Sec. 496—Applicability of section to proceedings under sec. 107, Cr. P. C.

A Magistrate is not bound as a matter of law to allow bail to a person brought before him for proceedings under sec. 107, Cr. P. C. Sec. 496, Cr. P. C., must be taken subject to the special provisions of cl. 4 of sec. 107.

NARAYANSAMI NAIKH, 22 Mad. L. J. 357 : S C. 1 Mad. W. N. 1912, p. 169.

Sec. 514—Liability of surety.

Where a person who has been let out on bail commits suicide the sureties are discharged from the obligation to produce him.

NRISINGHA DEV CHATTERJEE, 16 C. W. N. 550.

Sec. 522—Order under the section by Appellate Court.

In confirming a conviction passed by a Subordinate Magistrate the District Magistrate cannot pass an order for delivery of possession under sec. 522, Cr. P. C., when no such order was passed by the trying Magistrate.

BHAGBAT SHAHA, 16 C. W. N. 811.

Sec. 526—Court of equal jurisdiction—Presidency Magistrate and Chief Presidency Magistrate.

The Court of a Presidency Magistrate is a Court of "equal jurisdiction" with that of the Chief Presidency Magistrate within the meaning of sec. 526, Cr. P. C., and the High Court has power to transfer a case from the file of the Chief Presidency Magistrate to that of any other Presidency Magistrate.

In re VENKASTESWARA SASTRE, 22 Mad. L. J. 114.

Secs. 529, 531—Scope of the sections.

Having regard to the provisions of secs. 529, 531, Cr. P. C., it must be shown that proceedings wrongly held in a case have in fact occasioned a failure of justice before they can be set aside.

LATIT CHANDRA CHOWDHURY, I. L. R. 39 Cal. 119.

(To be continued.)

SURESH CHANDRA MUKERJI.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CARNDUFF and IMAM, JJ. CRIMINAL REVISION No. 910 OF 1912. BISHENDOYAL AHIR AND ANOTHER, Petitioners *v.* THE EMPEROR. 7th August, 1912.

Criminal Procedure Code, sec. 122—Fitness of surety.

The Petitioners were bound down by the Deputy Magistrate of Chapra under sec. 110, Criminal Procedure Code, and were ordered to execute a bond for Rs. 100 each with two sureties of the same amount to be of good behaviour for one year. The Petitioners offered two sureties but the Magistrate on the strength of a police-report in which it was stated that the sureties were related to the accused and were of suspicious character passed the following order: "The sureties being unfit I cannot accept them. The accused must give better sureties."

Their Lordships observed: "The Magistrate has rejected the sureties solely on the strength of the police-report that they are related to the Petitioners and are of suspicious character. This is not a sufficient basis for rejection of sureties. We direct that the sureties may be accepted."

Babu Dwarka Nath Mitter and *Monindra Narain Bannerji* for the Petitioners.

No one appeared to show cause.

S. C. M. *Rule made absolute.*

CRIMINAL REVISIONAL JURISDICTION. Before CARNDUFF and IMAM, JJ. CRIMINAL REVISION No. 866 OF 1912. BROJENDRO KISHORE ROY CHWDHURY AND TWO OTHERS, Petitioners *v.* THE EMPEROR. 7th August 1912.

Indian Penal Code, secs. 154, 155—Unpremeditated riot, not directly for the benefit of the landlord.

The Petitioner, Brojendro Kishore, is the proprietor of a fishery known as Ghale Doles khal within the sub-division of Habiganj in the district of Sylhet. On account of a fresh settlement of this *jalkar* with a different set of people the former ijaradars as also the villagers became offended and in February 1902 when the people of the new ijaradars went to the khal for fishing, the villagers turned out in a body to oppose them but the ijaradars on being informed of this came to the spot and in order to avert a riot withdrew their men. Subsequently an altercation took place between two sets of people none of whom were the tenants of the Petitioner, Brojendro Kishore, with the result that a riot took place in which a man was killed. The accused in the rioting case were convicted by the Sesseons Judge of Sylhet who in his judgment, dated the 6th June 1902, found that the riot was sudden and unpremeditated.

On the 12th May 1912 the police submitted a report to the Magistrate praying for proceedings under secs. 155, I. P. C., against the Petitioner, Brojendro Kishore. Thereupon the Sub-Divisional Magistrate of Habiganj by his order, dated 18th May 1912, summoned all the Petitioners under secs. 154, 155, I. P. C.

The Petitioners moved the High Court and obtained a rule calling upon the Deputy Commissioner of Sylhet to show cause why the proceedings under secs. 154, 155, I. P. C., should not be quashed on the grounds, *firstly*, that the riot was sudden and unpremeditated as found by the Sessions Judge, *secondly*, that the zemindar is resident in Calcutta and takes no active interest in the management of the estate in Sylhet, and, *thirdly*, that it is not for his benefit or in his behalf that the two sets of tenants quarrelled about the khal.

The Additional District Magistrate of Sylhet submitted an explanation in which it was stated that although the riot might have been sudden and unpremeditated as found by the Sessions Judge yet the bad feeling which culminated in a riot with loss of life was due to the zemindar's men leasing out the *khal* for fishing against the wishes of the villagers, that although the riot was not directly committed for the benefit of the zemindar yet the zemindar's men could have prevented the riot by refraining from settling with outsiders the khal which the villagers used for drinking purposes and that the fact of the zemindar being resident in Calcutta and taking no active interest in the management of the estate in Sylhet was no bar to a prosecution or conviction under secs. 154, 155, I. P. C. (I. L. R. 28 Cal. 504).

Their Lordships in making the Rule absolute observed—It is clear that the riot was sudden and unpremeditated as found by the learned Sessions Judge who tried the case and the riot cannot be said to have been committed directly for the benefit of the zemindar. It was impossible to hold the Petitioners responsible for what occurred.

Mr. P. L. Roy with *Babus Atulya Charan Bose* and *Ramani Mohan Chatterji* for the Petitioners.

Babu Srish Chandra Chowdhury for the Crown.

S. C. M. *Rule made absolute: Proceedings quashed.*

CIVIL APPELLATE JURISDICTION. Before D. CHATTERJEE and RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE No. 2024 OF 1910. BEHARI LAL ROY CHOWDHURY, Plaintiff, Appellant *v.* HARA KUMAR DUTT AND OTHERS, Respondents. 29th July 1912.

*Limitation Act (XV of 1877), Sch. II, Arts. 89, 116, 132—Account, suit for—*Kabuliyat *hypothecating immoveable property—Agent, dismissal of—Reinstatement.*

The appeal arose out of a suit for accounts for a certain period against an agent. Both the Courts below dismissed the suit as barred by limitation, evidently under Art. 89 of the Sch. II of the Indian Limitation Act.

The appointment of Defendant No. 1 ceased in 1306 and he was re-appointed in 1307 after his dismissal in 1306. The *kabuliyat* of 1305 of the

agent hypothecated certain immoveable property which would be answerable for any defalcation made by him or any damages suffered by the principal through his negligence. The defalcation and default were made in 1307 and 1308, that is after the Defendant No 1 had been dismissed in 1306 and re-appointed in 1307.

Held, that the position of the agent in 1307 was not governed by the *kabuliyat* of 1305 but by the ordinary rules applicable between the principal and the agent. Art. 89, Sch. II of the Indian Limitation Act was the article applicable in the case.

Hafiuddin Mondal v. *Jadu Nath* (12 C. W. N. 820) and *Jogesh* v. *Benode Lal* (14 C. W. N. 122) explained.

Babu Abinash Chandra Guha for the Appellant.

Babu Bhupendra Chandra Guha for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and COXE, JJ. SECOND APPEALS NOS. 1836, 2145 AND 2145 OF 1907. RAJANI KANT MUKERJI AND OTHERS, Appellants *v.* RAM DULAL AND OTHERS, Respondents. Heard, 24th and 25th July. Judgment, 2nd August 1912.

Possession, suit for—Abatement—Civil Procedure Code (XIV of 1882), sec. 368—Civil Procedure Code (Act V of 1908), Or. 22, r. 4—Tenant seeking to recover his holding—Regulations VII of 1822 and IX of 1825—Award—Limitation Act (IX of 1908), Sch. I, Art. 46.

The lands in suit were situated in Char Khandhar. The mahal was let in farm from 1287 to 1298. It was again let in farm for 1299 and again for 1300. From 1301 to 1305 it was kept in the direct possession of Government and it was again let in farm in 1306. The farmers in 1295 settled a holding known as No. 63 with the Plaintiffs. It was alleged by the Plaintiffs that in the settlement proceedings of 1301 a portion of the lands covered by No. 63 was excluded from that holding. They complained to the settlement officer who wholly or almost wholly rejected their claim. The order ran thus. "The lands recorded by amins as comprised in *jote* 63, consist of the *hasil* lands in their possession, and above 500 bighas of *Laikabad*; the remainder being *Malang*. 'These lands, I consider sufficient, and I order that in the names of the five men in para. 2" (*i.e.*, the present Plaintiffs) "be recorded all those lands. I also hereby reject their claims to any other land." The bulk of the lands for which the Plaintiffs' claims were rejected was claimed as accretion. The Plaintiffs' present claim was that the lands which they unsuccessfully claimed were part of their holding and were wrongly included in the Defendants' holding. They served Government with notice of a suit under sec. 424 of the Old Civil Procedure Code and Goverment finding that the order for the inclusion of the land in the Defendants' holding was wrong cancelled it in 1311. The Defendants however dispossessed the Plaintiffs and hence this suit : It was found that the Defendants had been in possession from 1301.

The Munsif decreed the suit. The appeal to the District Judge against the decree of the Munsif was allowed. The District Judge dismissed the suit on the ground that the settlement with the Defendant was valid and consequently could not be extinguished by the Plaintiffs. The Plaintiffs appealed to the High Court.

Certain of the Respondents died in each of these appeals. The appeals were analogous and were heard together by consent, except in the case of Appeal No. 2148. All those deaths occurred after the passing of the Code of 1908. In No. 2148, the Respondent died in April 1908.

Held, that under Order 22, Rule 4 of the Code of Civil Procedure the appeals abated as against the deceased Respondent.

That under sec. 368 of the Old Code of Civil Procedure the whole Appeal (No. 2148) abated.

The principle laid down in the case of *Binod Lal Pakrasi* v. *Kalu Pramanik* (I. L. R. 20 Cal. 709) could never have been intended to be applied to a tenant seeking to recover his own holding.

It was not intended by Regulation VII of 1822 which was made applicable to *khas mahal* by Regulation IX of 1825 that the Collector should decide disputes as to title between raiyats, in which the zemindar or Sudder Malguzars had no interest and which could in no way affect the assessment.

Sec. 9 of Regulation VII of 1822 does not apply to a case in which rival tenants claim, not only a tenancy of the same nature, but the same land under the same nature of tenancy.

Kanto Prosad v. *Asad Ali* (5 C. L. R. 453) and *Abdul Kadir* v. *Hamdu Miah* (12 C. W. N. 910) distinguished.

That the Settlement Officer's order was not an award under the Regulations and that the suit was not bearred by Art. 46, sec. 1 of the Limitation Act.

Babu Jogesh Chandra Roy for the Appellants.

Babu Harendra Narain Mitter, *Moulvi Nuruddin Ahmed*, *Babu Biraj Mohan Mojumdar* (for *Deputy Registrar*) and *Babu Romesh Chandra Sen* (in 2145) for the Respondents.

A. T. M. *Appeal allowed : Case remanded.*

[PRIVY COUNCIL.]

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1912,
Heard, 11 & 12, June.
Judgment, 26, June.

MOOSA GOOLAM ARIFF and others, Appellants,
v.
EBRAHIM GOOLAM ARIFF and another, Respondents.

Indian Companies Act (VI of 1882), secs. 6, 41—Certificate of incorporation, if may be questioned on the ground that Registrar of companies ought not to have granted certificate—Civil Procedure Code (Act IV of 1882), sec. 13, Expl. II— Res judicata.

The certificate of incorporation of a Company is conclusive that all previous requisitions had been complied with and precludes any enquiry as to regularity of the prior proceedings.

Once the certificate is given, the validity of the incorporation of the Company cannot be questioned on the ground that the conditions of registration prescribed by the Companies' Act were not duly complied with, e. g., *that there were not seven subscribers to the memorandum of association.*

PEEL'S CASE (1), OAKES *v.* TURQUAND (2) *followed.*

In re NATIONAL DEBENTURE AND ASSETS CORPORATION (3) *referred to.*

H. conveyed certain shares of his property to his two wives and five minor children, having previously procured the appointment of P. as the guardian of his minor children in order that the children by their guardian might accept the benefits which he intended to confer upon them. Subsequently he procured the registration of a limited Company to which in return for shares were transferred so much of the property as was retained by H. and the undivided shares thereof which had been conveyed to his wives and his minor children. His adult son and executor E., in 1902, commenced a suit for a declaration that the conveyances by H. to his wives and minor children and the deed of transfer in favour of the Company were invalid. The validity of the conveyances was established in that suit, but the validity of the incorporation of the Company was not expressly determined.

In a subsequent suit by the same Plaintiff for a declaration that the Company had not been duly incorporated and that the property conveyed to the Company should be transferred to the persons entitled to the same, it appeared that all the facts on which the later suit was based were known to the Plaintiff and were stated at length in the proceedings in the previous suit and no further evidence would have been needed and nothing was wanting but the addition of an issue on the point:

Held—*That the point ought to have been raised in that suit, and the present suit was therefore barred by sec. 13 of the Civil Procedure Code of 1882.*

KAMESWAR PERSHAD *v.* RAJKUMARI RUTTUN KOER (4) *followed.*

This was an Appeal by the Defendants from a judgment and decree, dated August 1st, 1910, of the Chief Court of Lower Burma on its Appellate Side, reversing a judgment and decree of the same Court on its Original Side, dated January 5th, 1909, in favour of the present Appellants.

The questions in the Appeal arose out of the formation of the Appellant Company by one Goolam Ariff deceased, and mainly concerned the validity of the signatures to the memorandum of asso-

(1) L. R 2 Ch App. 674 (1867).
(2) L. R. 2 E. & I. App. 325 (1867).
(3) L. R. [1891] 2 Ch. 505.
(4) L. R. 19 I. A. 234 (1892).

ciation and the legal effect of the issue of the certificate of incorporation of the said Limited Company by the Registrar of Joint Stock Companies under the Indian Companies Act, as well as the right of the Plaintiffs to the original suit (the Respondents) to institute the proceedings which have led to this Appeal.

Early in 1902 one Hadjee Goolam Ariff, a wealthy Mahomedan merchant of Rangoon, who was then about 65 years of age was desirous of making such a disposition of his property during his lifetime as would afford provision for his two junior wives and five infant children and so that his two eldest sons, on whom he said he had spent much money and who had proved ungrateful, should have no control over the minors' shares or the bulk of his property. He was also desirous of preventing a distribution of his property, which he wished to have kept as a whole.

He preferred 5 several petitions, one in respect of each infant child, before the Court of Lower Burma in March 1902, praying in each case that one Hashim Cassim Patail might be appointed guardian of the property of the infant during his or her minority and Hashim Cashim Patail was appointed guardian of the infants' property.

On April 2nd, 1902, Goolam Ariff executed seven conveyances to his two junior wives and five infant children of certain undivided shares in 18 parcels of land in Rangoon and shares in six trading companies of limited liability which for the purposes of the conveyances he had divided into 2000 parts. Of these he conveyed 850 in all to his said wives and children, retaining 1150 parts for himself. On April 11th, 1902, the memorandum and articles of association of the Goolam Ariff Estate Company were signed by Goolam Ariff himself, by one of his said two wives, and by each of the five minor children by their guardian the aforesaid Patail. The said memorandum and articles so signed were duly registered the next day, *i.e.*, April 12th, 1902 and the certificate of incoporation, dated April 12th, 1902, was issued by the Registrar of Joint Stock Companies pursuant to the Indian Companies Act (No. VI of 1882). Between April 22nd and May 3rd, 1902, the whole of the said property originally conveyed to the wives and children as well as the portion retained by Goolam Ariff himself were transferred to the said Company in return for shares in the latter, the number of shares assigned to each of the members being the same as the number of notional 2000ths conveyed or held by the members under the distribution of April 2nd above-mentioned. In particular by a deed made the 3rd May 1902 between Goolam Ariff and his two wives and five minor children of the one part and the Company of the other part Goolam Ariff and his wives and children (the latter by their said guardian) conveyed all their respective shares in the lands, tenements and hereditaments mentioned in the schedule thereto (which consisted of the said 18 parcels of land in Rangoon) unto and to the use of the Company.

On April 19th, 1902, Goolam Ariff executed his last Will and testament and as executors thereof he made his three brothers, his eldest son Ebrahim Goolam Ariff one of the Respondents, and Hashim Cassim Patail the guardian of his infant children aforesaid. On May 16th he died, and probate of his Will was granted to his eldest son Ebrahim Goolam Ariff on June 23rd, 1902, and to Hashim Cassim Patail on July 15th, 1902. The other executors named in the said Will did not prove.

MOOSA GOOLAM ARIFF *v.* EBRAHIM GOOLAM ARIFF.

On July 16th, 1902, Ebrahim Goolam Ariff commenced a suit for a declaration that the conveyances, including the said deed of the 3rd May 1902, were void and might be ordered to be delivered up to be cancelled on a variety of grounds based chiefly on principles of Mahomedan law, and also, as regards the deed of 3rd May 1902, that it was invalid as being made without consideration and not in accordance with the provisions of the Indian Companies Act. In both Courts in Burma this suit was dismissed. In the Burma Appellate Court the validity of the signatures to the said memorandum of association was discussed and one of the Respondent's grounds of Appeal to His Majesty in Council was that the Court below should have held that the circumstance that out of the 7 persons who purported to constitute themselves into the Goolam Ariff Estate Company, 4 were minors, invalidated the transaction, the subject-matter of that suit. On July 3rd, 1907, His Majesty in Council affirmed the said judgments. In 1904, the said Ebrahim Goolam Ariff presented a petition to the Chief Court of Lower Burma (Civil Miscellaneous No. 68 of 1904) for the winding up of the Appellant Company on the ground that it never had been duly constituted because of the matters set up in the present suit, but he withdrew this petition at the hearing on the 2nd August 1904. In September 1904, while the former suit was under appeal to His Majesty in Council Ebrahim Goolam Ariff instituted the suit out of which the present appeal arose.

The Respondent, Ebrahim Goolam Ariff, filed a plaint on September 13th, 1904, against all the Appellants except the Appellant Company, but by subsequent orders the Plaint was so amended that the said Ebrahim Goolam Ariff sued as executor of the estate of Goolam Ariff deceased, the Official Receiver (who had been appointed by the Court in the previous suit Receiver of the property of Goolam Ariff deceased in question in the suit) was added as co-Plaintiff and the Appellant Company as co-Defendant. The Plaintiff claimed that the Defendant Company was not and never had been a properly incorporated Company and that the memorandum and certificate of registration of the same, all dated April 12th, 1902, should be declared void, and that no Company was constituted thereby and that the property purported to have been conveyed to the said Company as aforesaid should be transferred to the persons entitled to the same.

The Defendants filed written statements. They denied the right of the Plaintiff, Ebrahim Goolam Ariff, to maintain the suit either personally or as executor and alleged that the Plaintiffs were estopped by reason of the withdrawal of their proceedings to wind up the Defendant Company on the grounds on which they based their present action in No. 68 of 1904, the matters being *res judicata* and also because of the proceedings in the previous suit. They further pleaded that the certificate of incorporation was conclusive as to the proper formation of the Company.

Certain issues were framed by the Chief Court of Lower Burma upon the above pleadings.

On December 22nd, 1905, Mr. Justice Bigge delivered judgment in favour of the Defendants. The Appellate Court, however, held that the suit could not be dismissed at that stage but ordered that the hearing be stayed until the decision of His Majesty in Council on the previous case was made known.

MOOSA GOOLAM ARIFF *v.* EBRAHIM GOOLAM ARIFF.

After the decision of His Majesty in Council the suit was accordingly re-heard before Mr. Justice Robinson who gave judgment for the Defendants on January 5th, 1909. In the first place he held that the present suit was not barred by the judgments of both Courts in Burma and of His Majesty in Council in the previous suit (No. 146 of 1902) on the ground that the matter in issue in the present suit was not directly and substantially in issue in the previous suit, nor was it heard and finally decided. He also held that the suit was not barred by the withdrawal of the proceedings in No. 68 of 1904, because under certain provisions of the Civil Procedure Code a petition under the Companies Act did not bar a suit governed by the Code, even though the object aimed at by both was the same.

He held however that the certificate was final and binding as to all antecedent requisites and that the Court could not go behind it and question the validity of the signatures to the memorandum of association or the competence of the signatories to contract. He further expressed the opinion that as a guardian can make contracts for his ward the proper mode of making such a contract was followed in the present instance and that in any case the question of the contract being void in Indian Law as the contract of an infant could not arise seeing that it was made with the guardian and not with the infant. The suit was dismissed with costs and a decree to this effect was issued on January 12th, 1909. The Plaintiffs appealed.

On August 1st, 1910, the Appellate Court delivered judgment reversing the judgment of the Court below. The Chief Judge, Sir C. E. Fox (in whose judgment Mr. Justice Parlet concurred) stated in the course of his judgment :—

"It is difficult to understand how a Registrar could have accepted and registered such a memorandum. Although under sec. 40 of the Act he was not bound to require evidence as to whether the subscribers to it were competent to contract, it was at least his duty to satisfy himself that seven or more persons had signed it.

The essential requirement for the formation of a Company, *viz*, seven or more persons associated for a lawful purpose signing their names to a memorandum of association, was absent in the case of this Company, and *primâ facie* it could not and never did come into existence as a Company under the Indian Companies' Act, 1882. It was contended on behalf of the Company and stated by the learned Judge who heard the suit that whatever may have been the defects in the formation of a Company, it came into existence by virtue of the registration of the memorandum and the cerificate of incorporation signed by the Registrar. This view is mainly based on the following portion of sec. 41 of the Act :—" A certificate of the incorporation of any Company given by the Registrar shall be conclusive evidence that all requisitions of this Act in respect of registration have been complied with."

The effect of a similar provision in the (English) Companies' Act of 1872 has been the subject of much discussion in the English Courts and eminent judges have expressed divergent views as to what a certificate of incorporation is conclusive of. It is not for us, in my opinion, to say which of those views has the weight of authorities in support of it.

Our duty is, in the words of Lord Halsbury, L. C., in *Salomon* v. *Salomon* (11) to look at what the Act itself has determined The sole guide must be the Act itself. The Act says that the certificate shall be conclusive evidence, "That all the requisitions of the Act in respect of registration have been complied with." In my opinion we cannot say that the certificate is conclusive as to requirements of the Act other than those as to registration having been complied with. I cannot agree that subscription in respect of registration by seven or more persons is one of the requisitions of the Act The fact that the British Legislature in 1900 passed another Act, 63 and 64 Vic, Cap. 48, making a certificate of incor-

(11) L. R. [1897] App. Cas. 22 (1896).

poration conclusive not only of registration but of matters precedent and incidental thereto having been complied with, appears to me to lend weight to the view, that notwithstanding judgments of some learned judges that under the original Act the certificate was conclusive for all purposes, this view was open to doubt.

The Indian Legislature has not as yet adopted provisions similar to those of sec. 1 of the Companies' Act, 1900. If the certificate as to the Defendant Company in this case is not conclusive as to matters precedent and incidental to the registration of the memorandum, there can, in my opinion, be no question that the requirement of sec. 6 of the Indian Companies' Act, that seven persons must sign a memorandum of association in order to form a company was not complied with in the case of the Defendant Company.

The language plainly means that seven separate persons must sign the memorandum and it is not complied with by one person signing his name twice or more times in different capacities. It was urged that the matter was *res judicata* in consequence of previous litigation, but in regard to this I agree with the view of the learned Judge who heard the suit."

Hence this Appeal.

Mr. Buckmaster, *K. C.*, and Mr. *McCarthy* for the Appellants submitted that the Court below had erred in law. The suit was barred by the principle of *res judicata*. Under sec. 13 of the Code of Civil Procedure, 1882, the matter which is the Respondents' ground of attack in the present suit might and ought to have been made a ground of attack in the former suit or proceedings (Suit No. 146 of 1902, or No. 68 of 1904.) The petition on wich Civil Miscellaneous No. 68 of 1904 was based was withdrawn. The provisions of sec. 647, C. P. C., are applicable to it as if it were a suit within sec. 13, C. P. C. The object of the said petition and the present suit was the same, namely, to put an end to the existence of the Company. Under sec. 43, C. P. C., the present suit was not maintainable. In any case no fresh suit could be instituted without first obtaining the leave of the Court. Further, the certificate of incorporation is in law final and conclusive as to the regularity and validity of all antecedent acts and proceedings in the formation and constitution of a Company and the Court below had no jurisdiction to go behind the certificate to examine the proceedings relating to the signatures. Reliance was placed on *Peel's* case (1), *Oakes* v. *Turquand* (2), *In re Nassau Phosphate Company* (5), *In re National Debenture and Assets Corporation* (3), *In the matter of Northumberland and Durham District Banking Company* (6), *Ladies Dress Association* v. *Pulbrook* (7), *In re Hertfordshire Brewery Co.* (8). The case of *In re Laxon* (9) was not really against the Appellant as there the contract of a minor was only voidable whereas it is void under the Indian Law. Under sec. 6 read with sec. 41 of the Indian Companies Act, 1882, the Registrar's certificate is conclusive for all purposes. The Indian Act is similar to the English Act in this respect. (Sec. 6, (English) Act of 1862). There could possibly be no doubt now that the certificate would be conclusive under the English Act. The words of Lord Cairns in *Peel's* case (1) have received Legislative enactment (see (English) Company's Act of 1900 and 1908. The subscription as to registration by a seven or more persons is also a requisition. Further sec. 6 of the Indian Companies Act requires signatures only. There could be no ques-

(1) L. R. 2 Ch. App. 674, 676, 680 (1867).
(2) L. R. 2 E. & I App. 325 (1867).
(3) L. R. [1891] 2 Ch. 505.
(5) L. R. 2 Ch. D. 610 (1876).
(6) 44 Eng. Repts. 1028 ; 2 DeG. & J. 357 (1858).
(7) [1900] 2 Q. B. 376, 381.
(8) 43 L. J. Ch. 358 (1874).
(9) L. R. [1892] 3 Ch. 555.

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tion that a guardian is entitled to sign the memorandum of association on behalf of a minor. There is nothing in law to prevent one man signing on behalf of two or more persons.

Mr. Bailhache, K. C., and *Mr. Snowden* for the Respondents submitted that before a Registrar could grant a certificate there must be seven different persons present before him. There were not seven different persons signing that is contracting and the certificate therefore had no operation. Sec. 6 of Indian Companies Act is a condition precedent and has not been complied with. The competency of persons who form a company is outside the jurisdiction of the Registrar.

Sec. 236 of Indian Act, 1882, is the same sec. 192 of the English Act. It is true that sec. 17 of the Companies Consolidation Act, 1908, puts the matter beyond doubt but up to that time there was much difference of opinion. The condition that seven persons must sign is not a mere requisition. *In re National Debenture and Assets Corporation* (3) is a direct and recent authority.

In cases where the contract is voidable the contract stands good until it is set aside and so does the certificate. But where the contract is void the certificate cannot stand. *In re Barned's Banking Company* (*Peel's* case) (1). If the certificate were conclusive there would be no power to inquire whether the signatories were minors or foreigners. But that is done. *In re Nassau Phosphate Company* (5), *Wenlock* v. *River Dee Company* (10), *Salomon* v. *Salomon* (11). The certificate is conclusive when there is something on which it could be authorized, *e.g.*, the Memorandum and Articles of Association signed by seven different persons. Then, as to *res judicata* the point that there were not seven different signatures was not raised in the former suit.

[LORD ATKINSON.—It could and ought to have been legitimately raised then. You said that the Company was not existing for one reason, but you did not say that there was not a sufficient number of signatories.]

Mr. Bailhache.—The question relating to the formation of the Company was not raised nor were the Respondents bound to raise it. Sec. 373, C. P. C., does not bar the present suit. It ought to be read with sec. 647, C. P. C. The first Court rightly decided the point.

Mr. Buckmaster replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—The Record in this case is more than ordinarily confused and the story is somewhat complicated. But for the purpose of this Appeal the material facts may be stated in a few sentences.

One, Hadjee Goolam Ariff, a wealthy Mahomedan merchant residing at Rangoon, being dissatisfied with the conduct of his two elder sons was minded to dispose of the bulk of his property for the benefit of his two junior wives and his five younger children who were all minors at the time. With this object he applied for and obtained five separate orders under the Act of 1890 for the appointment of one and the same person as guardian of each of his minor children in order that the children by their guardian might accept the benefits which he intended to confer upon them. Being

(1) L. R. 2 Ch. App. 674, 681 (1867).
(3) L. R. [1891] 2 Ch. 505.
(5) L. R. 2 Ch. D. 610 (1876).
(10) L. R. 38 Ch. D. 534 (1888).
(11) L. R. [1897] App. Cas. 22 (1896).

also desirous that his property should remain in one mass, intact and undistributed, he procured the registration of a limited Company called the Goolam Ariff Estate Company, Limited. To this Company in return for shares there was transferred so much of his property as was retained by him together with the undivided shares in his estate which he had conveyed to his junior wives and his minor children.

Hadjee Goolam Ariff died on the 15th of May 1902, having made his Will on the 19th of the previous month. It was proved by his eldest son, Ebrahim Goolam Ariff, one of the executors therein named on the 23rd of June 1902. From that time to the present there has been continuous and persistent litigation in which Ebrahim Goolam Ariff has endeavoured to set aside the disposition which his father made. In all these attempts Ebrahim Goolam Ariff failed except in his Appeal in the present suit to the Chief Court of Lower Burma. On that appeal the order was made from which the present appeal to His Majesty has been brought.

The object of the present suit was to have it declared that the Goolam Ariff Estate Company, Limited, was not duly incorporated and that the property conveyed to the company should be transferred "to the persons entitled to the same." The validity of the conveyances to the testator's junior wives and his minor children had been established in a suit, No. 146 of 1902, which ultimately came before this Board. But the validity of the incorporation of the Company had not been expressly determined.

The main grounds of defence to the present suit were—

(1) that the certificate of incorporation of the Company was conclusive; and

(2) that the question raised by the suit was "*res judicata.*"

The questions framed to meet these points were both answered by the Court of Appeal in favour of the Plaintiffs. In their Lordships' opinion both ought to have been answered in favour of the Defendants, who are the present Appellants.

In dealing with the first question their Lordships will assume that the conditions of registration prescribed by the Indian Companies Act were not duly complied with, that there were not seven subscribers to the memoranadum of association, and that the Registrar of Companies ought not to have granted a certificate of incorporation. As a matter of fact a certificate of incorporation was granted. In their Lordships' opinion the certificate of incorporation is conclusive for all purposes.

The provisions of the Indian Companies Act of 1882 as regards the incorporation of companies are the same as those contained in the Imperial Act of 1862, except that it is specially provided in sec. 40 of the Indian Act that it is not the duty of the Registrar to require evidence as to whether the subscribers to the memorandum are competent to contract. Probably this provision was introduced because according to the Indian law the contract of an Infant is not voidable but void and it would lead to endless confusion and expense if the Registrar were to take upon himself the duty of ascertaining whether the signatories to the memorandum were or were not of full age.

In England the question whether the Registrar's cerificate is conclusive was decided so far back as 1867 by Lord Cairns sitting in the Court of Appeal. In *Peel's* case (1), after signature and before

(1) L. R. 2 Ch. App. 674 (1867).

registration a proposed memorandum of association had been altered without the authority of the subscribers so materially that in the words of Lord Cairns, "the alteration entirely neutralised and annihilated the original execution and signature of the document." The Company, however, was registered and the Registrar gave his certificate of incorporation. It was objected that the memorandum of association had not been signed by seven or indeed by any subscribers and that the provisions of the Act had not been complied with. To that proposition Lord Cairns assented. But "the certificate of incorporation," he said "is not merely a *primâ facie* answer but a conclusive answer to such objection . . . When once the certificate of incorporation is given nothing is to be enquired into as to the regularity of the prior proceedings." That was a plain and direct decision on the point. The observations of Lord Chelmsford in *Oakes* v. *Turquand* (2) are to the same effect. "I think," said his Lordship, "that the certificate prevents all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive in this case that all previous requisites had been complied with." Undoubtedly Lord Cairns' decision has been cavilled at. For instance in *In re National Debenture and Assets Corporation* (3), a Judge of first instance declined to treat a certificate of incorporation as conclusive which had been, as was supposed, subscribed by six persons only. On appeal, however, further evidence was admitted and it was found that the memorandum had in fact been subscribed by seven persons. On that ground the Court of Appeal reversed the decision appealed from. But unfortunately the learned Judges of Appeal made some observations to the effect that if the learned judge had been right as to the facts his decision in point of law would have been correct. The observations were mere *dicta* and besides the Court of Appeal could have had no jurisdiction to reverse Lord Cairns' decision. In their Lordships' opinion that decision is of unquestionable authority untouched by any subsequent decision and unimpaired by any *dictum* in any Superior Court, although the legislature thought fit, no doubt for the good reasons, to set the matter at rest by the Imperial Act of 1900, which put the words of Lord Cairns and Lord Chelmsford in a legislative enactment repeated in the Imperial Act of 1908.

Their Lordships are prepared to go further and to say that, in their opinion, even if there were no authority to guide their decision, the matter would seem to them to be absolutely plain on the words of the Act. The use of the word "otherwise" in sec. 6 shows that the statutory condition that the memorandum of association must be signed by seven persons is as much a condition of registration as any other requisition to be found in the Act which is preliminary to registration, and apparently essential.

This view is sufficient to determine the case in favour of the Appellants, but inasmuch as the question of *res judicata* was very fully argued their Lordships do not think it right to abstain from dealing with it.

Sec. 13 of the Code of Civil Procedure of 1882 enacts that :—

"No Court shall try any suit or issue in which the matter directly or substantially in issue has

(2) L. R. 2 E. & I. App. 325 (1867).
(3) L. R. [1891] 2 Ch. 505.

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been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court."

Then Expl. 2 of that section declares that :—

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It was admitted by the learned Counsel for the Respondents that the alleged invalidity of the incorporation of the Goolam Ariff Estate Company, Limited, might have been made a ground of attack in the Suit No. 146 of 1902, in which the validity of the dispositions made by Hadjee Goolam Ariff was attacked.

That it ought to have been made a ground of attack in that suit appears to their Lordships to be equally clear. All the facts on which the present suit is based were known to the Plaintiff and are stated at length in the proceedings of the former suit. No further evidence would have been needed. Nothing was wanting but the addition of an issue on the point. The case is plainly within the ruling of this Board in the case of *Kameswar Pershad* v. *Rajkumari Ruttun Koer* (4).

Their Lordships therefore think that the question raised in the present suit is *res judicata*, and on that ground as well, as on the ground that the certificate of incorporation is conclusive, their Lordships think that the suit fails and ought to be dismissed.

Their Lordships are therefore of opinion that the Appeal ought to be allowed and the suit dismissed with costs both here and below, and their Lordships will humbly advise His Majesty accordingly.

(4) L. R. 19 I. A. 234 (1892).

Solicitors : *Messrs. Bramall & White* for the Appellants.

Solicitors : *Messrs. A. H. Arnould & Son* for the Respondents.

B. D. *Appeal allowed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 7 OF 1912.

JENKINS, C. J.
WOODROFFE, J.
1912,
18, March.

J. C. GALSTAUN
v.
W. O. HUTCHISON.

Indian Stamp Act (II of 1899), Sch. I, Art. 1—Account adjusted and balanced and signed as correct, if acknowledgment inadmissible unless stamped—Debt and account, distinction between—Limitation.

The Plaintiff had various monetary dealings with the Defendant from and after 28th August 1905; the account up to the 1st of September 1908 was adjusted and stated between them showing a balance of Rs. 45,039 9-3 due to Plaintiff, below which "I accept this correct—E. & O. E." was written by Plaintiff; the Defendant signed below it without affixing an one anna stamp; the balance was carried forward, further debit entries were continued and on the date of filing the suit (6th July 1911) Rs. 58,932-1-3 were due to the Plaintiff from the Defendant. The trial judge regarded the debit balance on 1st September 1908 and the words and signature below it as acknowledgment of debt by the Defendant within the meaning of Stamp Act (II of 1899), Sch. I, Art. 1 and held it to be inadmissible in evidence and disallowed the amount as being barred by limitation.

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On appeal, held *by* JENKINS, C. J.—*That the signature of the Defendant admitting the balance struck to be correct (errors and omissions excepted) was not an acknowledgment of debt within the meaning of Sch. I, Art. 1 of the Stamp Act and that the Plaintiff was entitled to a decree for the whole amount in suit.*

NUND KUMAR SHAHA *v.* SHURNOMOYI (1) *followed.*

WOODROFFE, J.—*That the entry of the 1st September 1908 and the acknowledgment of same by Defendant was only an admission by him of the correctness of the account and did not require to be stamped to be admissible in evidence.*

BROJENDRO KUMAR *v.* BROMOMOYI CHOWDHRANI (3), BROJO GOBIND SHAHA *v.* GOLUCK CHUNDER SHAHA (2) and NUND KUMAR SHAHA *v.* SHURNOMOYE (1) *discussed.*

This was an Appeal preferred on the 12th of February 1912 against the decree of Mr. Justice Chitty, dated the 26th of January 1912.

The facts as also the decision of the Court below will appear fully from the following portion of Mr. Justice Chitty's judgment:—

CHITTY, J.—This is a suit filed by the Plaintiff to recover from the Defendant a sum of Rs. 58,932-1-3 alleged to be due for principal and interest on an account between the parties. The suit has not been defended but I have none the less to see that the Plaintiff's claim is legally sustainable. It appears that from August 1905 the Plaintiff made advances to the Defendant from time to time and received payments from him on account. Interest was charged on the debit balances at the rate of 9 per cent. per annum. An account was prepared by the Plaintiff and submitted to the Defendant on 2nd September 1908 showing a balance due from Defendant up to 1st September 1908 of Rs. 45,039-9-3. This account is now produced by the Plaintiff in support of his case and bears the words:—"I accept this correct" with the Defendant's signature and the date—10th September 1908. The last payment made by the Defendant on the account was Rs. 175 paid on 16th January 1908. The Plaintiff has since made payments of certain premiums on behalf of the Defendant which with further interest brings the sum alleged to be due up to the amount now claimed. The question is whether this amount signed by the Defendant being an acknowledgment within the meaning of Art. 1 of Sch. I to the Stamp Act and being unstamped is admissible in evidence. If it is such an acknowledgment, being a document chargeable with a duty of one anna, it cannot be admitted under sec. 35 on payment of a penalty. I am of opinion that the document clearly falls within the description in Art. 1 and is inadmissible in evidence for any purpose (see *Mulji Lala* v. *Lingu Makaji* (4). * * * *
The Plaintiff is entitled I think to a decree for the three sums of Rs. 748 8 paid on the Defendant's account on 22nd February and 11th August 1910 and 20th February 1911 with interest at 9 per cent. on those amounts from the respective dates of payment till to-day (26th January 1912).

Mr. J. E. Bagram with him *Mr. C. Bagram* for the Plaintiff-Appellant.—Art. 5 of Sch. II of the Stamp Act of 1869 ran as follows:—"A note or memorandum written in a part whereby a debt

(1) I. L. R. 15 Cal. 162 (1887).
(2) I. L. R. 9 Cal. 127 (1883).
(3) I. L. R. 4 Cal. 885 (1878).
(4) I. L. R. 21 Bom. 201 (1896).

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or part of a debt amounting to Rs. 20 or upwards in acknowledged to be due." It is to be observed that no mention in this article is made of the necessity of the document being written for the purpose of supplying evidence of the debt. Nevertheless White and Mitter, JJ, held that this article did not apply to the case of entries in an account one side of which was intended to represent advances made from time to time and the other side payments made in reduction of advances. See *Brojendro Kumar* v. *Bromomoyi* (3). On principle this decision is sound for if an amount advanced is to be worked off or altered in the process of subsequent transactions which the parties contemplate it would be unreasonable to suppose that the making of entries of advances were intended to be acknowledgments of debts of the respective amounts of such advances. There would be no point in having acknowledgments where sums advanced are intended to be subjected to the process of alteration or extinction by subsequent transactions which are also to be recorded in accounts. An entry of an advance when made under such circumstances shows not that an acknowledgment of a debt was intended, but merely a record of a transaction consisting of a handing over of a particular sum of money from one person to another was intended to be made. The Legislalature apparently took this view of acknowledgments and thus in the present Act the additional requirement of the document being written for the purpose of supplying evidence of the debt referred to in the document is insisted upon in Art. 1 of the First Schedule of the present Stamp Act. Mr. Justice White's decision was followed in *Brojo Gobind Shaha* v. *Goluck Chunder Shaha* (2) and in *Nund Kumar Shaha* v. *Shurnomoyi* (1). It is only when a document which mentions a specified sum of money and purports to acknowledge an advance of that amount that the question of its being an acknowledgment of a debt can arise. Does such a question really arise when a document does not itself specify a particular sum of money? Does it again arise when all that it states is that something not therein appearing is to be correct? In the present case we have an account in the Plaintiff's handwriting containing certain calculations of interest and addition and subtraction of various figures in the two sides of an account. A balance in the Plaintiff's handwriting appears and at the foot of this document is an endorsement in the Defendant's writing in the words "I accept this to be correct." The Stamp Act being a fiscal act must be strictly construed and in favour of the subject. I submit that unless another position, (*viz*, the balance on the whole account) be referred to there is no mention here of any debt. How can these words "I accept this correct" be said to be an acknowledgment in the Defendant's handwriting? When looked into, this is a case of two documents on the same paper one of which is in the Plaintiff's handwriting and another in the Defendant's and it is only by reading them together that it is known that a balance of a particular account is acknowledged to be correct. The Stamp Act, Art. 1, contemplates documents the whole of which is in the debtor's handwriting or written on his behalf. There is no evidence that the account or balance was written in the debtor's behalf. They were not again a statement written by him.

(3) I. L. R. 4 Cal. 885 (1878).

(1) I. L. R 15 Cal. 162 (1887).
(2) I. L. R. 9 Cal. 127 (1883).

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That a balance is correct may be quite consistent with no debt being due at the time the statement is made. If there are two separate accounts showing balances one in favour of A and the other in favour of B, and A and B agree that only the difference is to be paid, a statement in writing by A or B that one or the other of the balances is correct would not establish the existence of a debt much less would it be an acknowledgment. Such a statement only acknowledges what it says, *viz.*, the correctness of certain calculations resulting in a certain balance. Though admitted to be correct, it may not in fact be correct. Such a provision does not find a place in the Stamp Law of England. I submit the class of documents that the Legislature contemplated were those expressly mentioning in them definite sums of money which are written by the debtor so as to be available as evidence in favour of the creditor, to shew at the time the creditor wishes to enforce payment that that very sum mentioned is recoverable after deducting part payments (if any). If this was intended at the time the writing was made it was an acknowledgment within the article, otherwise not. In the absence of such an intention the document may be a record of an advance simply or of an acknowledgment of indebtedness at the time it is written, or a release from further accounting. The following cases were also referred to: *Udit Upadhaya* v. *Bhawani Din* (5), *Chenbasapa* v. *Lakshman* (6), *Binga Ram* v. *Ram Mohun* (7), *Mulji Lala* v. *Lingu Makaji* (4), *Bishambar Nath* v. *Nund Kishore* (8), *Ramanuj Das* v. *Lakhun Parida* (9).

(4) I. L. R. 21 Bom. 201 (1896).
(5) I. L. R. 27 All. 84 (1904).
(6) I. L. R. 18 Bom. 369 (1893).
(7) I. L. R. 8 Cal. 282 (1881).

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The Plaintiff has brought this suit to recover Rs. 58,932-1-3. In his plaint he alleges that from and after the 28th August 1905 he and the Defendant had various monetary dealings : that the Defendant from time to time made various part payments on account of principal and interest : that on the 1st September 1908 the account was adjusted and stated between the Plaintiff and the Defendant showing a balance of Rs. 45,039-9-3 due to the Plaintiff and the same was admitted and signed by the Defendant as correct : that thereafter further dealings took place : and that there is now due owing from the Defendant to the Plaintiff Rs. 58,932-1-3.

The plaint was filed on the 6th of July 1911, and as provided by Order VIII, r. 1, the Defendant was required to present a written statement of his defence.

The Defendant entered an appearance through his attorneys, but he failed to present a written statement.

The suit was transferred from the list of defended causes to the list of undefended causes, and was heard by Chitty, J, who passed a decree in the Plaintiff's favour for Rs. 2,435-10-6 with interest and costs.

He, however, refused the rest of the Plaintiff's claim, not because it was not proved but because it was barred by limitation, as the document by which it was sought to gain the advantage of a fresh period of limitation did not bear an anna stamp, and so (in his opinion) was inadmissible.

From this decree the present appeal has been preferred by the Plaintiff.

(8) I. L. R. 15 All. 56 (1892).
(9) 11 C. W. N. 112 (1906).

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It is beyond dispute that the sum of Rs. 58,932-1-3 would be recoverable unless barred by limitation, and that there is an acknowledgment of liability made in writing, and signed by the Defendant on the 1st of September 1908 which would be a complete answer to the bar of limitation if it can be utilized.

Chitty, J., held that this acknowledgment could not be proved for want of an anna stamp, as in his opinion the instrument was an acknowledgment of a debt within the meaning of Art. 1 of Sch., I to the Indian Stamp Act, 1899.

For the instrument to require such a stamp all the conditions indicated in that article must be present.

Though each case must depend on its own peculiar circumstances, I am unable to draw any fair distinction to the Plaintiff's detriment between the present case and that which was the subject of decision in *Nund Kumar Shaha* v. *Shurnomoyi* (1), where it was held that a balance sheet prepared and signed by the Defendant and showing a balance due from him was not an acknowledgment within the corresponding article of the Stamp Act of 1879.

If anything, the present instrument is more removed from the provisions of the Stamp Act, for here a balance was carried forward, errors and omissions were expressly excepted; and having regard to all the circumstances of the case I am not satisfied that the document on which the Plaintiff relies is an acknowledgment within the meaning of Art. 1.

Any other conclusion might, I think, lead to considerable inconvenience and detriment.

The result then is that, in my opinion, the Plaintiff is entitled to the relief he seeks and the decree of Chitty, J., should

(1) I. L. R. 15 Cal. 162 (1887).

be varied by passing in the Plaintiff's favour a decree for Rs. 58,932-1-3 with costs of the suit as directed by Chitty, J., and also the costs of this appeal.

WOODROFFE, J.—Learned counsel has relied on the decision in *Nund Kumar Shaha* v. *Shurnomoyi* (1). On the question whether a particular document in suit amounts to an acknowledgment of a debt one decision can hardly be an authority for another, for each case must depend on its own circumstances. The observations however as to the general nature of signed accounts in the three cases next mentioned are relevant to the matter before us. If however we look at that decision in *Nund Kumar Shaha* v. *Shurnomoyi* (1), we find nothing stated beyond this:—"We have looked at the document ourselves and we think that it is not an acknowledgment of a debt within the meaning of Art. 1, Sch. I of the Stamp Act and we are fortified in this opinion by a decision of Mr. Justice Prinsep and Mr. Justice O'Kinealy on a very similar point in the case of *Brojo Gobind Shaha* v. *Goluck Chunder Shaha* (2)." I may note in passing that the suit in this case was brought to recover what was due on a balance or *nikash* sheet after crediting the Defendant with certain amounts admitted to be due to him. It appears therefore that the amount of the balance sheet did not show the actual debt due by the Defendant. The case as appears from the report was decided with reference to that in *Brojo Gobind Shaha* v. *Goluck Chunder Shaha* (2) which was stated to raise a very similar point, and we must therefore look at the latter case. This held that the document in question was not a promissory note and did not require a stamp. Prinsep, J., said—"It is

(1) I. L. R. 15 Cal. 162 (1887).
(2) I. L. R. 9 Cal. 127 (1883).

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exactly of the same nature as the document which forms the subject of the suit in the case of *Brojendro Kumar* v. *Bromomoyi Chowdhrani* (3)." Then citing White, J.'s judgment in that case he dismissed the appeal. We are thus taken back to the decision in *Brojendro Kumar* v. *Bromomoyi Chowdhrani* (3) which was the foundation for the decision in the other two cases. Now the facts of this latter decision are not entirely the same as those before us, but, as stated, the observation as to the general nature of signed accounts is helpful. There a sum of Rs. 20,825 made up of seven different advances on different dates was sued for. Each advance was entered on a *hathchitta* and was signed as it was made. The first advance was stamped and the remaining six were not. These entries were held not to come within the Stamp Act for the following reasons :—The account had two sides, *viz.*, one side of sums advanced, and the other of those received, the Court said "the amount due varies from time to time, and depends upon the relation of the amount advanced to the amount received. In the present case no sum is entered under the head of 'amount received,' but that is an accident, and makes no difference in considering the question as to what is the nature of the document which is offered in evidence. The intention of the parties in requiring the signature or seal of the borrowers to each sum advanced is, strictly speaking, to secure under their hands an acknowledgment that the sum is advanced. Whether or not that sum is due, or a larger sum or a less sum, depends upon the state of the account." The entries were not intended to stand alone in which case the Court said it might have been contended that they were acknowledgments requiring a stamp. In that case also no sum was entered under the "amount received" column, yet the Court held that to be an accident and made no difference in considering the question as to what was the nature of the document, (*viz.*, an account), which was offered in evidence. If, for instance, an account is balanced at the end of a year and is accepted as correct and a separate entry were made admitting its correctness and acknowledging the balance found to be due on that account as owing to the creditor, then I conceive that such an entry might amount to an acknowledgment within the meaning of the Stamp Act and require a stamp. The Court in such a case might perhaps reasonably infer an intention to acknowledge a debt notwithstanding that such debt was transferred to the next yearly account. The question is however one of intention to be gathered from the circumstances of each case, and it is only necessary to deal with the facts before us. In the present case the words "I accept this correct" were written by the Plaintiff and signed by the Defendant against the balance of the 1st September 1908 showing, (errors and omissions excepted), that a sum of Rs. 45,039-9-3 appeared to be payable on that account by the Defendant up to that date. It was an admission that up to that date the account was correct. This amount was carried forward in the account which was continued and further debit entries were made after the date of the acknowledgment, for which alone the Plaintiff has been given a decree. To use the language in the case last cited it was an accident that no further credit entries were made. There is nothing to show that it was intended that none were to be made or that the account should

(3) I. L. R. 4 Cal. 885 (1878).

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close with the acknowledgment. This accident did not, in the terms of the case cited, alter the character of the document. Balances were frequently struck during the course of the account, the last being in July 1911. The Plaintiff in his evidence stated that it did not occur to him at the time that the acknowledgment was taken with the object of supplying evidence (of the debt) but that he did it "so as not to worry for accounts in future I suppose I took it to use it when the time came as I am now doing." The question is whether in fact the writing is now used as an acknowledgment of a debt as apart from an acknowledgment of liability, and whether it is in fact so within the meaning of Stamp Act. It may be that as the result of such acknowledgment of liability together with the account itself, and other evidence in the case the law annexes as a consequence the obligation to pay the sum against which the acceptance of the Defendant appears, but from this it does not follow that the Defendant intended to acknowledge that particular sum as a debt within the meaning of the Stamp Act. Further the account was "E. and O. E." Even assuming that such a provision was for the benefit of the creditor only and that the Defendant, had he gone to the witness-box, would have been bound by his signature, (though it is by no means clear that the Defendant could not also have shown that such signature was given by mistake), it may well be argued that the insertion of such proviso made the Defendant's acceptance one which was conditional on the correctness of the account. Let it be supposed that an enquiry under the "E. and O. E" provision disclosed that the amount shown in the balance was incorrect and that the amount due was more or less than that claimed, could it be said then that the Defendant had acknowledged a "debt" when the acknowledged sum did not represent that rightly claimed. It may be admitted that the case in *Nund Kumar Shaha* v. *Shurnomoyi* (1) is in one respect perhaps stronger than the present one, (for the signature against each sum as it was advanced was strong evidence to show that the signature was given to witness that particular advance) as also that the dividing line may be in many cases a narrow one, but in a matter of this kind—which seems, to put the matter most adversely to the Plaintiff, at least open to doubt—I think we ought to follow the general principles of the decision in *Brojendro Kumar* v. *Bromomoyi Chowdhrani* (3) upon which learned Counsel for the Appellant relies, and I agree in holding that the entry relied on does not, under the circumstances of this case, amount to an acknowledgment which requires an anna stamp.

Messrs. Morgan & Co., Solicitors for the Appellant.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO. 236 OF 1911.

BRETT, J.
SHARFUDDIN, J.
1912,
Heard, 10 and 11, April.
Judgment, 11, April.

BABAR ALI BOSAR, Judgment-debtor, Appellant,
v.
SHISIR KUMAR BASU and others, Decree-holders, Respondents.

Civil Procedure Code (Act V of 1908), Or. 21, r. 2—Fraudulent decree, obtained jointly by two brothers—Admission in partition suit between brothers by one that decree fraudulent and that debtor released upon payment of portion—Entry of satis-

(1) I. L. R. 15 Cal. 162 (1887).
(3) I. L. R. 4 Cal. 885 (1878).

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faction by the other of his share only of decree as discharged by payment—Application to execute for the balance—Executing Court if may act on the admission.

S1, and S2, two brothers, obtained a decree against B. Subsequently in a partition suit instituted by S2 against S1, S2 having complained that S1 had not entered in the assets of the family property the decree against B, S1 filed a written statement in which he admitted that the decree had been obtained by fraud on account of enmity between the brothers and B and that B had been released of his liability under it upon payment of Rs. 200 only out of the decretal amount. The payment, however, was certified in execution as made in part satisfaction only of the decree. Subsequently S1 died and S2 filed a certificate in execution admitting receipt of another Rs. 200 from B and the full satisfaction of his half share of the decree and then applied on behalf of the minor sons of S1 for execution of the alleged unsatisfied balance of the decree :

Held—***That the case really did not fall under the provisions of r. 2, Or. 21, C. P. C., as it was not a question of payment or adjustment of the decree and the executing Court was justified in placing reliance on an admission solemnly made by the decree-holder himself prior to the application for execution in a suit in which the genuineness of the decree was in issue, and in dismissing the execution petition on its basis.***

This was an Appeal preferred on the 22nd of May 1911 against an order of Mr. B. B. Newbould, District Judge of Zillah Dacca, dated the 27th of March 1911, reversing an order of Babu Hira Lal Mukerjee, Munsif at Munshigunge, dated the 22nd of December 1910.

The facts of the case will appear from the judgment.

Babus Satish Chandra Ghosh and *Smritish Chandra Ghosh* for the Appellant.

Babu Upendra Lal Roy for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal against an order passed by the lower Appellate Court in certain execution proceedings. It appears that a suit was brought by the father of the two Respondents in the present appeal and by his brother Sudhanya Ray against the present Appellant, and a decree was obtained on the 9th September 1907. In October 1907 corresponding to 5th Kartik 1314, B. S., a sum of Rs. 200 was admittedly paid by the judgment-debtor to the decree-holders. Afterwards, Sudhanya Ray, the brother of the father of the Respondents, brought a partition suit against his brother Sital Ray and, in his plaint, he alleged that Sital had not entered in the assets of the family property the decree which they had obtained on the 9th September 1907 against Babar Ali. Sital, in his written statement, put in an objection to this allegation. He said that, at the time when the decree was obtained by the two brothers against Babar Ali, there was enmity between them and Babar Ali, that afterwards Babar Ali had come under their influence and Rs. 200 was accepted in full satisfaction of that decree and that Babar Ali was given to understand that he was exempted from further liability. Afterwards, when satisfaction was certified to the Court, the payment was certified as made only in satisfaction of one instalment due under that decree. It is not clear what was the result

of that suit but Sital afterwards died and Sudhanya, his brother, after putting in a petition admitting receipt of another Rs. 200 from Babar Ali in Aghran 1316 filed a certificate admitting full satisfaction of his half share of the decree and then put in the application which has given rise to the present appeal, in which he sought on behalf of the two minor sons of Sital for execution of the decree for the balance which, he alleged, was outstanding in their favour.

The Court of first instance dismissed the application. The learned Munsif held that from the admission made by Sital in the suit brought against him by Sudhanya it was clear that the decree obtained against Babar Ali was a fraudulent decree and was the outcome of enmity between them and him, that a sum of money was accepted in full satisfaction of that decree, apparently meaning the sum of Rs. 200 received on the 5th Kartik 1314, and that, after that admission by the father, the application made on behalf of the sons for execution of the decree for the balance outstanding could not proceed. The Munsif further found that, throughout the whole proceedings, there was clear proof of fraud on the part of Sudhanya. He not only held that the original decree was a fraudulent decree and that no money was really due under it to the present Appellants but he also held that Sudhanya fraudulently put in the certificate in satisfaction of his half share of the decretal money in order to avoid the effect of the admission made by Sital in the case which he had brought against him.

On appeal, the lower Appellate Court has entirely ignored the question whether the Munsif was entitled to rely on the admission made by Sital in the suit brought against him by Sudhanya and has confined its attention entirely to the point whether the Court of first instance was entitled, in execution of the decree, to accept any evidence of payment or adjustment, which had not been certified or recorded as required by Or. XXI, r. 2, C. P. C. The learned District Judge held that as full satisfaction of the decree had not been certified when Rs. 200 was paid to Sital and Sudhanya in 1314, the Court of first instance was not entitled to arrive at the conclusion that the decree had been satisfied, and he further found that there was no allegation that the decree-holders had by fraud kept the judgment-debtor in ignorance of the fact that satisfaction of the decree had not been certified. The learned Judge, therefore, set aside the judgment and order of the Court of first instance and directed that the execution should proceed.

The judgment-debtor Babar Ali has now appealed to this Court; and, in support of the appeal, the main point taken is that the Court of first instance was justified in the view which it took that after Sital, the father of the present applicants for execution, had, in the suit brought against him by Sudhanya, substantially admitted that the decree was a fraudulent decree and that the money paid by Babar Ali had been accepted in full satisfaction of that decree, no further sum was due from Babar Ali on account of that decree and that the decree was merely kept alive for the purpose of exercising pressure over Babar Ali in consequence of the enmity which existed between him and Sital and Sudhanya. The point for consideration in this case was not really one falling under the provisions of r. 2 of Or. XXI, C. P. C., but was whether, in the face of the admission

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made by the father, the two sons were entitled to succeed in the present application. The learned pleader for the Respondents has contended with great earnestness that the Court of first instance, in execution of the decree, had no right whatever to go into the matter whether or not Sital, the father of the minors, had admitted that no money was due to him from Babar Ali under this decree. The learned pleader has contended that all that the executing Court could take into consideration was the payment made under the decree which had been duly certified to the Court as required by r. 2 of Or. XXI of the Code and that, as full satisfaction of the decree had not been certified when the payment was made in Kartik 1314, therefore the executing Court had no jurisdiction to do anything else but to direct the execution to proceed; and in support of this contention, he has relied on the cases of *Bajrang Biharilal* v. *Lachmi Narain* (1) and *Iswar Chandra* v. *Huris Chandra* (2). With the decisions of this Court in those two cases we have no desire to disagree but the important point to be noticed is that in those two cases there was no question whatever whether the decree-holder had prior to the application for execution himself admitted that no money was due under the decree. The learned pleader has contended that the admissions contained in the written statement of Sital did not go so far as to say that no money was due under the decree after the payment of the Rs. 200 and he suggests that, in the case in which that decree was obtained, the Court, on the application of the judgment-debtor, directed that the decree should be paid by instalment. These facts may be true or not but there is nothing on the record before us to support them. The learned pleader has thought it his duty to read out to us the paragraphs in the written statement of Sital on which the Munsif has relied as showing that he admitted in that suit that the original decree obtained against Babar Ali was a fraudulent decree, that it was obtained at a time when the two brothers were at enmity with Babar Ali and that it was practically cancelled or satisfaction of it was accepted when they succeeded in bringing Babar Ali under their control. In our opinion, the contention which the learned pleader for the Respondents has advanced cannot, with due regard to the facts of the present case, prevail. We are fully in agreement with his argument that, in ordinary cases, the Court should not accept any payment in satisfaction of a decree or any adjustment made in satisfaction of a decree which has not been certified to the executing Court as contemplated by Or. XXI, r. 2, C. P. C.; but in this case, we have not to consider any adjustment of the decree such as is contemplated by that section. What we have to consider is whether the sons of Sital are, in these execution proceedings, entitled to recover any money due under this decree from Babar Ali after their father in a suit in which the genuineness of this decree was in issue had, solemnly in his written statement admitted, what we agree with the Munsif in terms amounted to saying, that the original decree was a fraudulent decree—the result of enmity between the two brothers and Babar Ali—and that the two brothers had subsequently relieved Babar Ali from any liability under that decree when they received the Rs. 200. In our opinion the

(1) 15 C. L. J. 88 (1909).
(2) I. L. R. 25 Cal. 718 (1898).

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Court of first instance was entitled to take that admission into consideration in determining whether the present proceedings in execution should be allowed to go on and the lower Appellate Court was wrong in refusing to give effect to that admission and in setting aside the judgment and order of the Court of first instance for the reasons given in its judgment. We, therefore, decree the appeal, set aside the judgment and order of the Court of Appeal below and restore the judgment and order of the Court of first instance with costs. We assess the hearing-fee in this Court at 3 gold mohurs.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO. 357 OF 1911.

SHARFUDDIN, J.
COXE, J.
1912,
29, July.

BHOGIRATH CHANDRA MONDAL and others, Petitioners, Appellants,
v.
SITAL CHANDRA SARKAR, Opposite Party. Respondent.

Bengal Tenancy Act (VIII of 1885)—Transferability of occupancy holding—Custom and usage, proof of—Sale in execution of decree—Landlord's consent on receipt of nazarana.

Where nazars *were as a rule paid to the zeminday and on payment of the* nazar *the purchaser was usually recognised by the landlord,*

Held—*That it was not evidence of any custom or usage by which an unwilling landlord was bound, or evidence that the landlord was compelled, to recognise the purchaser, on payment of* nazar *whether he wished to do so or not.*

This was an Appeal preferred on the 22nd of July 1911 against the order of Babu Pran Krishna Biswas, District Judge of Zillah Rungpur, dated the 25th of April 1911, affirming an order of Moulvi Ali Ahmed, Subordinate Judge of Rungpur, dated the 20th of September 1910.

The decree-holder, Respondent, obtained a mortgage decree against the judgment-debtors, Appellants. After all the mortgaged properties were sold the decree-holder attached certain other properties belonging to the judgment-debtors. The judgment-debtors made an objection under sec. 47 of the Civil Procedure Code and stated that the holdings were all non-transferable occupancy holdings and were not therefore liable to be attached or sold. The first Court held that the holdings were occupancy raiyati holdings but that the usage of sale of occupancy holdings was proved and the objection of the judgment-debtors was therefore rejected. The lower Appellate Court also came to the same conclusion. The portion of the evidence upon which the lower Appellate Court relied will be found *in extenso* in the judgment of their Lordships.

The other facts material to this report will appear from following portion of the judgment of the lower Appellate Court :—

"The judgment-debtors' own witnesses admit that raiyati holdings are bought and sold. The landlord's servant who was examined as a witness for the judgment-debtors, though he was cited by both parties, said that there is a pergunnah custom as to the sale of raiyati holdings. But he also said that *nazar* has to be paid to the landlord before the landlord recognises the purchaser as his raiyat. The pleader for the judgment-debtors refers to the case of *Kailash Chandra* v. *Hari Mohan* (1) as authority for the proposition that if the zemindar recognises the

(1) 13 C. W. N. 541 (1909).

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purchase only on receipt of *nazar*, that discloses the existence of a custom as to the sale of occupancy holdings without the landlord's consent. If the amount of *nazar* to be paid depends on the will of the landlord, then, of course, the above proposition is correct. But where the rate of *nazar* is fixed by custom and the zemindar recognises the purchase on getting the customary *nazar*, the custom as to the transferability of occupancy rights must be held to be proved, *Buzlul Karim* v. *Satish Chandra* (2). In the present case, the landlord's *amla* says that Rs. 2 per bigha is the customary rate. The custom must therefore be held to have been proved and the judgment-debtors' objection was properly rejected."

Babu Surendra Chandra Sen for the Appellant.—There is no evidence in this case to prove a custom or local usage of transferability of occupancy holdings; the evidence relied upon by the lower Appellate Court amounts to this only that the landlord on receipt of *nazar* recognises the transferee as the tenant; that is not sufficient; it must further be proved that the landlord *must* recognise; refers to the case of *Kailash Chandra* v. *Hari Mohan* (1). The case of *Bazlul Karim* v. *Satish Chandra* (2) does not help the other side, for that was a case of voluntary transfer and the present one is that of a compulsory sale—the decree-holder trying to sell the holding in execution of a decree; moreover, in the present case there is no evidence that the landlord *must* recognise. Even if it is proved that the landlord must recognise, that would not be sufficient to prove custom and usage; for, it is a privilege and right to both the landlord and the raiyat that a raiyati holding cannot be transferred; —the right and privilege of a landlord being that a stranger cannot come upon the land by purchase; those of a raiyat being that he will not lose his holding in case of his incurring debts; otherwise the result will be that a raiyat on occasions of marriage and festivities will be tempted to incur debts and the land will go to the creditors, and the agricultural classes will be landless. The landlord's consent alone is not sufficient to pass title to the transferee; the tenant is also interested, so the consent of both the landlord and the tenant is essential in proving a custom. Illus. (2) of sec. 183 of the Bengal Tenancy Act speaks of a custom or usage in regard to a voluntary transfer; it does not speak of a compulsory sale execution of a decree; so if the holding of a raiyat is sold against his will in execution of a decree, no custom or usage which entitles a purchaser to be recognised by the landlord on payment of a *nazaranna* although fixed by custom, can take away a raiyat's right; such custom and usage may confer a title to a purchaser to whom the raiyat has voluntarily transferred.

No one for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of an objection of the judgment-debtors, who are the Appellants before us, under sec. 47 of the Code of Civil Procedure that their raiyati holdings which had been attached, were not saleable by local custom or usage without the consent of the landlord. Both the Courts below dismissed the objection of the judgment-debtors and they have now appealed to this Court.

The proof that these holdings are saleable without the landlord's consent, de-

(1) 13 C. W. N. 541 (1909).

(2) 15 C. W. N. 752: s. c. 13 C. L. J. 418 (1911).

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pends entirely upon a passage in the evidence which has been quoted in the judgment of the first Court. The view of that portion of the evidence taken by the first Court is accepted by the lower Appellate Court. The quotation of the evidence given in the first Court's judgment is this : "There is a custom of the sale of raiyati jotes (meaning occupancy holdings) in the pergunnah. Without the permission of the zemindar the jotes are being sold. If the purchaser pays rent we take it and give receipt in the name of the old tenants. We do not give *marfat* of the purchaser. Without taking *nazar* we do not make *kharij-dakhil.* We take order of the zemindar and take *nazar* from the purchaser and then make *kharij-dakhil* . . . . without *nazar* never *kharij-dakhil* is made . . . . In these villages *nazar* is taken at the rate of Rs. 2 per bigha. We do not forbid the purchase of jote at auction-sale. We make *kharij-dakhil* of the name of purchasers if *nazar* is paid. No objection is taken to it." What this amounts to is that *nazars* are as a rule paid to the zemindar and on payment of the *nazars* the purchaser is usually recognised by the landlord. But the passage is not evidence of any custom or usage by which an unwilling landlord is bound, or evidence that the landlord is compelled, to recognise the purchaser on payment of *nazar* whether he wishes to do so or not. There is no other evidence in support of the finding of the Court below, which must therefore be regarded as based on no evidence and unsustainable.

We therefore set aside the judgments and decrees of the lower Courts and decree this Appeal with half costs in this Court, the hearing-fee being assessed at half a gold mohur. The Appellants before us are entitled to their costs in both the Courts below.

H. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE
No. 5 of 1910.

STEPHEN, J.	INDRO DEB DAS and ors.,
RICHARDSON, J.	Defendants, Appellants,
1912,	*v.*
Heard, 14, May.	AZIZUR RAHAMAN SARKAR
Judgment,	and others, Plaintiffs,
16, May.	Respondents.

Bond, construction of—Rate of interest—Stipulation to pay interest at Re. 1-9 per month and compound interest with six-monthly rests—"Per cent." if to be read into the stipulation.

Where the executants of a bond which secured an advance of Rs. 2,000 stipulated therein "we shall pay interest on this sum at the rate of Re. 1-9 per month" and "we shall pay the interest every 6 months from this date. If we fail to do so interest and compound interest shall at the end of every six months be added to the principal and we shall go on paying interest therein at the aforesaid rate until the time of repayment":

Held—*That, upon a true construction of this bond, the stipulation was that interest should be paid at the rate of Re. 1-9* per cent. *per month.*

This was an Appeal preferred on the 3rd of January 1910 against an order of Babu Annada Charan Sen, Subordinate Judge of Jalpaiguri, dated the 21st of September 1909.

The suit out of which the appeal arose was instituted upon the basis of two mortgage bonds of which the later in date was executed on the 27th of Ashar 1309 by the Defendants in favour of the Plaintiffs;

this mortgage bond was to the following effect:—

For the purpose of carrying on a timber business we have this day jointly borrowed from your tehbil Rs. 2,000 and have received the said amount in cash. We shall pay interest on this sum at the rate of Re. 1-9 annas per cent. per month. We shall go on paying it until repayment. The month of Poush of the present year is fixed as the stipulated time for repayment, when we shall pay up the whole of the principal with interest and take back this bond. If we are unable to pay up the whole amount at one time and pay from time to time in part, we shall endorse the payment on the back of this bond at the time of the payment distinctly stating what is paid on account of principal and what is paid on account of interest. Except the endorsements on the back of this bond separate receipts, acquittances or oral evidence of witnesses produced to prove payments shall be rejected by the Court. We shall pay the interest every six months from this date. If we fail to do so the interest and compound interest shall at the end of every six months be added to the principal and we shall go on paying interest thereon at the aforesaid rate until the time of repayment. We shall not be entitled to make any payment on account of principal so long as interest remains due. As security for the aforesaid loan with interest we mortgage to you the properties owned and possessed by us and which are described in the schedule given below.

Plaintiffs instituted the present suit on the 16th December 1908, claiming interest on the principal amount secured by this mortgage at the rate of Re. 1-9 per cent. per month and compound interest at the said rate with six-monthly rests as stipulated in the bond. The Defendants *inter alia* contended that the interest of Re. 1-9 was chargeable on the whole of the principal amount of Rs. 2,000. The Plaintiffs were allowed to adduce evidence to prove that the intention of the parties was that the interest should be payable at the rate of Re. 1-9 per cent., the expression "per cent." having been omitted through mistake, and the Subordinate Judge agreeing with the Plaintiffs' contention decreed the suit. The Defendants appealed.

Babu Karunamoy Bose for the Appellants.

Babu Brojo Lal Chuckerbutty for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

STEPHEN, J.—This case arises out of a mortgage bond executed by the Defendants in favour of the Plaintiffs. The bond recites that the Defendants on the day of execution of the bond borrowed Rs. 2,000 from the Plaintiffs. It then goes on to say "we shall pay interest on this sum at the rate of Re. 1-9 per month." Further on, there is a provision which is as follows:—"We shall pay the interest every six months from this date. If we fail to do so the interest and compound interest shall at the end of every six months be added to the principal and we shall go on paying interest thereon at the aforesaid rate until the time of repayment."

Before the lower Court it was argued on behalf of the Plaintiffs that the first of these passages meant that interest was to be payable at the rate of Re. 1-9 per cent. per month and that the words "per cent." had been left out by mistake. Under the circumstances, the lower Court allowed evidence to be adduced to show that such a mistake had in fact been made, and eventually held that the proper construction of the document in question was to read the words as though "per cent." had been added.

In appeal it is argued before us that the lower Court had no authority to admit the evidence that was tendered as regards the making of the mistake and that the construction of the document is wrong. We cannot take this view. For myself

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I must admit that had I to construe only the words "we shall pay interest on this sum at the rate of Re. 1-9 annas per month," I should hold that the words are intelligible in themselves and mean that Re. 1-9 annas would be due on the whole sum of Rs. 2,000. This is an intelligible construction. It creates a provision which it was open to the parties to make. Looking, however, at the subsequent words relating to compound interest, it seems to me, that the document becomes absolutely unintelligible unless the words "per cent." are included in the earlier sentence. It is not to be supposed that compound interest was to be reckoned at the rate of Re. 1-9 annas on the sum of Rs. 2,000. Some other rate was in contemplation and I have no doubt that, that was intended to be indicated by the words "per cent." which have been omitted by mistake. Taking the document as a whole I consider that the Judge is correct in reading it as he did. I would therefore dismiss the appeal with costs, the hearing-fee being assessed at two gold mohurs.

RICHARDSON, J.—I agree in the conclusion arrived at by my learned brother. The question as I understand it is one of construction and for my part bearing in mind the universality of the practice of fixing the rate of interest at a rate per cent., I think that the words to be construed can only mean as they stand that interest was to be chargeable at the rate of Re. 1-9 per cent. per month. If the document be read as a whole there can be no room for doubt on the subject.

Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 5032 OF 1911.

STEPHEN, J.	W. C. MCINTOSH,
D. CHATTERJEE, J.	Claimant, Petitioner,
1912,	*v.*
Heard, 1, April.	BIDHU BHUSAN SEN,
Judgment,	Decree-holder,
18, April.	Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 21, rr. 58, 61—Claimant in possession under a collusive sale if in possession as trustee for judgment-debtor.

A judgment-debtor with the object of defrauding his creditor executed a collusive sale of his property in favour of a third person who was put in possession and preferred a claim to the property under r. 58 of Or. 21 of the Civil Procedure Code, when the same was attached by the creditor in execution of his decree:

Held—*That the claim should be rejected on the ground that the property was in possession of the claimant in trust for the judgment-debtor within the meaning of r. 61 of Or. 21 of the Civil Procedure Code.*

It was not necessary, in order to defeat the claim, to show that the trust was one capable of enforcement by law.

This was a Rule granted on the 1st of September 1911 against the judgment of Babu Danda Dhari Biswas, Subordinate Judge of Mymensingh, dated the 7th of August 1911.

The material facts appear from the judgment.

Babu Harendra Narayan Mitra (for *Babu D. N. Chuckerbutty*) and *Babu Kali Kinkar Chuckerbutty* for the Petitioner.

Babus Tara Kishore Chowdhury and *Hem Chundra Sen* for the Opposite Party.

W. C. McINTOSH *v.* BIDHU BHUSAN SEN.

The JUDGMENT OF THE COURT was as follows :—

This is a claim case under Or. XXI, r. 58, in which the lower Court has dismissed the petition of claim. A Rule has been granted calling on the Opposite Party to show cause why the Subordinate Judge should not be directed to allow the claim of the Petitioner on the facts found ; to this Rule a clause has been added calling on the Opposite Party to show cause why the attachment obtained by him should not be set aside as being made without jurisdiction owing to a previous adjudication in insolvency made on the 19th September 1910. The facts of the case as found are as follows : On the 11th September 1909 a husband and wife, Mr. and Mrs. Sophianopulous, sold certain property to Mr. Philipopulous. This sale was not a *bonâ fide* one, which we understand to mean that it was entered into by Sophianopulous and Philipopulous for the purpose of shielding the property from the creditors of the former. On the 25th June 1910, Philipopulous sold the property to the claimant, who took possession and retained it till the attachment. This sale was a collusive one, being apparently a similar transaction to the first. Philipopulous was adjudicated insolvent on the 19th September 1910, a fact which curiously enough is not mentioned in the judgment of the Court below, though from the terms of the Judge's order we think he must have had it in his mind. The property was attached on the 7th May 1911 ; and it is against this attachment that the present claim is made. Under Or. XXI, r. 60, the Court was bound to make an order releasing the property if it was satisfied that the property when attached, was not in the possession of Sophianopulous or of some person in trust for him. Under r. 61 if the Court was satisfied that the property was in possession of Sophianopulous or of some other person in trust for him it was bound to disallow the claim. There is no question of possession by Sophianopulous, and the only question arising under these two rules is whether the property was in the possession of the claimant in trust for Sophianopulous. The findings show that the claimant was in possession of the property under a title which neither he nor Sophianoplous intended should be acted on as between themselves, and that he was in possession for the benefit of Sophianopulous and to defraud his creditors. We are of opinion that looking at the scope and purpose of the rules in question it is not necessary in order to defeat the claim to show that the trust is one capable of enforcement by law. Accordingly we hold that the claimant was in possession in trust for Sophianopulous : and the claim was therefore rightly dismissed. As to the second part of the Rule, it may be that the adjudication vested the property in dispute in the Official Assignee : but he has not so far made any objection to the attachment, though he has done nothing that can be taken as admitting its validity as against him. We see no reason why on revision we should allow the claimant to take advantage of a right in another which has not yet been asserted.

The Rule is therefore discharged with costs, the hearing-fee being assessed at 3 gold mohurs.

Rule discharged.

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Contents.

NOTES.

IT IS ANNOUNCED THAT LORD ROBSON HAS RETIRED from his office as a Lord of Appeal and Lord Haldane has made the best possible selection by the appointment of Lord Justice Fletcher Moulton to fill up the vacancy. It can hardly be said that the retiring Law Lord has left his mark on the judicial history of England though it must be said that his tenure of office has been far too short to give him much of an opportunity to leave a distinguish record behind him. The new Law Lord has a splendid record of judicial work behind him, and his appointment may be taken as an earnest of the real concern which the new Lord Chancellor feels in improving the *personnel* of the highest Court of the Empire. It is to be remarked that this appointment as also that of Lord Justice Hamilton who succeeds Lord Justice Fletcher Moulton are in no way party appointments.

THE DECISION OF THEIR LORDSHIPS OF THE Judicial Committee in *The Rangoon Botatoung Company, Ld.* v. *The Collector, Rangoon*, reported at p. 961 of the present issue, will cause surprise in this country in legal and lay minds alike. In this case, certain persons in Rangoon whose lands had been acquired for public purposes, being dissatisfied with the Collector's valuation, applied for and obtained a reference to the Chief Court as they were entitled to do under sec. 18 of the Land Acquisition Act. The reference was heard by a bench of two Judges of that Court. The hearing of the reference, as their Lordships do not fail to note, occupied 45 days, more than 100 witnesses were examined, a vast mass of documents was put in and the Judges at the request of the parties viewed the premises. In the result, they dismissed the reference, with the remark that the Collector had given the claimants "all and probably more than the full market value of their property."

AGAINST THIS DECISION, THE CLAIMANTS APPEALED to the Privy Council. As the reference had been heard before a bench of two Judges, the claimants had virtually lost their right to appeal to the "High Court" as provided in sec. 54 of the Land Acquisition Act, or as it is put in the argument on behalf of the Respondent, the right had "merged." However, that may be, on the appeal before the Judicial Committee, a preliminary objection was taken on behalf of the Respondent that no appeal lay from the decision of the High Court, and that objection has been given effect to by their Lordships. It was pointed out to their Lordships on behalf of the Appellants that as a matter of fact on several previous occasions, such appeals had been entertained by the Judicial Committee. *Secretary of State* v. *Charlesworth*, [1901] App. Cas. 373; *Ezra* v. *Secretary of State*, 9 C. W. N. 454; *Secretary of State* v. *India General Steam Navigation Co.*, 14 C. W. N. 134. But as no such preliminary objection had been taken to the hearing of the appeals in those cases, their Lordships did not hold themselves precluded from entertaining and giving effect to the objection taken in the present case.

TO THE LAY MIND, IT WILL CERTAINLY APPEAR not a little surprising that the Privy Council which has so long been hearing and disposing of these appeals should suddenly discover after all these years that such appeals are incompetent and ought not to be entertained; and considering the position of that august tribunal, even a lawyer may be excused for finding difficulty in reconciling the apparently inconsistent positions taken up by the Judicial Committee. But no lawyer would nevertheless be justified in cavilling at the present decision merely on that ground, if in other respects it is based on sound reasoning. Our objection, however, is that it is more than doubtful that this is so.

THE ARGUMENT OF THEIR LORDSHIPS AGAINST the competence of an appeal is mainly based upon an interpretation of secs. 53 and 54 of the Land

Acquisition Act, and although sec. 596 of the Civil Procedure Code of 1882 (corresponding to sec. 110 of Act V of 1908) is not specifically mentioned in the judgment, their Lordships' main ground for dismissing the appeal is that the decree of the High Court in a Land Acquisition case is not a "decree" within the meaning of that section. But there appears to be another ground suggested at the conclusion of the judgment, *viz.*, that the decision of the Court of Reference or of the High Court on appeal is in the nature of an "arbitration" and that the Judges are "arbitrators" for the purpose of valuing the property acquired. These expressions carry with them the suggestion of jurisdiction by consent and finality of decision. It seems to us that their Lordships' interpretation of the provisions of the Land Acquisition Act and the Civil Procedure Code is not at all jusifiable and the use of the expression "arbitration" in connection with the Court's award on the question of valuation is without foundation and is also misleading.

UNDER SEC. 12 OF THE LAND ACQUISITION ACT, the award made by a Collector—and the Collector in these proceedings does not act judicially but as the agent of the Government or Company on whose behalf the acquisition is made (*Ezra* v. *Secretary of State*, 7. C. W. N. 249, affirmed by the Privy Council in 9 C. W. N. 454)—is final and conclusive "as between the Collector and the persons interested," subject to the right of the latter if they do not accept the award to require that "the matter be referred by the Collector *for the determination of the Court*." The word "Court" is defined in sec. 3, cl. (*d*) of the Act as the "principal Civil Court of original jurisdiction unless the Local Government has appointed (as it is thereby empowered to do) a Special *Judicial Officer* within any specified local limits to perform the functions of the Court under this Act." Sec. 54 of the Act provides an appeal on facts from the decision of the Court as above defined to the High Court irrespective of the value of the interests involved.

TO ONE FAMILIAR WITH THE JUDICIAL ADMINISTRATION of this country, the object of these provisions of law is obvious. When statutes for compulsory acquisition of land were first introduced in this country, serious objections were taken against the principle of these Acts which undoubtedly interfere with the proprietary rights of individuals, a right which has long been recognised to stand on nearly the same footing as the individual's right to personal liberty. The object of these provisions was to conciliate public opinion and safeguard private rights. The provisions, therefore, purported to provide that the contest as to valuation between the Collector and the owner should be determined—and determined judicially—by the Principal Civil Court or a Judicial Officer (and not an officer of Government occupying the same position as the Collector who in these proceedings is an agent of Government). The Act also provided that this decision would be open to review on questions of fact by the High Court. The object of authorising the Local Government to appoint Special Judicial Officers is well-known. In practice a Special Land Acquisition Judge is only appointed when land is acquired in any district on an extensive scale, so that the references against the Collector's awards may not be taken to the Ordinary Civil Courts and the current business of these Courts thus seriously blocked.

BUT FOR THE DEFINITION OF "COURT" IN sec. 3 of the Land Acquisition Act the references would undoubtedly lie to the Court of the Munsif, or the Subordinate Judge or the District Judge, as the case might be, according to the value of the interest in dispute, and but for sec. 54, an appeal would lie from the award of the Munsif or of the Subordinate Judge when the value fell below Rs. 5,000 to the District Judge and a second appeal to the High Court. Except in so far as by sec. 21, the scope of the inquiry is restricted to a consideration of the interests of persons affected by the objections—and thus indirectly by the terms of the reference and perhaps also of the declaration (sec. 6)—it can be hardly urged with any show of reason that the Act contemplates the setting up of special Courts with special jurisdictions outside the scheme of Courts established by the Civil Courts Act, and governed in matters of procedure by the provisions of the Civil Procedure Code, including sec. 110 of that Code (Act V of 1908). This would also appear to be so by reference to sec. 4 of the Code. Secs. 3 and 54 of the Land Acquisition Act therefore never contemplated placing any restrictions on the ordinary rights of appeal under the provisions of the Civil Procedure Code to the King in Council. These sections, as we have already seen, were in fact intended to confer on the claimant in all cases the privilege of carrying the matter in first appeal before the High Court and obtaining its judgment on the evidence irrespective of the value at stake.

THAT THE JUDICIAL COMMITTEE HAVE DRAWN a contrary inference from those provisions of the Act is due, it seems to us, to their taking the provisions of the sections mentioned and of sec. 53

in particular piecemeal and placing their interpretation on the language of those sections without reference to the context. Sec. 53 lays down that "save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under the Act." The saving clause of this section was obviously added to guard against any conflict between the Code and the special provisions of the Act. There is no provision made in the Civil Procedure Code to regulate the procedure on a reference like that made under sec. 18 of the Land Acquisition Act. The provisions of the Civil Procedure Code have in view the institution of a suit by a Plaintiff and a resistance thereof by a Defendant, and can therefore apply only by analogy to proceeding before the Court to which a reference has been made against a Collector's award.

THIS, IT SEEMS TO US, AFFORDS A SUFFICIENT explanation for the enacting of sec. 53. That this is the only explanation, is further borne out by the analogous provisions of secs. 55, 83 and 86 of the Probate and Administration Act. If the decision of the Privy Council in the case under notice be correct then we may reasonably apprehend that the next appeal that is taken before the Judicial Committee in a matter arising out of a proceeding under the Probate and Administration Act might also be thrown out as incompetent—a contingency which few lawyers and fewer litigants will contemplate with equanimity.

AFTER WHAT WE HAVE SAID ON THE TRUE INTERpretation of the scope and provisions of the sections of the Land Acquisition Act already referred to, it seems hardly necessary to add further comments on the use of the expression "arbitration" and "arbitrator" in connection with the award of the judges on a reference by the Collector. Sec. 18 makes it clear that a reference may be demanded as well on a question of the preferential right of one amongst several rival claimants to the compensation awarded or of the apportionment thereof between them, as on the question of the amount of the compensation due to the owners from Government; that the reference may arise as often out of a contest between the Collector and the owner as out of a contest between co-owners, and that recourse is had to the Court solely in order to have these disputes judicially determined, subject, as provided by sec. 54, to an appeal on facts to the High Court. To describe the proceeding before the Court as "arbitration" and the Judges as "arbitrators" is surely not warranted by the provisions of the Act or the procedure followed in such cases.

IT MAY BE SAID THAT AFTER ALL NO HARM WILL be done by this decision as it will be always open to the Judicial Committee to grant special leave to appeal. But the concluding paragraph of their Lordships' judgment would dispel any doubt with regard to the matter. Their Lordships go on to say:

It is impossible to conceive anything more inconvenient than that a Court in this country should be called upon to review the determination of arbitrators as to the value of a piece of land in India—a mere question of fact—without the advantage of any local knowledge or the privilege, if it be a privilege, of seeing the cloud of witnesses who engaged the attention of two Judges of the Chief Court of Lower Burma for 45 days, or even the opportunity and the interest of viewing a property the value of which seems so extraordinarily difficult to discover.

The right of appeal always ensures a very careful consideration of both the fact and the law by the Courts below. Very large private interests are involved in these cases and Government being a a party to them, it is very desirable that the right of appeal to the Judicial Committee should not be taken away in Land Acquisition cases. But if matters continue to be disposed of by the Judicial Committee in the manner they are being disposed of, of late, the taking away of the right of appeal will be more of an advantage to suitors than otherwise.

IT IS NO DOUBT CONCEIVABLE THAT WHEN IT IS not a mere question of fact or a mere question of the "value of a piece of land in India," their Lordships may feel disposed to entertain an application for special leave to appeal. But the Civil Procedure Code as also long-established practice of the Board have led people to believe that an appeal will lie as a matter of right whenever the value of the suit is Rs. 10,000, or upwards, provided there are not concurrent findings of facts by Courts in India. Land Acquisition cases often involve claims far exceeding that value, and we cannot conceive why the Board should feel deterred from taking up Land Acquisition appeals for hearing on the same terms as other appeals. The argument advanced in the paragraph quoted above, if pushed to its logical consequences, would shut out all appeals on facts from India to the Judicial Committee. The gravity of principles above laid down can scarcely be exaggerated and the curtailment of the jurisdiction of the Privy Council especially in cases where the Government is a party is sure to be felt as a serious grievance by the people.

Review.

INTRODUCTION TO THE REGULATIONS OF THE BENGAL CODE. *By C. D. Field. Calcutta : Messrs. S. K. Lahiri & Co.*

Field's *Regulations of the Bengal Code* is

still a standard work to which a practitioner or a Judge cannot but refer with profit to guide him through the intricacies of land tenure in Bengal. The only pity is that a valuable work like this has been allowed to grow out of date. By far the most valuable part of the late Mr. Justice Field's work was however his introduction which has now been republished in the volume before us, evidently to supply the needs of students for the B. L. degree for whom it has been made a text-book.

In this little book we find not only a careful and detailed account of the land tenures prevailing in Bengal but also one of the growth of the entire judicial system of Bengal from out of the system as it prevailed in the days of the Mahomedan Rule. This latter part of the work was the result of patient industry and researches of the late Mr. Justice Field and it will always be read as a statement of the facts of a most important chapter in the legal history of British India.

The Calcutta University is to be congratulated for having selected this book as a text-book for the B. L. Examination. A study of this work will not only give students a good grounding in the complicated land system of Bengal and an insight into the modern legal history of Bengal, but may stimulate in some a spirit of research and lead to the further clearing up of an obscure portion of Indian History—the history of the transition from Moslem to British Rule.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CARNDUFF AND IMAM, JJ. REVISION No. 958 OF 1911. HARGOURI ROY AND OTHERS, Petitioners *v.* THE EMPEROR. 8th August 1912.

Criminal Procedure Code, secs. 190, cl. (e), 191.

The complainant in this case made some allegations of general ill-treatment against the Petitioners before the Sub-Divisional Magistrate of Jamooi while he was on tour. The Magistrate without examining the complainant held a judicial enquiry into the matter in the course of which the complainant and several witnesses were examined. As a result after enquiry the Magistrate selected one instance of ill-treatment and summoned the Petitioners under sec. 374, I. P. C., and ultimately convicted them.

The Petitioners moved the High Court and a Rule was issued on the ground that the circumstances under which the Sub-Divisional Magistrate took cognizance of the case showing that cognizance was taken under sec. 190, cl. (c) and the Magistrate not having complied with the provisions of sec. 191, Cr. P. C., the conviction of the Petitioners was liable to be set aside being made illegally and without jurisdiction.

Their Lordships made the Rule absolute on the ground on which it was issued.

Babus Dasarathi Sanyal and *Debendro Narayan Bhattacharya* for the Petitioners..

No one appeared to show cause.

S. C. M. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN AND COXE, JJ. APPEAL FROM APPELLATE DECREE No. 1385 OF 1910. HANIF MONDAL, Defendant, Appellant *v.* BARODA KISHORE ACHARJYA CHOWDHURY, Respondent. 1st August 1912.

Raiyat—Ijaradar, settlement by—Settlement-holder, status of, after expiration of ijara.

The appeal arose out of a suit for rent which was decreed by the Court below. It was found that the village in which the land was situated was let out to an ijaradar and that this ijaradar settled the land in suit with the Defendant in 1297 and collected rent from him at the rate of Rs. 15 odd. The ijara terminated at the end of 1300 and after that the Plaintiff's men continued to collect rent at that rate. In 1304 a registered *kabuliyat* was obtained from the Defendant at the rate of Rs. 30. The only question of importance that arose in the appeal was whether this *kabuliyat* was rendered invalid by sec. 29 of the Bengal Tenancy Act. On this point the Subordinate Judge said that sec. 29 of the Bengal Tenancy Act did not apply as the Defendant had taken settlement of an old tenant's land which he did not possess before his purchase. The Defendant at the time when he executed the *kabuliyat* had been a raiyat on this land for 7 years.

Held, if an ijardar gave a settlement of a holding to any one, that person became a raiyat on the land.

Atal Chandra Rishi v. *Lakhi Narain Ghose* (10 C. L. J. 55) referred to.

The case was remanded for decision whether he was a settled raiyat of the village or not.

Babu Kumar Sankar Roy for the Appellant.

Babu Chandra Kanta Ghosh for the Respondent.

A. T. M. *Case remanded.*

[PRIVY COUNCIL.]

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

LORD MACNAGHTEN.
LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1912,
Heard, 26, June.
Judgment, 16, July.

THE RANGOON BOTATOUNG COMPANY, LIMITED,
v.
THE COLLECTOR, RANGOON.

Land Acquisition Act (I of 1894), secs. 18, 53, 54—High Court's decision on reference against valuation of Collector, if appealable to Privy Council—Appeal, right of, not given by express enactment, if may be assumed—Court of reference, position of, that of arbitrators—Decision on award—Valuation, question of, appeal to Privy Council on, inconvenience of.

Appellants whose land had been acquired for public purposes under the provisions of the Land Acquisition Act, being dissatisfied with the Collector's valuation sought a reference under sec. 18 to the "Principal Court of Original Jurisdiction" which in this case was the Chief Court of Lower Burma. The reference was heard and dismissed by a Bench of two Judges of that Court:

Held—*That no appeal lay from that decision to the Privy Council.*

Sec. 53 of the Land Acquisition Act makes the Code of Civil Procedure applicable only to proceedings before the Court of Reference, and sec. 54, to proceedings in the course of an appeal to the High Court—a special and limited appeal given by the Act from the award of the Court of Reference. The force of sec. 54 is exhausted when the appeal to the High Court is heard, and no further right of appeal is given by the Act.

A claimant in Land Acquisition proceedings does not, once he is admitted to the High Court, acquire all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to the Privy Council, as if it were a decree of the High Court made in the course of its ordinary jurisdiction.

An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment.

SANDBACK CHARITY TRUSTEES *v.* THE NORTH STAFFORDSHIRE RAILWAY COMPANY (1) *referred to.*

This was an Appeal from an award of the Chief Court of Lower Burma, dated the 11th day of May 1908. The facts were briefly as follows:—

By a Notification, dated 1st March 1906, which was published in the *Burma Gazette* of the 3rd March 1906, the Local Government took action to acquire certain lands under the provisions of the Land Acquisition Act (I of 1894) for and on behalf of the Port Commissioners. These lands formed three properties belonging respectively to the Rangoon Botatoung Company, Ltd., Sheikh Kadir Baksh, and the British India Steam Navigation Company, Ltd. The Collector made awards, and from these awards the two former owners applied for a reference to the Chief Court. These two references were at the request of the parties heard together, the evidence recorded in the Botatoung Company's case being treated as evidence in Kadir Baksh's case also. The Collector awarded in the case of the Botatoung Company's case Rs. 1,10,000 per acre exclusive of the 15 per cent. statutory allowance, and in Kadir Baksh's case Rs. 1,00,000 per acre exclusive of the same allowance. In both cases the parties agreed as to the amount awarded under all other heads of sec. 23 of the Act, and the

(1) 3 Q. B. D. 1 (1877).

THE RANGOON BOTATOUNG COMPANY, LIMITED v. THE COLLECTOR, RANGOON.

only question for determination was the market value of the lands at the date of the publication of the Notification, that is, on the 3rd March 1906.

The learned Judges of the Chief Court (Hartnoll and Robinson, JJ.) held that the sum awarded by the Collector exceeded the compensation to which the Petitioners were entitled. The Appellants thereupon applied for leave to appeal to His Majesty in Council and the Chief Court granted a certificate that the case fulfilled the requirements of sec. 596 of the Code of Civil Procedure. Hence this Appeal.

The Respondents took a preliminary objection to the hearing of the appeal, namely, that under the provisions of the Land Acquisition Act, 1894, no appeal from the award of the High Court lay to His Majesty in Council.

Mr. Bailhache, K. C., Mr. Sankey, K. C., and *Mr. Jolly* for the Appellants submitted that the preliminary objection was not well-founded. There was no case in which the question was expressly raised and decided, but as a matter of fact such appeals have been entertained and heard by the Judicial Committee. The Land Acquisition Act did not in terms forbid such an appeal. The case came within the provisions of sec. 596, C. P. C. Secs. 53 and 54 of the Land Acquisition Act made the Code of Civil Procedure applicable to such proceedings and an appeal to His Majesty in Council lay under that Code. Reference was made to the following cases to show that such appeals were heard by the Judicial Committee, *Secretary of State* v. *Charles Worth* (2), *Ezra* v. *Secretary of State for India* (3), *Secretary of State for India* v. *India General Steam Navigation Company, Ld.* (4).

Mr. Buckmaster, K. C., and *Mr. Sargant* for the Respondent submitted that the Appellants had no right of appeal to His Majesty in Council. No such appeal was provided for by the Land Acquisition Act. There was no appeal from an award. An appeal lies only from "a decree or order" and an award is neither of them. Reference was made to secs. 3, 4, 11, 18, 21, 23, 31, 51, 53 and 54. Sec. 18 provided for a reference only and sec. 54 for the first time gives a right of appeal to the High Court. The Act provided for one appeal only and no more.

[MR. AMEER ALI.—If the reference were heard by one Judge of the Chief Court, would there have been an appeal ?]

Yes. There would have been one to the High Court. But the case having been heard by two Judges the right has merged. The only question for determination is the market value of the land and it was reasonable to believe that the Legislature intended that the awards of the Judges in India (who being on the spot were more fitted to judge such matters) should be final. The proceedings are in the nature of an arbitration. The Appellants must show that they had a right to appeal under some statute. Reference was made to *Sandback Charity Trustees* v. *The North Staffordshire Railway Company* (1), *Expatte County Council of Kent* (5), *In re Knight* (6), *Burgess* v. *Morton* (7).

Mr. Bailhache in reply. There was a right of appeal under sec. 54 of the Land

(1) 3 Q. B. D. 1 (1877).
(2) [1901] App Cas. 373.
(3) L. R. 32 I. A. 93 : s. c. 9 C. W. N. 454 1905).
(4) L. R. 36 I. A. 204 : s. c. 14 C. W N. 134 (1909).
(5) [1891] 1 Q B. 725, 726.
(6) [1892] 2 Q. B 613, 617.
(7) L. R. [1896] A. C. 136, 141 (1895).

THE RANGOON BOTATOUNG COMPANY, LIMITED *v.* THE COLLECTOR, RANGOON.

Acquisition Act to the High Court, and thereafter the Code of Civil Procedure regulated the proceedings. The Appellants have taken the two steps that were necessary.

Their Lordships intimated that they would give effect to the preliminary objection and would deliver their reasons later on.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—In this case a preliminary objection was taken to the Appeal. Having heard the point fully argued, their Lordships came to the conclusion that the Appeal was incompetent and they intimated that on that ground they would humbly advise His Majesty that the Appeal should be dismissed with costs.

The Appeal purported to be an appeal as of right from an award of the Chief Court of Lower Burma. Some land belonging to the Appellants had been taken for public purposes under the provisions of the Land Acquisition Act, 1894. In due course the Collector made his award. The Appellants did not accept it. They were dissatisfied with the amount of the Collector's valuation. On that ground and on that ground only they demanded, as they were entitled to do, that the matter should be referred to the Court under the provisions of the Act. The expression "the Court" in the Act is defined as meaning "a principal Civil Court of Original Jurisdiction." The reference was taken by two Judges of the Chief Court. They sat as "the Court" and also as the High Court to which an appeal is given by the Act from the award of "the Court." The hearing of the reference occupied 45 days. More than 100 witnesses were examined. A vast mass of documents was put in and the learned Judges at the request of the parties viewed the premises. Then they made an exhaustive award dealing minutely with the evidence, and they held that the award of the Collector had given the Appellants "all and probably more than the full market value of their property," and so they dismissed the reference with costs. They were precluded by the Act from awarding less than the amount awarded by the Collector.

It was admitted by the learned Counsel for the Appellants that it was incumbent upon him to show that there was a statutory right of appeal. As Lord Bramwell, then Bramwell, J., observed in the case of the *Sandback Charity Trustees* v. *The North Staffordshire Railway Company* (1): "An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment." A special and limited appeal is given by the Land Acquisition Act from the award of "the Court" to the High Court. No further right of appeal is given. Nor can any such right be implied. The learned Counsel for the Appellants relied both on sec. 53 and sec. 54 of the Act. Sec. 53 enacts that, "save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act." That enactment applies to an earlier stage in the proceedings and seems to have nothing to do with an appeal from the High Court. Sec. 54 is in the following terms:—

"54. Subject to the provisions of the Code of Civil Procedure applicable to appeals from origi-

(1) 3 Q. B. D. 1 (1877).

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nal decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under this Act."

That section seems to carry the Appellants no further. It only applies to proceedings in the course of an Appeal to the High Court. Its force is exhausted when the Appeal to the High Court is heard. Their Lordships cannot accept the argument or suggestion that when once the claimant is admitted to the High Court he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction.

It is impossible to conceive anything more inconvenient than that a Court in this country should be called upon to review the determination of arbitrators as to the value of a piece of land in India —a mere question of fact—without the advantage of any local knowledge or the privilege, if it be a privilege, of seeing the cloud of witnesses who engaged the attention of two Judges of the Chief Court of Lower Burma for 45 days, or even the opportunity and the interest of viewing a property the value of which seems so extraordinarily difficult to discover.

Solicitors: *Messrs. Arnold* *Son* for the Appellants.

Solicitors: *Messrs. Coward & Co.* for the Respondent.

B. D. *Appeal dismissed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 533 OF 1910.

CHAUDHURI, J. 1912, 6, May. } SM. KHETTERMONI DASSI *v.* SM. KADAMBINI DASSI.

Hindu Law—Inheritance—Widow's right to inherit—"Malignant hostility" to husband, if disqualifies a widow from inheriting—Hostility, meaning of.

The only qualification necessary for a widow to entitle her to succeed to her husband is physical chastity.

Where a wife refused to come to her husband's house when sent for after he had married for a second time:

Held—*That such conduct was not evidence of such hostility to her husband as disentitled her to her inheritance where there was no evidence of any misconduct.*

This was a suit for partition brought by the Plaintiff, a widow of one Nilmoni Dey, who died on 22nd May 1910, against her co-widow, the Defendant.

The facts of the case will appear from the judgment.

Messrs. B. C. Mitter and *N. Sircar* for the Plaintiff.

Messrs. B. Chakravarti, A. N. Chaudhuri and *M. N. Basu* for the Defendant.

The JUDGMENT OF THE COURT was as follows:—

This is a suit brought by a Hindu widow against her co-widow, for partition of the estate of her husband Nilmoni Dey, who died on the 22nd May 1910. The Plaintiff was married in January 1860 and the Defendant in 1866. It is admitted that these are the only two heirs whom he left him surviving. The Defendant, however, questioned the Plaintiff's right to succeed on the ground that

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she bore "malignant hostility and bitterness towards her husband all through her life." It has been strenuously argued on behalf of the Defendant that, under the Hindu Law, she is under the circumstances not entitled to succeed. The contention, as I have understood it, is this. That the word *Patni* (पत्नी) in the text of Yajnavalkya, II, 136-137, means lawfully wedded wife, one married according to one of the approved forms of marriage. The word etymologically means a wife who is an indispensable associate of her husband in religious rites and observances. That being so, she must be a *sadhwi* [साध्वी]. which is defined in Manu thus :—

पतिं या नाभिचरति मनोवाग्देह संयता ।
सा भर्तृलोकमाप्नोति सद्भिः साध्वीति चोच्यते ॥
Manu V, 165.

The passage is rendered by Sir William Jones thus—"While she who slights not her lord, but keeps her mind, speech and body devoted to him attains her heavenly mansion and is called *sadhwi* by good-men." I may mention that Haughton in his Institutes of Manu, Ed. 1825, p. 372, refers to this couplet and the next one as not found in the three copies of *Medhatithi* that he had the opportunity of consulting. These couplets, however, appear in Kulluk Bhatta's commentaries, and we may proceed upon the basis that they are not interpolations. His note is as follows :—

वाङ्मनसाभ्यामपि पतिं न व्यभिचरेदितिविधा नार्थो देहिकव्यभिचारनिहत्तेरुक्तायाः अनुवादः ॥

namely, that so far as Vak and Manas, speech and mind, are concerned this verse contains the *Vidhan* (विधान) and that so far as the body is concerned, the mention of it is an *Anuvad* (अनुवाद) a repetition, superfluous or self-evident. It has to be remembered that the *Manava Dharma Shastra* (मानवधर्मशास्त्र) is a book of mixed religion, morality and law, and in a great many instances contains appeals to one's moral side and it is impossible to accept the whole of it as a legal thesis. These couplets occur in a chapter of miscellaneous character, dealing with edibles, impurities, and methods of purification, and finally with rules relating to the duties of women (*stridharma*) and can hardly be looked upon as anything more than directions for regulating one's life, some of them in the way of precepts or moral injunctions. Verse 166 says that a woman by this course of life acquires high renown in this world, and in the next, the same abode with her husband. It is quite clear that the word *sadhwi* has not received the wider meaning that has been given to it in Manu Smriti in dealing with the question of inheritance. In Yajnavalkya the passage about the right of a widow to inherit is the subject of a long commentary. We find that Briddha Manu as there quoted says that "the widow succeeds keeping unsullied her husband's bed, and persevering in religious observances (व्रते स्थिता)." Katyayana is also there quoted "Let the widow succeed to her husband's wealth, provided she be chaste," the word used being *abyabhicharini* (अव्यभिचारिणी), which admits of no ambiguity. Then we find in the Vyavahara Mayukha, sec. 8, Part II, Katyayana is again quoted, followed by a quotation from "Harita" which has been thus translated.

"If a woman, becoming a widow in her youth, be headstrong (suspected of incontinence), a maintenance must in that case be given to her, for the support of life," II Cole. Dig. 536 ccccix. The word used is (कर्कशा) which has been

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translated as headstrong (suspected of incontinence)– Sankitavyabhicharaya—See Viramitrodaya, Ch. III, Part I, sec. 10. In Vivadachintamani, Harita is again quoted. The passage has been thus translated "If a young widow is untractable," &c., II Cole. Dig. 538 ccccix. The commentator says that the chaste wife is entitled to the property. In the Vishwakosa one of the meanings given to the word *Karkasa* is "unchaste"·"*Vyabhicharini.*" In Saraswati Vilash, § 528, Vishnu is quoted thus: "The share allotted to women who trangress their limits may be resumed"—"who trangress their limits" means "unchaste." Narada is quoted. The passage has been thus translated "His women if they keep their husband's bed inviolate shall be maintained till their death, but if they do not they shall not be." Narada xiii, 26.

In the Dayabhaga these passages from Briddha Manu and Katyayana are quoted, and also another from Vyasa which has been thus translated, "after the death of her husband let a virtuous woman observe strictly the duty of continence," Dayabhaga, Chap. XI, sec. 1, § 43, II Cole. Dig. 528 cccc. I do not think there is any doubt whatsoever that the only disqualification for a widow to inherit her husband's estate is that one of physical unchastity. To give it a more extended sense, that she forfeits her right or does not become entitled to inherit unless she has kept her mind, speech and body devoted to her husband is not justified by the interpretation which has been put upon the passages quoted. This is also the meaning put upon them by Srikrishna in his commentary. He says *sadhwi* [साध्वी] means "not adulterous." As regards the authority of Srikrishna, Mr. Justice Dwarka Nath Mitter says that "he is considered a greater authority as being superior even to the authority of Dayabhaga." I know that a later commentator of note does not consider Srikrishna of such high authority. But there is no question, it seems to me, upon a comparison of all the commentaries on these passages, that *sadhwi* [साध्वी] means a chaste woman who keeps the bed of her husband inviolate. These passages were elaborately discussed in what is known as the "Chastity Case" by Justice Dwarka Nath Mitter. See *Kery Kolitany* v. *Moneeram Kolita* (1). The question raised and decided in that case was that a Hindu widow who was unchaste was not entitled to succeed. On page 19 of the judgment the following passage occurs: "It has been said that some of the texts quoted above refer to many other virtues besides chastity, and that the argument in favour of forfeiture would be equally strong in the case of the widow's derilictions in respect of those virtues, as in the case of her failure to preserve her chastity. But the answer to this objection is very plain. A chaste widow who has failed to perform her duties to-day may perform them on some future date. But a widow who has once sullied the bed of her lord, not only causes her husband's soul to fall into a region of torment, but becomes from that time absolutely incompetent to do anything for his spiritual welfare." He held that if a Hindu widow failed in her other duties she might expiate and inherit the estate, but their non-performance was not a disqualification.

It has been further argued that, according to Narada XIII, § 21, an enemy to his father पितृद्विट् takes no share of the inheritance, that such disqualification extends to "enmity to the propositus"—

(1) 13 B. L. R. 1 (1873).

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(Golap Shastri's Hindu Law, 4th Edition, page 362) and as all grounds of disqualification which exclude males apply equally as against female heirs (Mitakshara II, 10 § 8, Mayne : 7th Edition, page 811), the Plaintiff in this case is not entitled to inherit. It was further argued that if disobediance and hostility were minor grounds for forfeiture, removeable by penance, the Plaintiff could not inherit until she had performed the prescribed penance, and the case of *Bhola Nath* v. *Mr. Sabitra* (2) was cited in support of the contention, but what the nature of the penance is to be, has not been suggested, and need not be considered. Now the expression पितृद्विष्ट is thus explained in Saraswati Vilash, § 152, "Those who hate their father, *i.e.*, those who say, 'this is not my father, &c.'" For otherwise when the son hates his father because of the latter's partiality, a share is ordained for him.". In the Dayakrama Sangraha, Chap. III, sec. 3, "an enemy to his father" is interpreted as "one who ill-treats his father, during his lifetime, or one who is averse to performing his obsequies when dead." In Vivada Ratnakara, Chap. V, "He who hates his father" is thus interpreted: "He who hates his father is the enemy of his father. Such hatred terminates in compassing the death of the father when he is alive and in refusing to offer for the benefit of his soul libations of water, &c., when he is dead." In Vivada Chintamoni the commentary is: "'Enemy of the father,' one who beats his father while alive and is averse to perform his *sradha*, &c., after his death." In Dayatatwa "an enemy to his father" is said to mean "one who abuses him by beating and the like while he is alive, and who is unwilling to perform his funeral obsequies when he is dead."

Assuming that malignant hostility excludes, there is not a particle of evidence of such or any hostility against the Plaintiff. The only witness was the Defendant herself and most of her evidence was hearsay. She is also shown to be altogether unworthy of credit, as shown by the fact that she claimed properties in her deposition as gifts against her own written statement in this case. All that her evidence comes to is that the Plaintiff refused to come to her husband when sent for. After the husband married a second time, the Plaintiff found it impossible to live with him owing to the treatment she received. That is all that we have against her, which is no evidence of hostility. The expression "*dwesh*" in Narad's text, according to the commentators, means physical violation coupled with a refusal to perform his *sradh*, &c., and one of them says that the hatred must be such as "terminates in compassing the death" of the propositus. I hold that the Plaintiff is not disqualified because she did not live with her husband or even if she refused to live with him and her co-wife. There is no evidence at all that she was guilty of any misconduct, in body, speech or mind.

I therefore declare that she is entitled to inherit the estate of her husband equally with her co-widow. The parties agreed that if I took the view that the Plaintiff was entitled to share the inheritance with her co-widow, the estate to be divided amongst them consisted of Government promissory notes of the value of Rs. 1,09,000 and a house No. 25, Hidaram Banerji's Lane. I direct that the Government securities be divided between them in equal shares. The house is also to be

(2) 6 S. D. 62 (71) (1837).

divided into two equal shares in the usual way. The estate is to be held by them as Hindu widows.

Costs of the hearing of the issues raised will be treated as costs in a partition suit, that is to say, each party will bear her own costs before the decree for partition. All subsequent costs will be according to their respective shares. The Defendant will bear her own costs of the commission and pay the Plaintiff her costs thereof taxed for three sittings only. Costs of the enquiry as to maintenance will be taxed as costs in the cause. The amount due from the Plaintiff on account of Kali Charan Dey is to be debited to her share. All other undisposed of costs will be costs in the cause.

Messrs. Fox and Mondal, Attorneys for the Appellant.

Messrs. T. H. Wilson and K. L. Boral, Attorneys for the Respondent.

Suit decreed.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 697 OF 1911.

FLETCHER, J. 1912, 17, June.

KESRI CHAND KOTHARI *v.* NATIONAL JUTE MILLS CO., LD., and MESSRS. ANDREW YULE & CO.

Plaintiff offering no evidence, if Defendant may prove case in written statement—Civil Procedure Code (Act V of 1908), Or. 9, r. 8.

When the Plaintiff offers no evidence the Court can only dismiss the suit for want of prosecution. In such a case if the Defendant offers evidence in support of his case the Code of Civil Procedure does not provide for such evidence being received. When, however, the Plaintiff has adduced evidence, then notwithstanding that at the close of the Plaintiff's case, the Judge has formed an opinion in the Defendant's favour, the Defendant can insist on calling evidence to prove the case made in his written statement.

EXPARTE JACOBSON, IN RE PINCOFFS (1) *referred to.*

This action was brought for the recovery of the sum of Rs. 2,69,000 from the National Jute Mills Co., Ld., alleged to be the price of jute sold by the Plaintiff to the Co., such jute having been purchased for Rs. 2,42,000 as salved jute from the New Zealand Insurance Co., Ld., of which Messrs. Andrew Yule & Co. were the managing agents. The National Jute Mills Co. in their written statement alleged that they never purchased any jute and Messrs. Andrew Yule & Co. in their written statement alleged that they had never sold any such jute and that the whole of the transactions mentioned in the plaint were false, fictitious and fraudulent and had no existence whatsoever in fact.

On the case being called on, no one appeared for the Plaintiff.

Mr. Norton (*Messrs. Pugh* and *Pearson* appearing with him) for the National Jute Mills Co.

As no one represents the Plaintiff the suit will naturally be dismissed. He would, however, like that some opportunity should be given him to clear the character of his clients against whom certain allegations were made in the plaint. He was prepared to put a witness into the box for the purpose.

Mr. Jackson (*Messrs. Gregory* and *Langford James* with him) for Messrs. Andrew Yule & Co. said that he was anxious to do the same thing, namely, to call a witness.

(1) 22 Ch. D. 312 (1882).

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[FLETCHER, J.—I cannot allow that. You are not called upon to answer a case until the Plaintiff gives evidence.]

Mr. Jackson.—What we want is to clear our character. The effect of disposing of the case like this might give rise to all manner of insinuations and suggestions. Your Lordship may have an application for restoration of the case. Furthermore he had come across an authority—a decision of Jessel M. R. in the Court of Appeal—under which the defence could insist upon evidence being heard, though the circumstances governing that case were not precisely those that prevail here. His contention with regard to the matter was that he was entitled to insist on a portion of his evidence being taken even though his Lordship was prepared to decide in his favour.

[FLETCHER, J.—There is nothing in our Code to suggest any such procedure.]

I submit that our Code does not differ from the English Code. The Judicature Act does not say that you are entitled to do it.

[FLETCHER, J.—There is nothing in the Judicature Act as to the form of trial.]

Your Lordship will permit me to draw your attention to the case. It is a decision of Sir George Jessel sitting in appeal, *Ex-parte Jacobson, In re Pincoffs* (1).

I only bring this matter to your Lordship's notice because it is a matter of considerable importance. We have had all the issues framed with reference to it. There are a number of other suits following this.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—There is nothing to say in this suit. The Plaintiff does not appear

(1) 22 Ch D. 312 (1882).

and Mr. Jackson and Mr. Norton on behalf of the Defendants say that they wish to open their case. That is a procedure which is not contemplated by the Code of Civil Procedure. The decision of Sir George Jessel in *Exparte Jacobson, In re Pincoffs* (1) does not apply to this case at all. That case was that when the Master had heard the evidence given on behalf of the Plaintiff he said he was prepared to decide on the Defendants' side without calling for any evidence to be given for or on behalf of the Defendants. That of course is a position which the Defendant is not bound to take up. Under our Code notwithstanding that at the close of the Plaintiff's case the Judge has formed an opinion in favour of the Defendant, the Defendant can say that he is entitled to give evidence in proof of the case he has made in his own written statement; so that in the case of an appeal there may be no remand but the whole case may be disposed of. That is not a case where the Plaintiff offers no evidence. When the Plaintiff offers no evidence the Court has no jurisdiction except to dismiss the suit for want of prosecution. This case must be dealt with on that footing. The Plaintiff must pay to the Defendant the costs of this suit and of the commission to England on Scale No. 2.

Mr. Jackson.—Will your Lordship also include reserve cost, if any?

THE COURT.—Yes.

Messrs. Fox and Mondal, Solicitors for the Plaintiff.

Messrs. Leslie and Hinds, Solicitors for the Defendants.

A. K. G. *Suit dismissed.*

(1) 22 Ch. D. 312 (1882).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 109 OF 1911.

JENKINS, C. J.
CHAPMAN, J.
1912.
23, April.

PANCH DUAR THAKUR, and another, Judgment-debtors, Appellants,
v.
MANI RAUT, Decree-holder, Respondent.

Civil Procedure Code (Act V of 1908), secs. 2, 47, Or. 21, r. 66—Sale proclamation, valuation for purposes of—Order determining value if appealable.

An order by an executing court under Or. 21, r. 66, of the Civil Procedure Code, determining the valuation of immoveable properties attached and sought to be sold in execution of a decree is not appealable as a decree.

DEOKI NANDAN SINGH *v.* BANSI SINGH (1) *followed.*

This was an Appeal preferred on the 27th of February 1911 against an order of Babu Charu Chandra Mukerjee, Subordinate Judge of Zillah Darbhanga, dated the 20th of January 1911.

The Respondent, decree-holder, applied on the 27th January 1910 for execution of a decree which she had recovered against the Appellants or their predecessor-in-title for Rs. 8,931-1-6 p., and costs amounting to Rs. 897-10 ans. 9 p., and attached certain immoveable properties belonging to the latter the value of which she assessed approximately at Rs. 11,000. The Appellants preferred an objection on the 14th June 1910, alleging that the real value of the property was not less than Rs. 65,000.

On 14th January 1911, the Court recorded the following order: "The judgment-debtors have put in the khatian which is relied upon by both sides. No other evidence is adduced. The decree-holder has filed the copy of the valuation register." On the 20th January 1911, the Court passed the following order: "The pleaders have calculated the value of Bhatgawan on a reference to the valuation-roll and it has been found that its value is Rs. 10,000. I assess the value accordingly. That of Maharajpur is found to be Rs. 28,000. I assess the value accordingly."

(1) 16 C. W. N. 124 (1911).

Against this order the judgment-debtors appealed on the ground that the properties had been undervalued, that the pleader for the Appellants had no hand in calculating the value of the properties, and that the Court below should not have proceeded on the materials prepared by the pleaders for the decree-holder alone, but should have examined the witnesses who were called and tendered in Court and admitted in evidence the documents produced by the Appellants.

Babus Baldeo Narayan Singh and *Jyotish Chandra Sarkar* for the Appellants.

Babu Shib Chandra Palit for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This is an Appeal from an order, and it is objected on the part of the Respondent that no appeal lies. The point in dispute is one that arises under Or. XXI, r. 66, and the only point we have to consider is whether a determination of a matter under that Rule is a decree and as such within sec. 47 and so appealable. There are a number of decisions on the old Code, which favour the view that an appeal lies. On the new Code, however, there is one decision which has been brought to our notice, that is the decision of Mr. Justice Mookerjee in *Deoki Nandan Singh* v.

PANCH DUAR THAKUR *v.* MANI RAUT.

Bansi Singh (1). I am in complete agreement with Mr. Justice Mookerjee's view of this matter, and having regard to the new definition of the word 'decree' in sec. 2, sub-sec. (2) of the Code, I do not feel that it is necessary to go back to the earlier decisions which were based on a different definition.

The result is that, in my opinion, the preliminary objection must prevail, and the Appeal must be dismissed with costs, hearing-fee 3 gold mohurs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1079 OF 1908.

BRETT, J.
CARNDUFF, J.
1912,
27, February.

MAINDI SARDAR and anr., Defendants Nos. 5 and 7, Appellants,
v.
GORA CHAND GHOSH and others, Plaintiffs, Respondents.

Civil Procedure Code (Act XIV of 1882), sec. 332—Delivery of possession to decree-holder—Proceeding under sec. 332, decision under, against decree-holder—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 11, 13, 120, 142.

Where in execution of a decree for possession the Plaintiffs were put in possession of immoveable property and were then dispossessed by reason of a proceeding under sec. 332 of the Civil Procedure Code being decided against them :

Held—*That a subsequent suit by the Plaintiffs to recover possession was governed by Art. 142 of Sch. II of the Limitation Act, and not by Arts. 11, 13, or 120 thereof.*

AYYASAMI *v.* SAMIYA (1) *approved.*

This was an Appeal preferred on the 26th of May 1908 against an order of Babu S. C. Ganguly, Subordinate Judge of Jessore, dated the 15th of February 1908, affirming a decision of Babu Pramatha Nath Bhattacherjee, Munsif of Satkhira, dated the 5th of December 1906.

The suit out of which the appeal arose was for recovery of *khas* possession of certain rent-paying and rent-free lands described in Schedules *ka*, *kha* and *ga* to the plaint, after declaration of Plaintiffs' title by auction-purchase to the same.

The Plaintiffs alleged that the lands in suit belonged to Serajuddy Sheikh and others, the predecessors of the Defendants Nos. 1, 2 and 3, that the interest of the said owners was purchased at auction by Plaintiff No. 1 and his brother one Bonamali Ghosh, deceased, the predecessor of the Plaintiffs Nos. 2, and 3, on 24th November 1879, that the said auction sale was confirmed on the 21st December 1879, and a sale-certificate obtained, that subsequently, on 14th February 1881, the purchasers obtained delivery of possession of the properties through Court and since then were in actual possession of the same, that the Defendants Nos. 1 to 3 having, in August 1891, wrongfully dispossessed the Plaintiffs Nos. 1, 2 and the husband of Plaintiff No. 3, the latter three persons brought a suit for recovery of possession of the said lands and obtained a decree which was upheld up to the High Court, that subsequently they got possession of the properties in execution of the said decree and remained in actual possession of the same until 1311 when the Defendants Nos. 1 to 3 in combination with the other Defendants wrongfully dispossessed them thereform. Hence the suit.

Defendants Nos. 5 and 7 contested the suit alleging *inter alia* that in the exe-

(1) 16 C. W. N. 124 (1911).
(1) I. L. R. 8 Mad. 82 (1884).

cution case No. 104 of 1897, between Plaintiffs Nos. 1 and 2 and Kedar Nath Ghosh, husband of Plaintiff No. 3, on the one hand and the Defendants Nos. 4 to 11 on the other, in the Munsif's first Court at Satkhira, there was a proceeding under sec. 332 of the Civil Procedure Code, and that proceeding was disposed of against the Plaintiffs; that under the circumstances the suit having been instituted more than one year after that decision, was barred by limitation as provided by Arts. 11 and 13 of the Limitation Act.

This contention of the Defendants was overruled by both the lower Courts and the suit was decreed on the merits in the Plaintiffs' favour, whereupon the Defendants preferred this second appeal.

Babu Satindra Nath Mukerjee for the Appellants.

Babus Mohendra Nath Roy and *Harendra Krishna Mookerjee* for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

In support of this appeal, the only argument which has been advanced on behalf of the Appellants is that the lower Courts erred in law in not holding that the suit was barred by limitation. It has first been contended that the lower Courts should have held that the suit was barred under the provisions of Art. 120 of Schedule II of the old Limitation Act (XV of 1877). In this case, an order was passed in favour of the present Appellants under sec. 332, C. P. C., on the 7th August 1897, and the present suit was instituted on the 16th December 1905. It is contended that the suit was barred under the provisions of Art. 120 of the Limitation Act, because it was not brought within six years from the date of the order passed under sec. 332, C. P. C. In our opinion, this contention cannot prevail. The suit which has been brought by the Plaintiff is a suit for possession of immoveable property after establishment of title and for such a suit limitation was provided by Art. 142 of Schedule II of Act XV of 1877. Under that article, the period of limitation is twelve years and the suit has been instituted within that period.

It has next been contended that, if Art. 120 does not apply, Art. 11 or Art. 13 of the Second Schedule of Act XV of 1877 would apply. As to this argument, we have only to observe that in Art. 11 no mention is made of orders under sec. 332, though orders under other sections are mentioned, and that that article has clearly no application to an order under sec. 332. As regards the application of Art. 13, it is only necessary to observe that, under the provisions of sec. 332 of the Civil Procedure Code, 1882, the suit which the Opposite Party had to bring, was a suit to establish his right to the property, and not a suit to set aside the order under sec. 332. Art. 13 of Schedule II of the old Limitation Act, therefore, cannot apply, and this, in fact has been held by the Madras High Court in the case of *Ayyasami* v. *Samiya* (1). The points taken on the ground of limitation, therefore, fail.

Another point which has been taken is that, as the Appellants were not parties to the suit in execution of the decree in which the Plaintiffs are alleged to have taken symbolical possession, they are not bound by that proceeding, and that the Plaintiffs, by reason of that fact, are not entitled to claim that they are saved from the bar of limitation. This point, however, was not considered by the lower

(1) I. L. R. 8 Mad. 82 (1884).

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Appellate Court, and there is a finding by that Court in the following words:—"I have no doubt that the Plaintiffs had actual and not constructive possession." That is a finding of fact which precludes us from taking up that point in second appeal.

The result, therefore, is that the points taken in support of the appeal fail and the Appeal is dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1255 OF 1910.

CARNDUFF, J. CHAPMAN, J. 1912, Heard, 5 and 6, June. Judgment, 6, June.	BANGA CHANDRA NANDI, Defendant, Appellant, *v.* TARA KINKAR PAL, Plaintiff, Respondent.

Public Demands Recovery Act (I, B. C., of 1895, as amended by Act I, B. C., of 1897), sec. 19, sub-sec. (2)—Suit to declare Defendant's puchase of land at certificate sale benami *for Plaintiff, if maintainable—Civil Procedure Code (Act IV of 1882), sec. 317, if applies.*

By virtue of sub-sec. 2 of sec. 19 of the Public Demands Recovery Act, 1895, as amended by Act I, B. C., of 1897, the provisions of sec. 317 of the Civil Procedure Code of 1882 (which correspond with those of sec. 66 of the Code of 1908) apply to the case of a purchaser at a sale in enforcement and execution of a certificate issued under the Public Demands Recovery Act and a suit by the Plaintiff for a declaration that the Defendant's purchase of certain lands in execution of such a certificate was **benami** ***on behalf of the Plaintiff was barred by the provisions of sec. 317 of the Civil Procedure Code of 1882.***

AMBIKA PROSAD *v.* GOPAL BUKSH DAS (3) *not followed.*

HARI CHARAN SINGH *v.* CHANDRA KUMAR DEY (4) *followed.*

This was an Appeal preferred on the 30th of March 1910 against the decree of Babu Danda Dhari Biswas, Subordinate Judge of Zillah Chittagong, dated the 17 h of December 1909, reversing the decree of Babu Narendra Nath Neogy, Munsif of Coxe's Bazar, dated the 28th of April 1909.

The Plaintiff alleged that the Defendant who was his tehsildar purchased the lands in suit at a cerficate sale with Plaintiff's money and *benami* for Plaintiff, that although kabuliyats had been nominally taken from the tenants in Defendant's name, the lands had been, ever since the purchase, in Plaintiff's possession, that Defendant having been recently dismissed by the Plaintiff for misconduct had commenced interfering with Plaintiff's possession and was trying to set up his own right in the lands. Plaintiff prayed for declaration of his title, and for *khas* possession in case Defendant should deny Plaintiff's present possession.

The Defendant in reply asserted his own title by purchase and possession and further urged that sec. 317 of the Civil Procedure Code of 1882 was a bar to the suit.

The Munsif found in Plaintiff's favour on the merits but held that the suit was not maintainable by virtue of sec. 317 of the Civil Procedure Code. The Subordinate Judge on appeal agreed with the Munsif's findings on the merits and decreed the suit holding sec. 317 of the Civil Procedure Code to be inapplicable.

(3) 1 C. L. J. 550 (1901).

(4) I. L. R. 34 Cal. 187: s. c. 11 C. W. N. 745 (1907).

BANGA CHANDRA NANDI *v.* TARA KINKAR PAL.

The Defendant preferred this second Appeal.

Babu Khitish Chandra Sen for the Appellant.

Babu Dhirendra Lal Khastgir for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

CARNDUFF, J.—The short point raised by this appeal is as to whether the provisions of sec. 317 of the Code of Civil Procedure, 1882, which correspond with those of sec. 66 of the Code of 1908 and bar a suit against a certified purchaser buying *benami* at a sale in execution of a decree, apply to the case of a purchaser at a sale in enforcement and execution of a certificate issued under the Public Demands Recovery Act, 1895 (Being Act I of 1895), by virtue of sub-sec. (2) of sec. 19 of the said Act.

The application to such certificates of sec. 244 of the old Code, in Chap. XIX of which both that section and sec. 317 find place, has been the subject of a number of conflicting decisions. Thus, in *Umedali Bhuya* v. *Rajlakshmi Debya* (1), Brett and Woodroffe, JJ., held that sec. 244 was applicable; whereas in *Raghubans Sahai* v. *Ful Kumari* (2), Harington and Mookerjee, JJ., ruled that it was inapplicable. But as regards sec. 317 there is, so far as I know, only one reported case, namely, that of *Ambika Prosad* v. *Gopal Buksh Das* (3), in which Banerjee and Rampini, JJ., expressed an opinion against the applicability of the provision. That opinion, however, was really an *obiter dictum*, the case having been decided on other grounds, and the learned Judges were then construing sub-sec. (2) of sec. 21 of the Public Demands Recovery Act of 1895, as it was enacted in the first instance, when it ran as follows:—The procedure prescribed in Chap. XIX (with the exception of sec. 310A) shall, so far as it is applicable, be the procedure followed in execution proceedings to enforce such certificate and realise the amount recoverable thereunder.

Sec. 19, sub-sec. (2), which has, by sec. 12 of the Bengal Public Demands Recovery (Amendment) Act, 1897, (Bengal Act I of 1897), been made to take the place of the earlier provision, is, however, very differently expressed in these terms:—

"Such certificate may be enforced and executed in the manner provided by Chap. XIX of the Code of Civil Procedure for the enforcement and execution of decrees for money; and all the provisions of that chapter, except sec. 310A thereof, shall apply so far as they are applicable."

Now the words of the present provision seem to me to be perfectly clear, and I would construe them exactly as they were construed by Woodroffe, J., in *Hari Charan Singh* v. *Chandra Kumar Dey* (4). They begin by declaring that certificates are to be enforced and executed as if they were decrees for money under the Civil Procedure Code; and then they go on expressly to render applicable, so far as may be, all the secs. 223 to 343 to be found in Chap. XIX of that Code, with one carefully specified exception. What we are now asked by the learned Vakil for the Respondent to do is to qualify the latter part of the enactment by in-

(1) 10 C. W. N. 130: s. c. 1 C. L. J. 538 (1905).

(2) 1 C. L. J. 542 (1905).

(3) 1 C. L. J. 550 (1901).

(4) I. L. R. 34 Cal. 787, 808: s. c. 11 C. W. N. 745 (1907).

serting the words "for the enforcement and execution of a decree" after the words "that chapter," or by adding after the word "applicable" the words "for the enforcement and execution of a decree." I think that it is not open to us to do anything of the kind. It seems to me, indeed, that the only argument in favour of the Respondent's view is that mentioned by the lower Appellate Court, namely, that if sub-sec. (2) of the new sec. 19 be sufficient to draw all the provisions of Chap. XIX of the old Code, then the new sec. 20, which explicitly applies to secs. 311 and 313 of that chapter, becomes superfluous. But that is an argument which, standing alone, seems to me to carry but little weight : it is useful only as an additional argument where there are already others to be supported. For it is well known that the Legislature, sometimes it may be *per incuriam*, and sometimes doubtless *Pro majori cautelâ* not infrequently commits itself to redundant provisions; and, if the construction which I have indicated makes sec. 20 of the amended Act superfluous, my reply is that the construction for which the learned Vakil for the Respondent contends, reduces the latter part of sub-sec. (2) of sec. 19 to a similar superfluity. In other words, if the latter part of that sub-section is to be read as limited to such provisions only as bear upon enforcement and execution, then it carries the earlier part not a step further.

In my view the only limitation upon the application of any of the provisions (other than those of sec. 310A) contained in Chap. XIX of the old Code is that imposed by the words "so far as they are applicable," and I can find nothing in sec. 317 of that Code in any sense inapplicable to a purchase at a sale in execution of a certificate. On the contrary, its provisions are salutary and appropriate, and there is no difficulty whatever in applying them *mutatis mutandis*, to purchasers at such sales.

The result is that the Respondent's suit was, in my opinion, rightly dismissed by the original Court. This Appeal must, therefore, be allowed, the decree of the lower Appellate Court discharged, and that of the Court of first instance restored, with costs throughout.

CHAPMAN, J.—I agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

S. A. No. 1304 OF 1910.

STEPHEN, J.
RICHARDSON, J.
1912,
Heard, 2, May.
Judgment,
14, June.

BATUK NATH MANDAL, and on his death his heirs and legal representatives DWARKA NATH MANDAL and others, Plaintiffs, Appellants,
v.
BEPIN BIHARI CHAUDHURI, Defendant, Respondent.

Indian Contract Act (IX of 1872), sec. 69—Decree for rent against recorded tenant who had sold his share before the whole of the amount sued for fell due—Sale in execution set aside by deposit by a co-sharer—Latter's right to recover from recorded tenant—Contribution, suit for—Suit brought after recorded tenant ceased to own any interest in the tenure if suit of Small Cause Court nature—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41—Second appeal—Civil Procedure Code (Act V of 1908), sec. 102, Or. 21, r. 89.

Plaintiff owned a 3/7th and the Defendant No. 1 a 2/7th share in a tenure. In the beginning of 1308, B. S., the latter transferred his share to a stranger. Thereafter the landlord sued Defendant No. 1, who was the sole recorded tenant, for arrears of

rent for the years 1307 and 1308 and had the tenure sold. The sale was set aside under sec. 310A, Civil Procedure Code, (1882), upon the application of the Plaintiff who deposited the whole amount with the statutory compensation to the purchaser. Subsequently he sued for recovery of two-sevenths of the sum deposited from the Defendant No. 1 without making the latter's vendee a party or asking any relief from him :

Held—*That the Defendant as the recorded tenant was "bound by law" to pay the amount of the decree passed against him, within the meaning of sec. 69, Contract Act, and the Plaintiff as a person interested in the payment of the debt within that section was entitled to be reimbursed by the Defendant No. 1 ; and the fact that he had transferred his share before the arrears for 1308 accrued due was no defence against the portion of the claim which related to that year.*

Held further—*That the fact that at the date of the institution of the suit the Defendant No. 1 had no interest in the tenure did not put the case outside the scope of Art. 41 of the Second Schedule of the Provincial Small Cause Courts Act, and the provisions of sec. 102 of the Civil Procedure Code of 1908, restricting the right of second appeal, did not apply to it.*

KRISHNA v. GOPI (1) *explained* and *distinguished.*

Quære :—*Whether the Plaintiff was in law entitled to recover more than 2/7th from the Defendant No. 1.*

This was an Appeal preferred on the 4th of April 1910 against the decree of Babu Jogendra Nath Bose, Additional Subordinate Judge of Zillah Rajshahye, dated the 17th of May 1909, modifying the decree of Babu Jadav Chandra Bhattacherjee, Munsif of Nattore, dated the 16th of May 1908.

The Plaintiff, the Defendant No. 1 and some others were co-sharers of a *putni* down to the end of 1307. At the end of 1307, the Defendant No. 1 sold his interest to Raja Ramoni Kanta Roy of Chowgram by a registered *kobala*. The name of the purchaser not having been registered in the *sherista* of the zemindar, the latter brought a rent suit (being Suit No. 356 of 1902) on account of the rent of the *putni* for the years 1307 and 1308 against Defendant No. 1 alone. A decree for Rs. 346-7½ annas was passed *ex parte* in that suit. The zemindar then executed the decree and brought the *putni* tenure to sale. The Plaintiff thereafter had the sale set aside on paying the decretal money with costs and interest plus the purchaser's compensation. The Plaintiff instituted the present suit to recover Rs. 146-2-4 pies from the Defendant No. 1 as the sum proportionately due on account of his share of the property. The other co-sharers, it was stated, had paid their shares of the debt to the Plaintiff. The Defendant No. 1 did not dispute the allegation of the Plaintiff and did not also deny that the amount claimed was due on account of the share of the property which belonged to him down to the end of 1307. But his contention was that as he had parted with the property, he was no longer liable to contribute, and that the amount should be realised from Raja Ramoni Kanta Roy of Chowgram who ought to be made a party to this suit.

The Munsif passed a decree for the claim in full but on appeal the Subordinate Judge held that the Defendant No. 1 was not bound to reimburse the Plaintiffs in respect of whatever fell due during the

(1) I. L. R. 15 Cal. 652 (F. B.) (1888).

BATUK NATH MANDAL *v.* BEPIN BIHARI CHAUDHURI.

year 1308. The Plaintiff preferred this second Appeal.

Babu Rama Kanta Bhattacharyya for the Respondents took a preliminary objection to the hearing of the appeal. The appeal was valued at Rs. 75 and the suit being cognizable by the Court of Small Causes, there was no second appeal. The suit was not exempted under Art. 41 of the Sch. II to the Small Cause Courts Act. *Krishna* v. *Gopi* (1).

Babu Jotindra Nath Lahiri for the Appellants submitted that the suit clearly fell under the exception of Art. 41. *Krishna* v. *Gopi* (1) does not apply under the new Act. The decision was obsolete. Relied upon *Bhatoo Singh* v. *Ramoo Mahton* (2).

[RICHARDSON, J.—But you are not a co-sharer in respect of the rent for the year 1308.]

The nature of the suit is to be determined by the pleadings. The portion of my claim for the year 1307 was certainly not cognizable by the Small Cause Court, and I could not split up my cause of action. The liability was under a decree. The Defendant cannot get behind his liability as determined by the decree obtained by the landlord. It was not open to him now to say that he had parted with his interest in the tenure. All those defences he could take only when the landlord brought his suit for arrears against him alone. Besides we do not know what his covenants with his vendee may be. It may be that he stipulated to clear up all arrears. The *kobala* is not before your Lordships. I was interested in the payment and the suit clearly comes within the broad terms of sec. 69 of the Contract Act. The provisions of the Contract Act are not exhaustive with regard to suits for contribution. See *Ajodhya Singh* v. *Jamroo Lal* (3), *Umesh Chandra* v. *Khulna Loan Co.* (4). *Manindra Chandra* v. *Jamaher Kumari* (5) also is in my favour.

Babu Rama Kanta Bhattacharyya.—I did not derive any benefit. I had already parted with my interest. The landlord should have made the purchaser a party.

Babu Jotindra Nath Lahiri in reply.

The JUDGMENT OF THE COURT was as follows :—

STEPHEN, J—The Plaintiffs and others including the Defendant No. 1 were co-sharers in a certain putni tenure, the share of the Plaintiff being three-sevenths of the whole and that of the Defendant No. 1 two-sevenths. It appears however that the name of the Defendant No. 1 was alone recorded in the landlord's books as the holder of the tenure. The tenure, therefore, so far as the landlord was concerned was represented by that Defendant. In that state of things in the year 1307 the latter sold his share of the tenure to a stranger who is not a party to the suit, and the case has been argued on the footing that the share passed to the vendee with effect from the beginning of the year 1308. Subsequently the landlord brought a suit for recovery of arrears of rent of the tenure in respect of the years 1307 and 1308, and no steps having been taken for the rectification of the landlord's books in which the name of the Defendant No. 1 still stood as the holder of the tenure, the suit was brought and a decree was obtained against him alone. In execution of the decree the tenure was sold

(1) I. L. R. 15 Cal. 652 (F. B.) (1888).
(2) I. L. R. 28 Cal. 189 (1895).
(3) 14 C. W. N. 699 (1910).
(4) I. L. R. 34 Cal. 92 (1906).
(5) 9 C. W. N. 670 (1905).

by auction but the sale was set aside under the provisions of sec. 310A of the Code of 1882 upon the Plaintiff depositing in Court the sum of Rs. 383-8-6 consisting of the amount (Rs. 358-8-6) due under the decree and the amount (Rs. 25) due as statutory compensation to the auction-purchaser. The Plaintiff's claim in the present suit relates to the sum so deposited and may be stated as follows. Deducting three-sevenths of the whole as payable in respect of his own share of the putni, he seeks to recover two-sevenths from the Defendant No. 1, liability for the balance being assigned in the plaint to other shareholders who have since paid what was due from them and with whom in this appeal we are not concerned. The Defendant No. 1 by his written statement denied all liability on the ground that he had parted with his share of the tenure. The first Court found in the Plaintiff's favour and gave him a decree for the whole amount of his claim against the Defendent No. 1. On an appeal preferred by the latter the Subordinate Judge in the Court below held that he was liable only in respect of so much of the claim as could be attributed to default in the payment of rent due for the year 1307 and that no liability rested upon him in respect of the year 1308. The Subordinate Judge accordingly modified the decree of the first Court and reduced the amount recoverable by the Plaintiff thereunder by one-half. The Plaintiff has appealed to this Court on the ground that no such reduction should have been made.

Two questions have been urged before us. The first arises upon a preliminary objection taken on the Respondent's behalf to the admissibility of the appeal. It is contended that inasmuch as at the date of the institution of the suit, the Respondent had no interest in the tenure, the suit falls outside the scope of Art. 41 of the Second Schedule of the Provincial Small Cause Courts Act and being therefore a suit of the nature cognizable by a Court of Small Causes no second appeal lies (sec. 102, Civil Procedure Code). The second question is as to the liability of the Respondent in respect of the year 1308. He no longer disputes his liability in respect of the year 1307.

Before dealing with these questions it will be convenient to indicate the nature of Respondents' position in the suit brought by the landlord.

As regards the year 1308 the Appellants' claim against the Respondent is based upon the fact that the decree obtained by the landlord was made against the Respondent alone. Now it may be—and for the present purpose it must be assumed—that the landlord was entitled to sue the Respondent alone. But it must be admitted that as between himself and the other shareholders in the tenure during the period to which the landlord's suit related, the Respondent occupied the position of Defendant in that suit in a representative capacity. He represented the shareholders for the time being. As regards the year 1307 he represented himself and others. As regards the year 1308, he had then ceased to have any interest in the tenure, and under the cloak of his name the real Defendants were his vendee, the Appellant and others.

The fact then that as between himself and the other co-sharers for the time being the Respondent as Defendant in the landlord's suit filled a representative capacity has to be borne in mind in dealing with the questions which were argued before us.

The first of these questions is decided

by the frame of the suit as disclosed in the pleadings. From this there can be no doubt that the Plaintiff's claim was based on the assertion that he was a co-sharer with the Defendant. The Plaintiff has indeed sued on the assumption that Defendant No. 1 was a co-sharer in 1308 an assumption which is incorrect in fact, and the purchaser is not included in the suit as perhaps he might have been: but this cannot alter the nature of the suit as it stands. The case of *Krishna Kamini* v. *Gopi Mohun* (1) cited by the Respondent has no bearing on the present case, as it was not a suit for contribution between co-sharers, and was decided with reference not to Art. 41 of the Second Schedule to Small Cause Court Act, but to an earlier enactment. As regards the second question the case is not so clear. In the suit brought by the landlord the present Respondent alone was sued because he was the registered tenant. In so far as other persons, including his own vendee in 1308, were interested in the property in respect of which he was sued, he was therefore as between him and them their representative, and whether he was a co-sharer as was the case in 1307 or was not, as was the case in 1308, his position as their representative would be the same. Had he paid anything which was in fact due from them he might no doubt have his remedy against them. But his remedies against others cannot affect his liability to the landlord when once a decree against him is passed. He then becomes "bound by law to pay" the decreed amount to the landlord, in the terms of sec. 69 of the Contract Act. There is no doubt that the Plaintiff was a person interested in the payment of this debt, and the consequence follows that he is liable to be "reimbursed" by the Respondent. In terms this seems to give the Plaintiff a right to recover the whole of the money that he has paid to the landlord. It cannot however be supposed that he could compel the Respondent to pay him money which the Respondent became "bound by law" to pay as his representative. But is it necessary to read any further restrictions into the very general terms of sec. 69? No question arises here as to the Respondent's liability to reimburse to the Plaintiff the money which he paid, but which was really due from the other original co-sharers in respect of their shares; because those co-sharers have repaid those sums to the Plaintiff. But where the Respondent has introduced a new co-sharer, whom he represents as much as he does the other co-sharers, is there any reason for saying that the re imbursement is to stop short of the money paid for the benefit of the assignee of the man bound by law to pay, who also represents him? No clear authority has been produced before us to show that this section should be considered not to apply to co-sharers; and if it does the law seems to cast the burden of collection from defaulting co-sharers whose common interests are affected by a decree on the person bound by law to pay rather than on the person who in fact pays because he is interested in the payment, and this consideration applies with special force when such person is the assignor of one who may be taken to be a defaulting co-sharer. For these reasons we consider that the Appellant is entitled to recover from the Respondent the amount he has paid in respect of the rent of the Respondent's purchaser for 1308.

The Appeal is therefore allowed. The decree of the lower Appellate Court is set

(1) I. L. R. 15 Cal. 652 (F. B.) (1888).

aside, and that of the Munsif restored. The Appellant is entitled to his costs in this Appeal.

RICHARDSON, J.—I agree to the judgment proposed by my learned brother with some hesitation as to the liability of the Defendant No. 1 in respect of the year 1308.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1853 OF 1908.

BRETT, J.
CARNDUFF, J.
1912,
Heard, 28 and 29, February.
Judgment, 29, February.

HALODHAR CHATTOPADHYA and others, Defendants, Appellants,
v.
RAMENDRA NARAIN RAY CHOUDHRY and others, Plaintiffs, Respondents.

*Revenue Sale Law (Act XI of 1859), sec. 37—Onus of proof—*Lakhiraj *or* mal *lands.*

In a suit for khas *possession free of incumbrance of lands on the ground that they were included within a taluk purchased by the Plaintiff at a revenue sale it was found that the Defendants held certain rent-free tenures within the estate and that these tenures existed from before the Permanent Settlement.*

Held—*That the onus was on the Plaintiff to prove that the lands in suit were included within the* mal *lands of the estate.*

This was an Appeal preferred on the 19th of August 1908 against the decree of Babu Kishori Lal Sen, Subordinate Judge of Zillah Dacca, dated the 8th of May 1908, reversing the decree of Babu Tarak Nath Bose, Munsif at Munshigunj, dated the 9th of August 1907.

The facts of the case will appear from the judgment.

Babus Joges Chandra Roy and *Chandra Kanta Ghosh* for the Appellants.

Babu Harendra Narain Mitter for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The Plaintiffs-Respondents in this Appeal are the purchasers of estate No. 230 on the roll of the Collectorate at Dacca, at a sale for arrears of Government revenue and, by virtue of that purchase, they claim to be entitled to recover *khas* possession of certain lands which are admittedly in the possession of the Defendants-Appellants. The Plaintiffs instituted the present suit against the Defendants apparently under sec. 37 of Act XI of 1859, claiming to be entitled to recover possession of the lands in the estate which they had purchased as it was at the time of the original settlement and free from all incumbrances which had subsequently been imposed upon it. The Defendants claimed to be in possession of the lands in suit under a *lakhiraj* title and they alleged that the Plaintiffs had no right to eject them from the lands or to recover *khas* possession. The *lakhiraj* title which the Defendants set up dated from before the Permanent Settlement. The defence, therefore, was that the suit brought to eject them under the terms of sec. 37 of Act XI of 1859 could not succeed.

The Munsif supported the plea set up by the Defendants. He held that it was proved that the lands were within the estate purchased by the Plaintiffs but he found that the Defendants were in possession of the lands and that they had proved the *lakhiraj* title which they had set up and that that *lakhiraj* title was in existence from before the Permanent Settlement. In these circumstances, he held

that, as the Defendants claimed the lands in suit under cover of that *lakhiraj* title, the onus rested on the Plaintiffs to prove that the lands from which they claimed to eject the Defendants were *mal* lands of the estate and not *lakhiraj* lands covered by the Defendants' title. He found that the Plaintiffs had failed to prove that the lands in suit were *mal* lands of the estate which they had purchased and, therefore, he held that the suit must fail.

On appeal, the lower Appellate Court has set aside the judgment and decree of the Court of first instance and has decreed the Plaintiffs' suit. The learned Judge of the lower Appellate Court, in disposing of the case, held that the Plaintiffs had proved that the lands in suit were included within the estate purchased by them and that the Defendants had proved that they held certain rent-free tenures in that estate and that these tenures existed from before the Permanent Settlement; but, finding that the Defendants had failed to prove that the plaint lands formed any part of the said rent-free tenures or that the said lands were held as parts of the said tenures in the time of the original grantee or afterwards, he held that the Defendants had failed to prove a *primâ facie* case which the Plaintiffs might be called upon to rebut.

The Defendants have appealed and in support of their appeal, it is urged that the lower Appellate Court erred in law in holding that, in this case, the onus lay on the Defendants to prove that the lands in suit were covered by their *lakhiraj* title. It is contended that, as the Defendants were admittedly in possession of the lands in suit and as both the lower Courts have found that the Defendants have established a *lakhiraj* title to lands within the ambit of the estate purchased by the Plaintiffs, therefore, it becomes a question, as between the Plaintiffs and the Defendants of parcel or no parcel and the onus lay on the Plaintiffs to prove that the lands from which they claimed to eject the Defendants were *mal* lands of the estate. In support of this contention, reliance is placed on the decisions of this Court in the cases of *Bacharam* v. *Peary Mohun* (1) and *Narendra* v. *Bishun Chandra* (2). Those two cases, no doubt, related to suits for the resumption of invalid *lakhiraj* lands; but it is contended that the same principle would apply in the present case and that this is clear from the decision of this Court in the case of *Rajendro Kumar* v. *Mohim Chandra* (3). In that case, the learned Judges of this Court relied on certain passages in the judgment of their Lordships of the Privy Council in the case of *Hurryhur* v. *Madab* (4). The case before their Lordships of the Privy Council was one brought by a zemindar to compel the Defendant to pay rent. In that suit, the Defendant claimed the land in respect of which rent was sued for, excepting a small portion, as his *lakhiraj*. Their Lordships held that an admission made with reference to some of the lands in question by the Defendant that they were included within the estate of the Plaintiff was not by itself sufficient to relieve the Plaintiff from the onus of proving his case, namely, that he was entitled to recover rent in respect of it from the Defendant. Their Lordships remarked :—" It was, at most, an admission that the lands were within the ambit of the estate, not that they had ever been *mal* lands." Their Lordships were of opinion that, where, as in that

(1) I. L. R. 9 Cal. 813 (1883).
(2) I. L. R. 12 Cal. 182 (1885).
(3) 3 C. W. N. 763 (1894).
(4) 14 M. I. A. 152 (1871).

case, a suit for recovery of rent was brought and an adverse title was set up by the Defendant and where the Defendant had established that he had been adversely in possession of the land, the question between them resolved in itself into one of parcel or no parcel and, therefore, the Plaintiff could not be relieved from the ordinary rule of establishing his own case. This was the view taken by the learned Judges of this Court in the case of *Rhidoy Kristo* v. *Nobin Chunder* (5). The present case is clearly not one falling within the provisions of sec. 37 of Act XI of 1859. The Defendants do not claim to have any protected rights under that section in the lands which they hold in the estate but they claim under a separate and distinct title alleging that the lands are rent-free lands and that the Plaintiffs have no right to recover *khas* possession. The case of *Wise* v. *Bhoobun Moyee* (6) and the case of *Ambika Churn* v. *Daya Gazi* (7) on which the learned pleader for the Respondents relies cannot, therefore, be taken to have any application to the facts of the present case. This is not a case in which, as apparently the lower Court has held, the Defendants must be compelled to make out a *primâ facie* case that the lands in suit are included within the lands held by them as *lakhiraj*. The Defendants in the present suit are clearly in possession of the lands and, as the learned Munsif has pointed out, they have substantiated the defence which they set up that they hold the lands within the ambit of the estate purchased by the Plaintiffs under a *lakhiraj* title. The onus ordinarily, in such a case, would be on the Plaintiffs to prove their case. The Plaintiffs' case is that the lands in suit are included in the *mal* lands of the estate which they have purchased. The Defendants, however, are in possession and they have proved that they have a *lakhiraj* title to lands in the estate and the Munsif has held that, in those circumstances, the Plaintiffs are not relieved from the ordinary onus of proving their own case and that the question between the parties becomes one of parcel or no parcel and the onus lies on the Plaintiffs to make out that the lands in suit are included within the *mal* lands of the estate. In our opinion, the view of the law which the learned Munsif has taken is supported by the rulings on which the learned pleader for the Appellants relies. We think that the learned Subordinate Judge erred in law in holding that the Plaintiffs were entitled to succeed because the Defendants failed to make out a *primâ facie* case which the Plaintiffs were called upon to rebut. In fact, in the present case, the possession was with the Defendants. Both the lower Courts have found that the Defendants have proved that they hold the lands under a *lakhiraj* title within the estate and, in those circumstances, the question between the parties, in our opinion, must be held to be one of parcel or no parcel and the onus lies on the Plaintiffs to prove that the lands in suit are included within the *mal* lands of the estate which they have purchased. We agree with the Munsif that, as the Plaintiffs have failed to prove that fact, the suit must fail. We, therefore, decree the appeal, set aside the judgment and decree of the lower Appellate Court and restore those of the Court of first instance with costs in this Court and in the lower Appellate Court.

(5) 12 C. L. R. 457 (1883).
(6) 10 M. I. A. 165 (1865).
(7) 10 C. W. N. 497 (1906).

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 532 OF 1912.

HOLMWOOD, J. IMAM, J. 1912, Heard, 23, May, Judgment, 24, May.

THE PUBLIC PROSECUTOR, 24-PERGUNNAHS, for the King-Emperor, Petitioner, *v.* SHEIKH IDOO, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 332, 403, 437—Discharge, order of, by High Court Sessions, if any bar to fresh proceedings—Nolle prosequi.

An order of discharge by the High Court in the exercise of its Original Criminal Jurisdiction is no bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a police-report or under sec. 190 (c) of the Code of Criminal Procedure.

MIR AHWAD HUSSAIN *v.* MAHOMED ASKARI (1) *referred to.*

Where an accused person was put upon his trial before the High Court Sessions on charges punishable under secs. 363 and 366 of the Indian Penal Code and an order of discharge was passed upon the Advocate-General entering a nolle prosequi, *and subsequently the accused being again sent up to take his trial upon the same charges, the Deputy Magistrate held that he could not be so tried:*

Held—*That the Magistrate was wrong in declining jurisdiction which he undoubtedly had, and he was bound to adjudicate on the charges properly laid before him against the accused.*

Held also—*That the order of discharge by the High Court Sessions could not be set aside by any tribunal and it did not require to be set aside for initiation of fresh proceedings on the same charges.*

(1) I. L. R. 29 Cal 726 F. B.: s. c. 6 C. W. N. 633 (1902).

This was a Rule issued on the 22nd of April 1912 calling upon the District Magistrate of 24-Pergunnahs to show cause why further enquiry should not be made in the case of Sheikh Idoo on charges under sec. 376 and other sections.

On an information laid by one William Juliah Clifford, Secretary to the Society for the protection of children in India, at the Entally Thanna, Calcutta, on 23rd September 1911, the accused Sheikh Idoo was sent up by the Police before the Chief Presidency Magistrate, Calcutta, to stand his trial for offences punishable under secs. 363 and 366 of the Indian Penal Code; and on the 31st January 1912 he was committed before Mr. Justice Stephen, presiding over the High Court Sessions. Before the said Court of Sessions the indictment was drawn up by the Clerk of the Crown under secs. 363, 366 and 376 of the Indian Penal Code. The offence under sec. 376 said to have been committed, having been alleged to have been committed at Sealdah and so outside the local limits of the Ordinary Original Criminal Jurisdiction of the High Court the charge under that section was struck out and the accused was put upon his trial upon the other charges.

In the course of the trial Mr. Justice Stephen intimated that as the evidence that had already been placed before him to prove the offence under sec. 366, if believed, would prove that the accused had committed rape, the accused ought to be tried for the latter offence which was a graver offence but he had no jurisdiction to try the charge of rape on the abovenamed ground. Thereupon the Advocate-General entered a *nolle prosequi* and accused was discharged. Subsequently, however, on 9th March 1912 the accused was re-arrested by the Police and was produced before the Deputy

Magistrate of Sealdah, within the local limits of whose jurisdiction the evidence shewed the offence of a rape was committed, to take his trial again upon charges punishable under secs. 363, 366 and 376 of the Indian Penal Code. An objection was then taken on behalf of the accused to the legality of the proceedings on the ground that the learned Advocate-General having entered a *nolle prosequi* the accused could not be re-arraigned again.

Thereupon the Deputy Magistrate passed an order that the accused could not be tried under secs. 363 and 366 of the Indian Penal Code but the prosecution might go on only under sec. 376 of the same Code.

Mr. B. C. Mitter, Standing Counsel, and *Babu Hemendra Nath Mitter* for the Crown, Petitioner.

Mr K N. Chaudhuri and *Babu Satish Chandra Ghosh* for the Opposite Party.

The Judgment of the Court was as follows :—

We think that the question raised on this Rule can be simply answered by pointing out that the order of discharge made by Mr Justice Stephen cannot be set aside by any tribunal and does not require to be set aside.

Upon all the authorities an order of discharge does not operate as any bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a Police report or under sec. 190 (c), Cr. P. C This was finally settled in the case of *Mir Ahwad Husain* v. *Mahomed Askari* (1) by a Full Bench of this Court. If this is the rule of law in the case of Presidency and Provincial Magistrates where the higher Courts have been specially empowered to interfere and order fresh enquiry, and if in those cases it is unnecessary to set aside the order of discharge or order fresh enquiry, *a fortiori* it is unnecessary in the case of a discharge by the High Court in the exercise of its Original Criminal Jurisdiction, where there is no authority that can interfere with the order of discharge. We do not order further enquiry in this case since it is unnecessary. It is enough for us to lay down that the Magistrate is mistaken in declining jurisdiction which he undoubtedly has, and he is bound to consider and adjudicate on any criminal information properly laid before him against the accused.

H. C. S.

(1) I. L. R 29 Cal. 726 : s. c. 6 C. W. N. 633 (1902).

[CRIMINAL REVISIONAL JURISDICTION.]

Rev. No 316 of 1912.

Holmwood, J. Imam, J. 1912, 12, April.	Jabbar Sheikh, Complainant, Petitioner, v. Tomiz Sheikh and 6 others, Accused, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs 263, 417—Magistrate if may refuse to take evidence at a summary trial—Order of acquittal, if may be set aside on revision.

Sec. 263 of the Criminal Procedure Code excuses a Magistrate trying a criminal case according to the summary procedure from recording the evidence of any of the witnesses but not from hearing the evidence of all the witnesses.

Where the accused were acquitted by the Magistrate upon the result of a local inspection and without taking oral evidence :

Held—*That the order of acquittal was without jurisdiction and should [illegible] aside.*

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Contents.

NOTES.

THE APPELLATE JUDGMENT OF MR. JUSTICE Woodroffe in the Midnapore conspiracy case (*Peary Mohan Das* v. *Weston and others*), for its inordinate length, its tone and temper, its wholesale condemnation of the Plaintiff's case and his counsel and witnesses, its almost unqualified acceptance of the plea advanced by the Defendants' counsel at the Bar, its unseemly observations concerning the judgment of a colleague on the Bench and its sweeping aspersions against people who were in no sense under trial before the Court, is unsurpassed in the history of judicial pronouncements in this country. We have not yet had either the opportunity or the privilege of making a survey of the length and depth of this portentious judgment and can but claim only a superficial acquaintance with it from the newspaper reports. When even the presiding Judge himself after a severe determination to read it through in open Court from morning till evening broke down on the third day, we are sure we shall be pardoned if, overlooking all its declarations and dissertations we confine ourselves to some very simple issues in the suit which nothing can obscure.

THE CASE, SO FAR AS WE HAVE BEEN ABLE TO follow, was that the Plaintiff who was a man of 70 years of [illegible] the District Magistrate of Midnapur and two Police officers for having arrested him and kept him in confinement for putting pressure on his son to induce him to confess to a very grave criminal charge for which his son was convicted by the Additional Sessions Judge of Midnapur and sentenced to 10 years' transportation. The assessors had found his son Santosh not guilty and on appeal the conviction and sentence were set aside by the Chief Justice Sir Lawrence Jenkins and Mr. Justice Mookerjee. The conviction was based on a confession of the Plaintiff's son which was found by the Chief Justice and Mr. Justice Mookerjee to have been obtained by pressure brought to bear on the father and the son by the Magistrate and the Police officers who were Defendants in the present case. The real issue in the present suit was whether what Mr. Weston and the Police officers did in connection with Peary's arrest and Santosh's confession amounted to conspiracy and whether they could be mulcted in damages for any wrong that they had so inflicted on the Plaintiff.

A REVIEW OF THE GENERAL POLITICAL SITUATION which followed the Partition of Bengal is a matter more for the historian than for a Court of law. We consider it utterly useless and irrelevant to discuss it at the present moment either in connection with this case or otherwise. It will suffice for our present purpose to mention that, following up the discovery of a bomb conspiracy at Maniktolla, and the trial of those concerned in it at Alipore (*Emperor* v. *Barindra Ghose*, 14 C. W. N. 1114) proceedings were taken to establish a similar conspiracy at Midnapur and to prove the complicity of some of its leading citizens therein. Judicial proceedings in this connection hopelessly failed and the honour of the people concerned was vindicated.

WITH REGARD TO THE ALLEGED MIDNAPUR conspiracy which was so much made of at one time, we must mention that it is hardly material in connection with the present suit. The Plaintiff was at no time charged with any complicity in this alleged conspiracy and had nothing to his discredit on that account. Even in the informer's or other police reports his name was never mentioned. Following up the informer's reports which more than one Judge

have found to be false, Plaintiff's house was searched on the 8th of July 1908, and a bomb was discovered in his *baitakkhana* (visitor's room) alleged to have been kept there by his son. His son was arrested on that day and remanded to custody. Peary, the Plaintiff, was neither arrested on the day the bomb was discovered nor was it ever suggested at any time before the present case came in that the Plaintiff was arrested because an explanation was needed from him with reference to the bomb found in his house.

TAKING THE ABOVE FACTS AS ALSO THE WHOLE course of conduct of Mr. Weston and the Midnapur Police in connection with Santosh's confession and his father Peary's arrest, this most voluminous judgment falls far short of convincing any reasonable man that the confession of Santosh was in any sense voluntary or that Peary's arrest had nothing to do with it. The plea that has been put forward in this case that the arrest of Peary was under the Explosive Substances Act utterly fails when it is considered that he was not arrested before a fortnight had elapsed since the discovery of the bomb and that during this time suggestions were thrown out by Mr. Weston to the Plaintiff for the obtaining of his son's confession. The plea that he was waiting for the report of the Chemical Examiner also fails considering that Captain Weinman had reported as to the dangerous character of the bomb immediately after it was found and that the Chemical Examiner's report that it was a *bazar* bomb rather detracted from the gravity of the case than otherwise. The plea utterly fails when it is further considered that when a similar bomb was found in another man's house, Mr. Weston never arrested him.

THE PUBLIC HAVE READ THE LONGEST JUDGment that has ever been delivered in India and are still complaining that it throws no light on the crucial questions in the case. Why is it that Mr. Weston between the date of this discovery and Plaintiff's arrest made engagements with Peary for interviews with him in his own house? Why is it again that Mr. Weston granted such frequent permits to Peary to visit his son in Jail and have prolonged interviews with him? Are we to believe that Mr Weston, whom even Mr. Justice Woodroffe reluctantly finds to be an officer possessing an excess of executive rigour and also very unpopular with the people, was so overflowing with the milk of human kindness for this old and distressed father and had such a soft corner in his heart for his son Santosh, that these interviews were "arranged" for either the welfare of the son or the exchange of paternal and filial felicitations? It is indeed taxing human credulity too far to try to induce the public to believe in the face of these and other admitted facts that the arrest of Peary upon which the confession followed had nothing to do with it.

UNDER THE CIRCUMSTANCES WE FEEL CONstrained to accept the common sense view of the matter which also found acceptance with the learned Chief Justice, Mr. Justice Mookerjee, Mr. Justice Fletcher and the two assessors at the Midnapur bomb trial (see 13 C. W. N. 861). We must also confess that we in common with the general public in this country share the view of the learned Judges above-mentioned that the bomb which was brought out from the Plaintiff's *baitakkhana* was placed by some one other than Santosh and it is unnecessary to discuss who that other person was or may have been. We find that Mr. Justice Digambar Chatterjee practically agrees with the findings of Mr. Justice Fletcher in these and many other respects. People have been asking how it is then that he agreed with Woodroffe and Coxe, JJ., in allowing the appeal with costs. This is a question which we never hope to be able to answer.

IN ONE PORTION OF THE JUDGMENT, THEIR LORDships (Woodroffe and Coxe, JJ.) have in the usual discursive manner discussed the questions whether Mr. K B Dutt should have accepted the brief for the Plaintiff and having accepted his brief whether he should not have gone into the witness-box while he was engaged in conducting the case. This question was raised by the defence counsel in the course of the trial of the suit and Mr. Justice Fletcher decided the question in Mr. Dutt's favour. Before we go into the views of the Appellate Court we must observe that we do not consider it at all proper on the part of the counsel for the Appellants in this case to have formulated some questions in their own way with regard to the decision of the first Court and with reference to the facts of a case which was still pending before the Appeal Court and submitted them for the opinion of the Bar Council in England. We expected the Appellate Court to enlighten us with their views as to the propriety of the course adopted by the Defendants' counsel in this respect. But in keeping with the tenor of the whole judgment the observations of their Lordships in this case are all one-sided. We do not know whether it was disclosed to the Bar Council by the counsel for the defence that their opinion was sought for being used in a pending case. If it had been, we are sure that the Bar Council would never have agreed to express any opinion with regard

to the questions. Mr. Dutt conducted the case under great difficulties and he acted wisely by not adding to them by raising such side issues. He also acted with befitting dignity and thorough straightforwardness by not objecting to the opinion of the Bar Council, so obtained, being used against him by his opponents and referred to by the Bench. Nor did he care to prefer any charges of impropriety against his opponents on this account, but the Court in our opinion should have taken notice of the fact and expressed its opinion in order to discourage such practice.

MR. JUSTICE WOODROFFE CONSIDERS THAT MR. Dutt should not have accepted the brief in this case because he had taken part in local politics and had personal knowledge of many of the men and events of Midnapur where he lived and practised. This is such an absurd proposition on the face of it that we may dismiss it without any serious consideration. One may not surely use his personal knowledge of men and things in one's professional capacity but what is there to preclude him from acting if the same information is conveyed to him in his instructions? We also fail to appreciate or comprehend what was there to disqualify Mr. Dutt from appearing as counsel for an aggrieved person simply because he had acted sometimes as counsel in a series of judicial proceedings connected more or less directly or indirectly with Plaintiff's case and at other times made representations to the executive heads of Government as a citizen for the protection of his fellow townsmen including, it may be, himself, against some acts of the local police and the executive which he regarded as lawless and oppressive. To accept Mr. Justice Woodroffe's proposition would amount to depriving people of the services of lawyers in the mofussil where, as in this case, their life, honour and liberty may at times be in danger.

THE NEXT QUESTION THAT MR. JUSTICE WOODROFFE raises is whether having accepted his brief Mr. K. B. Dutt ought to have gone into the witness-box and corroborated or given a denial to the statements of the Plaintiff by reference to his instructions? It is a matter of common knowledge that a counsel should not act both as counsel and witness if he can help it. The learned Judges do not say who was to have called him to depose in the witness-box? Mr. Justice Woodroffe admits that "it is recognised by the Courts and the profession that as a general practice it is undesirable when the matter to which Counsel depose is other than formal, that they should testify either for or against the party whose case they are conducting." If Mr. Dutt had volunteered to depose on behalf of his client or advised his client to have him examined as a witness he would have laid himself open to a charge of professional impropriety. His opponents, perhaps, might, with much less impropriety, have called him to contradict his own witnesses. Apart from the question of the professional propriety of such a course, did the Defendants ever call Mr. Dutt into the witness-box and did Mr. Dutt ever decline to depose? So we must say that the reflections passed by the Hon'ble Judges on Mr. Dutt in this connection are both unjust and unmerited.

THEIR LORDSHIPS PROCEEDED TO CITE SOME cases in this connection which seem to have little relevancy to the question they discuss. Every members of any standing at the Calcutta Bar well remembers the question of professional conduct which came up before Sir Francis Maclean and to which their Lordships refer and from the proceedings of which they give some extracts without stating what the case was about. The question in that case was whether Counsel was justified in visiting the place of occurrence before trial and questioning witnesses regarding the occurrence and then at the hearing of the case using the personal knowledge so derived to contradict such witnesses. We are not aware that Mr. Dutt did anything of the kind in the Midnapur case and we fail to see what earthly relevancy that case has with the present. *Corea* v. *Peiris* (14 C. W. N. 86), which their Lordships cite in this connection also furnishes no ground for their Lordships' adverse comment on Mr. Dutt. The Privy Council decided in that case that where the Court of first instance refused to receive the evidence of counsel tendered by the client himself, the Appellate Court was justified in calling and examining him. So according to this authority it is their Lordships who should have called and examined Mr. Dutt before them if they thought that his evidence was either material or necessary to their coming to a proper finding.

THE LEARNED JUDGES BLAME MR. DUTT FOR NOT volunteering into the witness-box and corroborating or contradicting statements made by his client on oath regarding the conversations that he had with Mr Weston before his arrest and which he said he had reported to Mr. Dutt. If he had done so, we would not have been at all surprised if the same learned Judges had found him guilty of professional misconduct. We do not profess to understand also why any corroboration was needed particularly from Mr. Dutt as counsel, when the story of the Plaintiff in this respect was corroborated by his son Ashu who had accompanied his old father in all his visits to Mr. Dutt and had heard all that he had narrated to Mr.

Dutt. There is no authority in law which would justify their Lordships' drawing any adverse inferences from Mr. Dutt's most honourable disinclination to volunteer as a witness on behalf of his client.

THE OPINION OF THE BAR COUNCIL SUBSEQUENTLY obtained and referred to by their Lordships does not also touch Mr. Dutt's case. What is there to show that Mr. Dutt knew or had reason to believe that he would be an important witness in Peary's case? The Defendants did not object to his appearance as a Counsel at the outset, but raised the question of his being a witness in the case some time after. The Bar Council expressly say that in the case of its becoming apparent "before the concluding of the evidence in the case" that Counsel is a witness on a material question of fact he might retire from the case if he can do so "without jeopardising the interests of his client." Since it did not appear to the trial Judge before the concluding of the evidence that Mr. Dutt was a material witness, Mr. Dutt could not surely be blamed for not retiring from the case or going into the box. The proviso added by the Bar Council relating to the interest of the client being the supreme consideration is conclusive that after all Mr. Dutt was the best judge whether he could or could not retire from the case without jeopardising the interests of his client.

AS REGARDS THE QUESTION OF MR. DUTT'S professional propriety being impugned in the case, their Lordships have gone the length of noticing the charge of bribery recklessly made by a most disreputable witness put forward by his opponents only to suggest and not to proceed to any proof with regard to the allegation. Mr. Dutt was thoroughly justified in treating these suggestions with the contempt that they deserved. The letter alleged to have been written by him in this connection was never attempted to be proved by the defence and it has been declared by the Indian colleague of their Lordships, who is familiar with the Bengalee character in which it is written, to be a flagrant forgery. Are their Lordships aware that this defence witness, Akshaya Pal, had since his deposition been convicted of forgery in another case and is now lodged in jail! Yet it is on the evidence of such witnesses and such materials that Woodroffe and Coxe, JJ, have not hesitated to throw dirt on a counsel of Mr. Dutt's position and standing both at the Bar and in society. This unique and unprecedented judgment carries its own condemnation with it all through. We have for many years entertained a very high opinion of Mr. Justice Woodroffe as a Judge and this judgment has, therefore, come upon us as a most painful surprise.

UNCERTIFIED ADJUSTMENTS OF DECREES.

Cl. (3) of r. 2 of Or. 21 of the Civil Procedure Code of 1908 expressly provides that a payment or adjustment of a decree which has not been certified or recorded in a proceeding before a Court of execution shall not be recognised by any Court executing the decree. This provision of law which has been reproduced with hardly any modification from the Code of 1882 was enacted with the object—a very laudable one—of making all adjustments or payments of decrees matters of record, so that a dispute which has already terminated in a decree may not give rise in course of execution proceedings to fresh disputes requiring fresh adjudication upon evidence; such a course, if permitted, would no doubt to a great extent neutralise the main purpose of a decree, *viz.*, the final settlement of a dispute. But in order that the remedy may not be worse than the disease, the judgment-debtor, where the adjustment has not been certified in execution proceedings, is merely prevented from *resisting execution* on the ground of such adjustment. The provision in question leaves it open to the judgment-debtor to sue the decree-holder for damages for fraud, when the adjustment or payment has not been certified owing to the decree-holder's fraud or for breach of contract when the decree has been executed in breach of a valid agreement for adjustment of the decree

Now, if all judgment-debtors were wise, they would, having regard to the express provisions of the Statute, always insist upon adjustments or payments of decrees being certified in Court within the period of limitation allowed by law; and when from any circumstance, a judgment-debtor has failed to do so or has been prevented from doing so, he ought not to set up the plea of payment or adjustment against the decree-holder's application for execution, but should quietly suffer execution to proceed. But no person likes to pay a debt twice over, and a judgment-debtor of all debtors is the least inclined to be generous towards a judgment-creditor. Therefore, following the dictates of his own feelings and in the teeth of the express prohibition of the statute, he usually opposes the application on a plea of an uncertified adjustment. In such circumstances the obvious duty of the Court which has to apply the express provisions of a statute without regard for considerations of abstract justice or hardship, would be to reject the judgment-debtor's plea, and call on him to satisfy the decree, leaving him to seek his remedy in a fresh suit. To tell the judgment-debtor to sue for damages, would however in most of such cases be a counsel of perfection because a judgment-debtor who has had to pay a decree

twice over would not ordinarily, unless he is a man of substance who resists a just claim for mere pleasure, have the means to launch into a fresh litigation. Courts, therefore, are frequently found disinclined to carry out the letter of the law, and whilst professedly accepting it seek by arguments not always convincing to get round it.

Two very apposite illustrations of this tendency are to be found in *Biron* v. *Jaimurat*, reported in the last number (16 C. W. N. 923), and *Babar Ali* v. *Shisir Kumar*, reported in this issue (16 C. W. N 951). In the former case the judgment-debtor withdrew an appeal he had preferred against the decree by reason of an adjustment with the decree-holder. The fact of such adjustment, (though not i s terms) was mentioned before the Appellate Court, but the decree-holder nevertheless, after the appeal had been withdrawn, applied for execution of the decree, whereupon the judgment-debtor set up the adjustment as an answer to the application. The High Court held that the fact of the adjustment should be investigated by the executing Court. In the latter case, another Bench of the High Cour held that where one of two joint decree-holders had, in a partition suit between them in which the question of the enforcibility of the decree had been direc ly in issue, solemnly admitted in his written statement that the decree had been satisfied by payment, it was open to the judgment debtor to rely on the admission in resisting an application for execution by the legal representatives of the decree-holder. In the former case, the Court held that the application for withdrawal of appeal, in which the fact of the adjustment was mentioned, and the subsequent petition before the executing Court asking for an investigation together constituted a compliance with the provisions of Or. 21, r. 2, whilst in the latter case the Court declared that the question in that case was not one of adjustment or payment of decree at all, and that Or. 21, r. 2, did not apply to the case.

These decisions, however consonant they may be with natural justice, are, we are constrained to say, quite irreconcilable with the provisions of Or. 21, r. 2 of the Civil Procedure Code. But when Judges of the High Court find themselves in the interest of justice under the necessity of not applying the plain provisions of a statute, it is surely arguable that the provisions in question are on the whole not conducive to justice. Why should not the provisions of the Rule be so modified as to make admissible statements and admissions made by the decree-holder in judicial proceedings before Courts other than the executing Court? Such an amendment would not run counter to the purpose the Legislature obviously had in view in enacting the rule. We think one of the first duties of the Rules Committee of the Calcutta High Court, when constituted, would be to recommend an amendment of the rule so as to enable Courts of execution to recognise adjustments of decrees evidenced in the pleadings of the parties whether before the executing Court or any other Court.

CURRENT CRIMINAL CASES.

II.—THE EVIDENCE ACT.

Secs 14, 15—Evidence of previous offences.

In a trial for dacoity, the evidence of other dacoities by the accused is inadmissible either under sec. 14 or 15

MAUDI GHASI, 1 Mad. W N 1912, p 49

In a trial for cheating the evidence that the accused similarly cheated persons other than those named in the charge is inadmissible

EMPEROR *v.* ABDUL WAHID KHAN, I. L. R. 34 All. 93

Sec 30—Confession

A confession made to a private person immediately after the occurrence and before the arrival of the police which was repeated two days later to a first class Magistrate but was retracted four months after was held to be sufficient corroboration of the approver against the maker

LALAN MULLIK, 16 C W N. 669

Where an accused pleads guilty and is removed from the dock and the other accused alone is tried, the confession of the former cannot be taken into consideration as against the latter for there has been no joint trial.

EMPEROR *v* KERAMAT SIRDAR, 16 C. W. N. 49.

Verification of confession

Where a confession is verified by a Magistrate the proper course for the prosecution is to examine the Magistrate himself and not the other verification witnesses whose evidence would be inferior to his.

KADER SUNDER, 16 C W. N. 69.

Sec. 32, cl (1)—Dying declaration

Where the verbal statement of a dying person is sought to be proved the proper and legal mode of proving it is by eliciting from the person who heard the deceased make the statement which the deceased made If the statement was taken down in writing by the witness or by some one in the presence of the witness the witness would be entitled to refresh his memory by referring to such writing; otherwise the writing itself is not relevant unless it is in the nature of a deposition taken in the presence of the accused.

THE PUBLIC PROSECUTOR *v* BALA NAGI REDDI AND OTHERS, 22 Mad. L J. 453. S. C. 1 Mad. W. N. 1912, p 405

Sec 45—Handwriting—Expert evidence.

The one thing necessary for the admission of the evidence of an expert witness as to handwriting is that the writing with which the comparison is made should be proved beyond doubt to be that of the person alleged. Where there is no comparison with proved or admitted handwriting in open Court in the presence of the party affected the evidence of the expert is inadmissible.

SURESH CHANDRA SANYAL, 16 C. W. N. 812.

Uncorroborated testimony of an expert—Value of.

It is unsafe to convict an accused person of forgery on the uncorroborated testimony of an expert alone

especially when the handwriting of the accused is not marked by any striking peculiarities which he could not avoid.

BASRUR *v.* VENKATA ROW, 1 Mad. W. N. 1912, p. 125.

Sec. 81—Presumption under the section, scope of.

The presumption of the genuineness of a newspaper under sec. 81 does not include a presumption that it was printed and published by the person by whom it purports to be printed and published.

JEREMIAH *v.* VAS, 22 Mad. L. J. 73.

Secs. 123, 124, 125—Statements in departmental enquiry.

Statements made by witnesses in the course of a departmental enquiry into the conduct of police officers who were subsequently put upon their trial on charges of taking illegal gratification are not privileged under secs. 123, 124 or 125 and the accused are entitled to cross-examine the witnesses under sec. 153 of the Evidence Act on the statements made by them at the departmental enquiry.

HARBANS SAHAI, 16 C. W. N. 431.

Sec. 132—Taking of a thumb impression, not equivalent to asking a question

Where a Magistrate believing that the complainant had given false evidence in the course of a trial by denying the fact of a previous conviction had his thumb impression taken out of Court for the purpose of identification in a future prosecution under sec. 193, I. P. C., and there was nothing to show that the latter had objected to the taking of it,

Held, that the thumb impression was admissible in a subsequent trial for giving false evidence and that the proviso to sec. 132 of the Evidence Act was not applicable inasmuch as the taking of such an impression was not equivalent to asking a question and receiving an answer.

TUNOO MIA, I. L. R. 39 Cal. 348: S. C. 16 C. W. N. 503.

CURRENT CIVIL CASES.

Guardians and Wards Act, sec. 12, cl. 3 (b)—Court if may order debtor to deposit money in Court pending disposal of guardianship application.

In this case on an application by H to be appointed guardian of J and for the appointment of a receiver to take charge of a debt owing to J from G or other order to protect the property of the minor the Court had passed an order in the absence of G directing G to forthwith deposit the amount of the debt in Court. G took out summons on H to show cause why the order should not be set aside on the ground that he had not appeared as the notice which H had served on him simply stated that an application for appointment of receiver was to be made.

Held, that the order of the Court was legally passed. As G had received notice of the application he had no grievance, for the petitioner could not possibly know beforehand what order the Court would make. On the application that had been made the Court had in the circumstances of the case jurisdiction to pass the order under sec. 12 of the Guardians and Wards Act.

Robertson, J. In re BAI JAMUNABAI, I. L. R. 36 Bom. 20.

Civil Procedure Code (1882), sec. 539—Suit against trespasser for possession of property impressed with trust, if [illegible] *ght under sec. 539—Hindu Law—Right of heir* [illegible] *into effect*—Res judicata.

A by his will directed his executors to dedicate a property to the god Shiva. The executors died without completing the dedication. After the time named for the dedication had arrived this suit was brought by the heir of A in the Court of a Subordinate Judge to eject Defendants as trespassers from the house, to get possession of property, for the appointment of trustees, the settlement of a scheme and other reliefs which fell within the scope of sec. 539 of C. P. C. of 1882 (sec. 92 of the new C. P. C.). But the suit was not brought under the provisions of that section. In a previous suit by the same Plaintiff as heir of A against the same Defendants for possession of A's estate including the property in dispute the Plaintiff had succeeded with reference to all the property except this property which was excluded on account of the trust impressed on it.

Held—That though some of the reliefs claimed fell within the scope of sec. 539, the suit for possession as against a trespasser was not within that section simply because the property was impressed with a trust.

The executors having died without executing trust, Plaintiff as the heir of A was authorised under Hindu law to take steps for carrying out the trust after recovering possession of the property from a trespasser. That gave him such title as would entitle him to recover.

The decision in the previous suit was not *res judicata* as here the Plaintiff sued as a trustee though the trusteeship arose out of heirship while in the previous suit he had sued in his own right.

Chandavarkar, J. GHELABHAI *v.* UDERAM, I. L. R 36 Bom. 29.

Indian Contract Act, sec. 19—Registered deed of gift—Validity of may be impugned by third party.

The Plaintiff in this case sought to recover possession of a property under a registered deed of gift from one J. The Defendant having failed to make out his title as adopted son of J.'s admitted heir sought to impugn the deed of gift as procured by undue influence or misrepresentation.

Held—That the Defendant being a person without title to the property, and the Plaintiff having made out a *primâ facie* title was entitled to succeed unless Defendant made out a better title in himself.

It was not open to a stranger to a deed like the Defendant to attack it upon grounds of misrepresentation, undue influence, &c., which might have been available to the donor herself and so long as the registered deed stood it could not be attached on such grounds by a stranger.

Scott, C. J. TRIMBAK *v.* SHANKER, I. L. R. 36 Bom. 37.

Surety bond for restitution of property, if decree set aside—Suit if lies on.

Where a bond was executed as security for restitution of property against which execution was levied under a decree of the High Court in case the decree was reversed on appeal to His Majesty in Council a suit would lie on the contract contained in the bond even if the bond could be enforced by a proceeding in execution.

Scott, C. J. MOTILAL *v.* CHANDRU SANGJE, I. L. R. 36 Bom. 42.

Res judicata—*Impartibility—Agreement if can make an estate impartible—Permission of Court to a compromise where minor a party.*

Where a village was claimed to be impartible on the grounds (1) that under an agreement with Government all tenants were jointly responsible for the revenue and (2) that in a previous suit, where a minor was a party

it was settled on compromise that the lands in the village were not divisible and that therefore the question was *res judicata*.

Held—That the agreement with Government could not determine relations of tenants *inter se*. The decision in the previous suit being on a compromise without any issues being raised was not *res judicata*. The sanction of the Court not having been obtained to the compromise it was not binding on the minors.

The fact of an arrangement between the parties that an estate should be undivided could not make it impartible. Impartibility could only arise by custom. Agreements against partibility of estates were against public policy.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD AND IMAM, JJ. CRIMINAL REVISION No. 907 OF 1912. MANIK CHANDRA CHAKRAVARTI AND OTHERS, 1st Party, Petitioners *v.* PRANNATH KOIR AND OTHERS, 2nd Party, Opposite Party. 15th August 1912.

Criminal Procedure Code (Act V of 1898), sec. 145—Puja, dispute between persons one of whom claims to represent the public—Constructive conditional possession.

In this case a proceeding was drawn up under sec. 145, Cr. P. C., in respect of a plot of land. The nature of the dispute between the parties will appear from the following portion of the Magistrate's judgment:—"The first party claims that it is their ancestral land where Bhadrakali Puja is held from the time of their ancestors. The second party claims to represent the general public and alleges that for over three hundred years a Barwari Puja has been held on that land out of public contribution. The Puja is held on the last day of Bysak."

The Magistrate after examining witnesses on both sides found that the second party were in constructive conditional possession of the land from a very long period for the performance of the Barwari Puja on the last day of Bysak. The first party thereupon moved the High Court and obtained a Rule calling upon the District Magistrate and the Opposite Party to show cause why the order passed under sec. 145, Cr. P. C., should not be discharged on the grounds—

(1) that the public who claim the right of easement for one day in the year cannot be a party to sec. 145 proceedings,

(2) that constructive conditional possession is not known to the law.

Their Lordships after hearing both sides made the Rule absolute.

Babu Atulya Charan Bose for the Petitioners.

Mr. K. N. Chaudhuri with *Babu Monmatha Nath Mukherjee* for the Opposite Party.

S. C. M. *Rule made absolute.*

CRIMINAL REVISIONAL JURISDICTION. Before HOLMWOOD and IMAM, JJ. CRIMINAL REVISION MISCELLANEOUS No. 113 OF 1912. RAM BANDHAN TEWARI AND OTHERS, Petitioners *v.* THE EMPEROR. 16th August 1912.

Criminal Procedure Code (Act V of 1898), sec. 526—Transferee—Remark by Judge showing prejudice—Refusal of bail in bailable case on appeal.

The Petitioner, Ram Bandhan, and four others were tried under secs. 147 and 323, I. P. C., by the Deputy Magistrate of Sambalpur who convicted three of the accused and acquitted two including the Petitioner, Ram Bandhan. The accused persons who were convicted appealed to the Sessions Judge of Manbhum and Sambalpur who in dismissing the appeal made some observations against the Petitioner, Ram Bandhan, and remarked as follows—"The next point raised is that two of the accused were acquitted though identified by four men. But I am of opinion that they were acquitted from excess of caution . . . Even the learned vakil admits that there is little to be said as to Ram Bandhan."

Thereafter the Petitioners were convicted by the Deputy Magistrate of Sambalpur in another case under sec. 164 of Act VI of 1901 and were sentenced to undergo rigorous imprisonment for one year each. They preferred an appeal to the said Sessions Judge who at the time when the application for the admission of the said appeal was made asked the Petitioners' pleader, "Is it the same Ram Bandhan who was acquitted?" The Sessions Judge admitted the appeal but rejected the Petitioners' application for bail although an offence under sec. 164 of Act VI of 1901 is bailable.

The Petitioners moved the High Court for the transfer of the appeal and obtained a Rule.

Their Lordships after hearing both sides made the Rule absolute and directed that the Appeal should be heard by another Sessions Judge.

Messrs. Jackson, K. N. Chaudhuri and *Babu Monmatha Nath Mukherjee* for the Petitioners.

Babu Jyotish Chandra Hazra for the Crown.

S. C. M. *Rule made absolute.*

CRIMINAL REVISIONAL JURISDICTION. Before CARNDUFF AND IMAM, JJ. CRIMINAL REVISION No. 1020 OF 1912. TRILOCHAN ROY, Petitioner *v.* EMPEROR. 20th August 1912.

Indian Penal Code (Act XLV of 1860), sec. 193, Perjury—Statement made on a point not material—Intention—Motive.

In this case the Petitioner was convicted under sec. 193, I. P. C, and sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rs. 100, for having made a false statement in cross examination in a case in which he was the complainant. The Sessions Judge in appeal affirmed the conviction but in reducing the sentence of imprisonment to one of a month found among other things that "the statement in respect of which the Appellant is said to have committed perjury was undoubtedly false. . . . The only question for consideration is whether the statement in question was material in the case in which it had been made . . . There was no particular advantage to be gained" (by the Appellant).

The Petitioner moved the High Court and obtained a Rule calling on the District Magistrate to show cause why the conviction and sentence should not be set aside on the ground that in the absence of any evidence or finding to show that the Petitioner intended to give false evidence by making the statement alleged to be false and especially in view of the findings of the Sessions Judge showing that the Petitioner had no intention to make the alleged false statement and that the said statement was not material to the case the conviction was liable to be set aside

Their Lordships made the Rule absolute and set aside the conviction and sentence

Babu Monmatha Nath Mukherjee for *Babus Dasarathi Sanyal* and *Debendra Narayan Bhattacharya* for the Petitioner.

No one appeared to show cause

S. C. M. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and BEACHCROFT, JJ APPEAL FROM ORIGINAL DECREE NO. 119 OF 1910. PARSANIA, Appellant *v.* HARI CHARAN DAS, Respondent. 3rd July 1912.

Letters of Administration—Muth—*No assets for administration.*

The Appeal was directed against an order for grant of letters of administration to the estate of one Mohanth Ganga Dass who died in 1904. He left a widow, a daughter and a son, leaving him survived. The son came into possession of the properties, and had his name registered in the Collectorate, and died in 1908. On the 20th September 1909, the Respondent, claiming to be the *chela* of the deceased Mohanth, made the present application for letters of administration. He stated explicitly that as an attempt had been made by the son of the deceased Mohanth to take possession of the estate, that is the Asthal, a certificate might be granted to him under Act V of 1881. The District Judge granted the application because he was satisfied that the widow of the deceased Mohanth was endeavouring to keep the property as if it belonged to her husband personally.

Held—"A Mohanth is not the owner of the property of the *muth* and on his death a person claiming to be his successor in office cannot apply under Act V of 1881 for letters of administration in respect of the *muth* property."

Jib Lal Gir v. *Mohanth Jug Mohan Gir* (16 C. W. N 798) referred to.

That as there were no assets to be administered, there should be no grant of letters of administration.

Lakhi Narain v. *Nanda Rani* (9 C. L. J. 116) followed.

Babu Kshetra Mohun Sen for the Appellant.

Babus Nogendra Nath Mitter and *Biswa Nath Sen* for the Respondent.

A T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and COXE, JJ. APPEAL FROM APPELLATE DECREE No 1828 OF 1910. JOGESH CHANDRA ROY, Appellant *v.* ANNADA CHURN CHOWDHRY AND OTHERS, Respondents. Heard, 30th July and 2nd August. Judgment, 7th August 1912.

Specific Relief Act (I of 1877), secs. 22, 54—*Injunction*—*Brick-making*—Kabuliyat.

The Defendants in this case were the Plaintiff's tenants and the suit was brought to obtain a declaration that the Defendants were not entitled to make bricks on the land or alter the condition and also for an injunction. The *kabuliyat* provided that they would not make any digging (*khad*), tank, gift or mutation.

The suit was originally dismissed but on appeal to the High Court was remanded for a fresh decision, the lower Appellate Court being directed to decide the purpose for which the tenancy was created, the question of *res judicata* and other questions. The suit was again dismissed and the Plaintiff appealed to the High Court.

Held, that the suit fell under sec. 54 read with sec. 22 of the Specific Relief Act.

The fact that one suit for in[illegible] failed did not preclude the Plain[illegible] bringing another suit, if further damag[illegible]

Babu Dhirendra [illegible] for the Appellant.

Babus [illegible] *K*[illegible] *Das and Krishna C*[illegible] Respondents.

A. T. [illegible] *Appeal dismissed.*

JABBAR SHEIKH *v.* TOMIZ SHEIKH.

This was a Rule granted on the 11th of March 1912 against the order of Mr. H. P. Waddell, Sub-Divisional Magistrate of Tangail, dated the 4th of January 1912, acquitting the accused under sec 245, Cr. P. C.

The order of the Magistrate who tried the accused summarily for offences under secs. 143, 447 of the Indian Penal Code and acquitted them, was in the following terms :—

"I have made a local enquiry in this case and seen the spot. . . . . There is . . . no doubt as to the title of accused and their maliks. As regards possession the huts of accused are close to the disputed land and have been there for at least 1 year. When there are these facts to go upon, the oral evidence which can easily be produced by both parties is of little value. The fact that complainant party have instituted sec. 9 suits in the Civil Court for adjoining land indicates that they are now out of possession. I am of opinion that accused party were in possession of the land in question and did not act illegally in cutting the paddy Accused are all acquitted."

Babu Atulya Ch. Bose for the Petitioner.

THE JUDGMENT OF THE COURT was as follows :—

This Rule must be made absolute on the ground on which it was issued. We are surprised to find that the learned Sub-[illegible]al Officer should so misapprehend [illegible]sions of the law under sec. 263, [illegible] That section does not excuse [illegible] from hearing the evidence [illegible] from re- [illegible] of [illegible] is an elementary point that [illegible] evidence is not the same as hearing evidence. In all criminal cases if the accused denies the charge, the complainant and such witnesses as he may produce must be examined and the case must be decided upon the effect of their evidence. The order of acquittal is therefore clearly without jurisdiction having been made without evidence having been heard.

The order of the lower Court is set aside and there will be a retrial before any Magistrate the District Magistrate may direct

Rule made absolute.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SHAW SIR JOHN EDGE. MR. AMEER ALI. 1912, Heard, 25 and 26, June. Judgment, 22, July.	MUSAMMAT BHAWANI KUMAR, Plaintiff, Appellant, *v.* MATHURA PRASAD SINGH, Defendant No. 1, Respondent.

Revenue Sale Law (Act XI of 1859), sec. 54—Share of revenue-paying estate, sale of—Mortgagee who has sold the share in execution of mortgage decree and purchased it before the estate fell in arrear, if may use mortgage as "shield" against purchaser at revenue sale, when mortgage sale confirmed after last date of payment—Extinction of incumbrance on date of sale—Civil Procedure Code (Act XIV of 1882), sec 310—"Keeping alive mortgage," right of—Land Registration Act (VII of 1876, B C)—Removal of name from register, order of Court for.

A mortgagee of a share in certain villages forming part of a revenue paying estate obtained a decree on his mortgage and had the same sold in execution thereof and purchased it himself on the 19th March 1900, and the sale was confirmed on the 23rd April [illegible]. Meanwhile the March kist of the Government Revenue fell in

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arrear on the 28th March 1900, and the share of the villages in question along with a corresponding share in the remaining villages of the estate was sold under sec. 54 of Act XI of 1859 for its own arrears of revenue:

Held—*That the right, title and interest of the mortgagor in the properties in question passed to the mortgagee on the 19th March 1900, and the mortgage incumbrance became extinct when on that date he became the complete owner of the properties, and that it was not open to him after that date to use that incumbrance as a "shield" against the purchaser at the revenue sale.*

That from the 19th March 1900 the mortgagee became responsible to Government as owner for payment of the revenue.

This was an Appeal from the High Court of Calcutta, dated the 10th of January 1908, setting aside a decree of the Subordinate Judge of Gaya, dated the 27th of January 1905.

The suit was brought by the Plaintiff Appellant to obtain from Defendant No. 1 (Respondent) possession of a certain share amounting to five annas 1½ pies in four villages situate in Taluk Agamgash, Pergunnah Shaharghati, in the Gaya district. The share had been mortgaged in the year 1886 to the mother of the Respondent and in the year 1898 the Respondent as her heir brought a suit to enforce the said mortgage wherein a decree was passed in his favour against the mortgagors and an order absolute was made for the sale of the mortgaged properties on the 19th of December 1899. In execution of the said decree the Respondent caused the said mortgaged properties to be sold and on the 19th of March 1900 himself purchased them, such purchase being subsequently confirmed by a certificate of the Court, dated the 23rd of April 1900.

On the 29th of March 1900, Government revenue for that *kist* upon the said share together with a similar share in 67 other villages forming part of the same estate (the aggregate of which shares are referred to in the case as the *ijmali* or "residue" share in the said villages) became overdue and on the 6th of June 1900 the whole of the said *ijmali* share was sold by the Collector for realisation of the arrears and was purchased by one Durga Prasad (Defendant No. 3) in the name of Hulas Narayan, Defendant No. 2. The last named Defendant subsequently executed a formal document disclaiming all interest in the properties in favour of Durga Prasad by whom the same were on the 20th of September 1902 transferred to the Appellant, his wife, by a deed of gift of that date.

The question for determination in the case was whether the title of the Appellant to the 5 annas 1½ pies share in the said four villages based upon the aforesaid revenue sale of the 6th of June 1900 prevailed over the claim of the Respondent under his said mortgage or auction sale.

The Subordinate Judge held that what was sold at the said revenue sale was merely the right, title and interest of the mortgagors which (so far as concerned the share of the four villages in suit) had already passed to the Respondent under the previous execution sale, and that therefore the Appellant had acquired no interest therein by his purchase at the said revenue sale, and he accordingly dismissed the Appellant's suit with costs.

The High Court on appeal (Brett and Mookerjee, JJ.) differed from the Subordinate Judge.

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The learned Judges held that the view taken by the Subordinate Judge that the purchaser at the revenue sale purchased merely the right, title and interest of the defaulting proprietor on the date of sale and consequently purchased nothing, because his interest had already passed to the Defendant was not well-founded, being contrary to the policy of the Revenue Law and opposed to the decisions of the Court in, amongst other cases, *Debi Das* v. *Bipra Charan* (1) and *Annoda Prasad* v. *Rajendra Kumar* (2); that the purchase by the mortgagee at the sale in execution of his decree was not completed under sec. 316 of the Civil Procedure Code till the date of the confirmation of the sale on the 23rd April, 1900, as between the date of the sale on the 19th March 1900 and the date of the confirmation there was a possibility of an application to set aside the sale under sec. 311, Civil Procedure Code; that therefore on the 28th March 1910, the mortgagee had not become the owner of the property and he was not "a proprietor at the time of default"; that the fact that before the date of the revenue sale, the mortgagee had by the confirmation of the sale become full owner made no difference in the position of the parties and that the decision of the Judicial Committee in *Sham Kumari* v. *Rameswar Singh* (3) was distinguishable from this case; that the mortgage incumbrance was not extinguished by the debt having been converted into a judgment debt [*Drake* v. *Mitchell* (4)] and that although there was authority [*Bibijan Bibi* v. *Sachi Bewah* (5)] for holding that a security is extinguished upon the actual sale of the mortgaged properties and the distribution of the proceeds, yet a mortgagee who has purchased at a sale in execution of a decree upon his mortgage is entitled to rely upon his mortgage as a shield against a subsequent incumbrancer [*Debendra Narain* v. *Ramtaran* (6)]; that as in this case it would be for the mortgagee's benefit to keep alive the mortgage it should be presumed on the principle of the cases of *Gokaldas* v. *Puranmal* (7), *Mohesh Lal* v. *Bawan Das* (8) and *Dinobandhu* v. *Jogmaya* (9), that the lien had been kept alive as against the purchaser at the revenue sale. "It would" observed Mookerjee, J, "be manifestly unjust to hold that because by a mere accident the mortgage sale was confirmed a few days before the revenue sale, the rights of the mortgagee were completely lost."

In the result their Lordships discharged the decree of the Subordinate Judge and passed a decree in the Plaintiff's favour for possession conditional upon redemption of the mortgage of the Defendant within six months, the suit being declared liable to dismissal on the failure to redeem within that period.

The Plaintiff preferred this Appeal to the Privy Council.

Mr. L. DeGruyther, K. C., and *Mr Lowndes* for the Appellant.—The Respondent's mortgage was not an incumbrance upon the properties in suit at the date of the revenue sale. The mortgage had been extinguished by the auction sale on the 19th March. The auction-purchaser's title accrued from the date of his purchase

(1) I. L. R. 22 Cal. 641 (1895).
(2) 6 C. W. N. 875 (1901).
(3) L. R. 31 I. A. 176: s. c. 8 C. W. N. 786 (1904).
(4) 3 East. 251 (1803).
(5) I. L. R. 31 Cal. 863 (1904).
(6) I. L. R. 30 Cal 599 (1903).
(7) L. R. 11 I. A. 126 (1884).
(8) L. R. 10 I. A. 62 (1883).
(9) L. R. 29 I. A. 9 (1901).

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i.e., the 19th March, and not from the date of the certificate. From that date the auction-purchaser became liable for Government revenue. He also became entitled to any accretions to the property and to sue for mesne profits in respect of it. The default in payment of revenue was made after the 19th March. Reliance was placed on the case of *Bhojrub* v. *Soudamini* (10). Sec. 316, C. P. C., does not affect that decision. It applies to the parties to the suit and not to third persons. That section has been differently construed by the Judges, but the construction for which the Appellant contends has found favour with the Legislature. Sec. 65 of the new Code of Civil Procedure, 1908, lays down that the property vests from the date of actual sale. Sec. 28 of Act XI of 1859 does not alter the date of sale. This Board has decided that when sale or purchase is spoken of in connection with time, " the time meant is that at which the sale takes place in fact, not that to which its operation is carried back by relation "—*Sham Kumari* v. *Rameswar Singh* (3). In any case the auction sale was confirmed on the 23rd April. Thereafter the mortgage certainly came to an end. There could be no incumbrance on the 6th June. The High Court is wrong in holding that the auction-purchaser was entitled in equity to use his old right of a mortgagee as a shield. No equitable considerations arise here. The true test is what are the rights and liabilities of every auction-purchaser.

Gokaldas v. *Puranmal* (7) has no application. All the rights the mortgagee had merged in his decree, and the auction sale gave him a new title as an ordinary purchaser. Counsel discussed the cases mentioned in the judgments of the Judges of the High Court, and also referred to the following :—

Abdool Bari v. *Ramdas Coondo* (11), *Adhur Chunder* v. *Aghore Nath* (12), *Dagdu* v. *Pancham Singh* (13), *Bibijan Bibi* v. *Sachi Bewah* (5).

Mr. G. E. A. Ross for the Respondent submitted that the view taken by the Court below was right. The auction-purchase was not complete till after the confirmation of the sale, and the title vested from the 23rd April under sec. 316, C. P. C. The Respondent was entitled to rely upon his mortgage and use it as a shield against the revenue sale purchaser.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an Appeal from a judgment and decree of the High Court of Calcutta, dated the 10th January 1908, which set aside a decree of the Subordinate Judge of Gaya in Bengal, dated the 27th January 1905.

The suit was brought by the Appellant as Plaintiff to obtain possession of a certain share, amounting to 5 annas $1\frac{1}{2}$ pies, in four villages in the Gaya district, which are named in the plaint. The Appellant's rights are those of a purchaser who bought these properties at a revenue sale,—that is to say, a sale for arrears of revenue. The Appellant pleads that he has received, in his character of purchaser and as from the date of sale, a right which cannot be defeated by the Respondent. The Respondent was a mortgagee holding a security over the property for money lent thereon, and in respect of this

(3) L. R. 31 I. A. 176, 178 : s. c. 8 C. W. N. 786 (1904).
(7) L. R. 11 I. A. 126 (1884)
(10) I. L. R. 2 Cal. (F. B.) 141 (1876).
(5) I. L. R 31 Cal. 863 (1904).
(11) I. L. R. 4 Cal. 607 (1878).
(12) 2 C. W. N. 589 (1898).
(13) I L. R. 17 Bom. 375 (1892)

loan the property was sold in execution to him. It is out of this conflict between the rights of the former, who may be called the revenue vendee, and the latter, who was mortgagee and purchaser at the execution sale, that the suit has arisen.

As their Lordships are unable to agree with the views which have been taken with regard to this case, either by the Subordinate Judge or by the High Court, it is necessary to mention certain dates which are material, and to test crucially what were the rights of parties at those dates.

On the 9th August 1886, a mortgage for Rs. 5,000 was granted in favour of the Respondent over the shares aforesaid of four out of seventy one villages. On the 31st May 1899, the Respondent obtained a decree on his mortgage bond, which was made absolute on the following 19th December. He executed his decree, a sale in the ordinary course took place, and on the 19th March 1900, which is the first important date in the case, the mortgaged property was sold, and it was purchased by himself, the mortgagee.

Nine days thereafter, namely, on the 28th March 1900, the March instalment of Government revenue on the 71 villages, amounting to Rs. 1,554, fell into arrear, and the whole, including the four which had just been purchased by the mortgagee, were notified for sale by the Collector. The situation of matters accordingly then was that, so far as the ownership of the property was concerned, a transaction of sale thereof in favour of the morgagee as purchaser had in point of fact taken place, and this at a time when, by the use of the ordinary information available as public facts, or upon enquiry with regard to the property purchased it would have been found that the period of the falling due of revenue was almost at hand, and that proceedings preliminary to a sale in respect of arrears then left unpaid would inevitably be commenced.

The mortgagee, however, did not pay the revenue which fell due at the end of March. Without doing so, he went forward with proceedings to get the sale to himself in execution of the mortgage confirmed. On the 23rd April he obtained a certificate confirming the sale, the certificate bearing that he "has been declared the purchaser at sale by public auction on the 19th March, 1900 . . . . and that the said sale has been duly confirmed by this Court on the 23rd April 1900."

It was maintained in argument for the mortgagee that the true meaning of this was that the sale to him did not become a a legal fact until the 23rd April. In their Lordships' opinion, this is an under-statement and a mis statement of the mortgagee's rights. It is true that upon that date the sale was confirmed, but what was, as the certificate bears, confirmed, was a sale "by public auction on the 19th March 1900." There seems little reason to doubt that upon the 19th March all the lands sold had been transferred to the mortgagee, and that if there had been any accretions to the property between that date and the date of confirmation, those accretions would have become the property of the purchaser. On the other hand, there seems no legal principle which would leave un-transferred to the mortgagee any obligations which arose during the same period. Furthermore, if the properties which were the subject of sale were liable to attachment for sums due from the lands as revenue, and falling into arrear subsequent to the actual date of sale, namely, the 19th March 1900, it was not within the legal right of the mort-

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gagee on the one hand to claim as against the mortgagor that the ownership of the property had been transferred, and at the same time to claim against the Government, or in respect of third parties unconnected with either mortgagor or mortgagee, that the mortgagor had not transferred the rights of ownership to the mortgagee, but himself remained in the position of owner. For the mortgagee to be permitted to say to the mortgagor that the ownership had been transferred, and to say to an outsider, like the Collector of Revenue, that the ownership had not been transferred, is a conclusion not supported by good sense and, in the opinion of their Lordships, they are not forced to it by any canon or rule of law.

If the date of sale be taken as the true and actual date in fact, which, in their Lordships' opinion, was, as explained, the 19th March 1900, it appears to their Lordships equally clear that what was in fact then sold was the estate itself and nothing other or less than this which might be denominated by the terms "right, title, or interest" of the mortgagor only, or the like. And it would seem to follow as a necessary consequence that when the mortgagee thus became the purchaser and owner of the subjects mortgaged, he was not in a position to maintain as against himself, or as against third parties unconnected with mortgage transactions upon the property, the position that his mortgage still remained an encumbrance thereon.

In their Lordships' opinion it is clearly unsafe to apply considerations as to the rights of prior and succeeding mortgagees to questions like the present. For in the present case no question arises as between a first and succeeding mortgagee, and no right or duty emerges with regard to the avoidance of an inequitable priority alleged to arise inferentially by acquisition of the estate. On the 19th March 1900, the crucial date in question, there were no interests of any kind to enter into account or consideration so as to impede the full and complete transfer of ownership of the estate as such.

In these circumstances, when the 29th March 1900 was reached, the property which fell then into arrear of revenue and became liable to subsequent sale was the property in fact and in law of no one but the purchaser, namely, the mortgagee. It is admitted,—the concession was logically unavoidable,—that if at the sale on the 19th March the mortgagee himself had not purchased, but a stranger or outsider had, then such purchaser would have stood liable for the obligations accruing on the property and been responsible to Government for the payment of revenue and for the consequences which would ensue if the revenue fell into arrear. It seems somewhat difficult to discern why these consequences, which would be inevitable in the case of a stranger purchaser should be avoided because the mortgagee was purchaser himself.

The above considerations seem substantially to dispose of the whole case and lead their Lordships to a conclusion the opposite of that reached by the High Court, who think that it was possible for a mortgagee to maintain the ownership of the property in himself with an encumbrance which he should use to defeat, or, to use the term which the learned Judges employ, as a "shield against" the rights of third parties.

Upon this subject it is true that the language of sec. 54 of the Act No. XI of 1859—the Bengal Statute as to sales of land for arrears of revenue—provides

that when a share or shares of an estate may be sold "the purchaser shall acquire the share or shares subject to all encumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners." This provision, however, appears to their Lordships (1) to confirm the view that what is taken by a revenue vendee is nothing less nor more than what belonged to the former owner, and (2) to negative the idea that it is open to an owner to protect hinself as by "a shield" against the consequences of that full transfer by keeping incumbrances alive against the revenue vendee. These incumbrances had become extinct and lost in the mortgagee's overriding right when he became the complete owner of the lands. To keep them alive as sought would introduce confusion into the mechanism of transfer and an insecurity into the rights in real estate which are not warranted by the Act.

Their Lordships will humbly advise His Majesty that the judgments of the Courts below be reversed, and that the Plaintiff be declared entitled to the lands in suit in terms of the plaint, that possession be delivered to the Appellant of the properties in dispute the possession of the Respondent being removed, that the name of the Plaintiff be caused to be entered in the Land Registration Office accordingly, the name of the Defendant being expunged and his illegal possession removed, and that the cause be remitted to the High Court for the ascertainment of mesne profits for the period of dispossession up to the date of delivery of possession and for a decree therefor against the Respondent. The Respondent will pay the costs both here and in the Courts below.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors: *Messrs. Watkins & Hunter* for the Respondent.

B. D. *Appeal decreed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 357 OF 1910.

CHAUDHURI, J.
1912,
8, July.

W. STEWART
v.
THE NEW ZEALAND INSURANCE CO., LD.

Policy of Marine insurance—Perils of the sea—Wear and tear not included within the words.

Where a boat was insured against perils of the sea, and it was proved that it sank in fair weather and smooth water without any assignable cause and where it was not proved that the bottom plates had sprung a leak in consequence of the alleged bumping of the boat, and where also there was some evidence of the boat having been deliberately scuttled, which if not accepted would lead to the inference that the bottom plates had corroded in consequence of age and ordinary wear and tear:

Held—*That the case was not covered by the terms of the policy.*

The term "perils of the sea" refers only to fortuitous accidents or casualties of the sea. The words do not cover every loss of which the sea is the immediate cause and so wear and tear do not come within the meaning of those words. There must be some casualty, something which could not be foreseen as one of the necessary accidents of adventure.

THE "XANTHO" (2) *followed.*

ANDERSON *v.* MORICE (3), BLACKBURN *v.* THE LIVERPOOL AND BRAZIL RIVER PLATE STEAM NAVIGATION CO. (7) *distinguished.*

(2) 12 A. C. 503 at p. 509 (1887).
(3) 10 Com. Pleas 58 (1874).
(7) [1902] 1 K. B. 290 (1901).

W. STEWART *v.* THE NEW ZEALAND INSURANCE CO., LD.

The facts material to the report are sufficiently stated in the judgment.

Messrs. Langford James and *Pankridge* for the Plaintiff.

Messrs. B. C. Mitter, *L. P. E. Pugh* and *H. G. Pearson* for the Defendants.

The JUDGMENT OF THE COURT was as follows:—

CHAUDHURI, J.—The Plaintiff is the owner of a Steam Launch named *The Fox*. It was an old Government boat which the Plaintiff purchased. He had it repaired and eventually chartered it to a firm in Chittagong. It was sent to Chittagong where there was some difficulty with the charterers whose creditors appeared to have attached the boat. After some considerable trouble, the Plaintiff succeeded in getting the boat away. It apparently started back some time after July 1910 and arrived at Port Canning. The Plaintiff states that it met with rough weather on the return voyage and lost two water tanks and a jolly boat, but no damage was done to the boat itself. He himself took charge of the boat at Matla and came to Calcutta on the 8th or 10th October 1909. The delay was due to the crew and want of coal. The boat had been insured for the return voyage with the Defendant company, but when it arrived at Port Canning the Plaintiff wrote to them that having regard to the delay which had taken place further insurance was necessary. At last an insurance was effected with the Defendant company on the 17th of September 1909, for one year, for Rs. 15,000 the amount of the policy in suit. Out of the premium payable to the Defendant company a sum of Rs. 187-8-0 had been paid before the loss of the boat and Rs. 562-8-0 remained unpaid.

The Plaintiff alleges that the boat has been totally lost to him. It sank on the other side of the river near Shibpur, and was a total wreck and he claimed the amount of the insurance Rs. 15,000 less the amount of the premium due. He claimed this amount as covered by his insurance as against "perils of the seas."

It appears that after the boat was brought to the Shalimar side, opposite Shibpur, there was a gale on the 17th of October; the ship broke loose and drifted to the Calcutta side. It was towed back by the Port Commissioners to the Shibpur side on the 18th of October. The Plaintiff states that no damage was done to the boat except that some portion of the wood work had been washed away. He says he intended to beach the boat in order to give it a coat of paint, and that he left orders with the *secunny* for that purpose, but his orders were not carried out. The *secunny* is said to have made various excuses and at last wanted a *dinghy* to carry ropes from the vessel to the shore, for the purpose of beaching it and that the Plaintiff eventually engaged a *dinghy* two or three days before the accident took place. Even then his orders were not carried out, upon which he sent his son, Donald Stewart, to the vessel on the 22nd of October to see that it was beached. A friend of this young man of the name of West accompanied him. They went at night and West's account is that they went to sleep, Donald Stewart leaving orders that the men were to wake him up at 3 or 4 o'clock in the morning in order to beach the boat. They went to sleep in the same cabin. They were however suddenly roused about day dawn on being told that the ship was filling with water. They came down and had just time to

get into a *dinghy*, when the vessel sank. It sank in fair weather and smooth water. According to the Plaintiff there are only two theories possible, namely, that either the boat was deliberately scuttled, or that the bottom plate had corroded and sprung a leak. He said that simple corrosion of the bottom plate would not account for the leak, if any, but there must have been bumps superadded to start the plate leaking, and he stated that he had heard from his son that on the night of the occurrence he had distinctly felt a bump of what he thought was a country boat. His explanation was that it was possibly due to this collision, added to the fact that the bottom plate had probably corroded which had started a leak and in consequence of which the vessel sank. He stated that all the plates of this boat had been renewed three years before the accident, except the bottom plates which could not be renewed without the boiler being lifted, and as that involved much expense, they were not changed. Unfortunately we have not got the evidence of Donald Stewart who had died since the accident, but the statement of the Plaintiff finds no corroboration from that of the *secunny*. The Plaintiff stated that the *secunny* had corroborated his son shortly after the accident. The *secunny* however stated in the witness-box that he knew nothing of any boat bumping that night. Therefore, so far as the collision theory is concerned, I must reject it as without evidence. It was never suggested at the earlier stages of the case, and seems to have been an afterthought. The evidence is that the boat was in a water-tight condition up to the night of the accident and suddenly sank in smooth water and fair weather.

The boat, as I have said, sank in the morning of the 23rd of October. No intimation was given by the Plaintiff to the Insurance Company that day or the next. He says 23rd October was a close holiday, 24th October was a Sunday, and he received a letter on the morning of the 25th from the Insurance Company calling his attention to the fact that his boat had sunk. He immediately sent a reply. He promised to see Mr. Legatt of the Insurance Company on the 28th, but did not go to him before the 30th. His explanation is that inasmuch as the *secunny* was ill, he could get no information from him. So far as the statement of the illness is concerned, it is not supported by the *secunny*. He was not ill. He was somewhat fatigued and distressed according to his own account. But the Plaintiff's description of the illness was somewhat graphic. When stating that the *secunny* was ill, the Plaintiff showed how he shook with fever when he came to him. The *secunny* denies that he had fever. This seems to be an invention on the part of the Plaintiff. There was no protest made by the *secunny* until the 23rd of November 1909 and it is important to see what is stated there. The *secunny's* statement on that occasion was that the boat had started a leak in the forehold and in consequence gone down. Now, the Plaintiff says the boat could not have started a leak in the forehold. The plates had been changed, and he says it was the *secunny's* mistake. The leak must have started according to him in the engine hold, which is the centre hold, somewhere under the ash-plate of the boiler. The water must have rushed into the middle hold through the bottom plate and from there forced its way into the forehold, and he stated as his ground for so saying, that the boat had

sunk stern foremost. It is difficult to accept a theory of that kind, when the man who was actually on the boat states that the leak must have sprung in the forehold. The protest also suggests that some of the rivets must have got loose during the storm on the 17th of October. This is not supported by the Plaintiff at all. He does not suggest it, the *secunny* also does not support it, and the statements made in the protest are contradicted by the evidence which has been given. The Plaintiff denies he knew what the *secunny* was going to say in the protest, but the language used does not seem to be the *secunny's*. He no doubt made his statement in Bengali, but the way the protest puts the case, I doubt, if the *secunny* could have put it.

There was considerable evidence given about the finding of a plug, a gland attached to the plug, and some pins. The plug is said to belong to one of the sea-cocks. If the plug was removed from the sea-cock, it is conceded that the boat would have made water and sunk. The evidence of the Defendant company is this, that one Capt. Haines was employed by them to raise the boat. The boat was raised on or about the 18th December. On the morning of the 19th a man of the name of Metcalfe who was employed on the boat was there, Capt. Haines was there and a coolie who was working on the boat brought up from the bottom of the boat a plug and a gland, the same as produced. At that time one Mathieson, a Chief Engineer of the River Steam Navigation Company, was there also. These things were brought up in their presence from the hold of the boat. We have the evidence of Capt. Haines on this point: Mathieson has been examined and Metcalfe also. So far as Capt. Haines is concerned, he was examined on commission. When application was made for the issue of a commission, it was strenuously opposed by the Plaintiff on the ground that it would be impossible for him to join in it, as he could not afford the expense, but the learned Judge, who heard the matter and ordered the commission, thought that no sufficient ground had been shown by the Plaintiff against its issue. Counsel for the Plaintiff protested at that time as he said it practically prevented his client from cross-examining Capt. Haines. He further stated that his client was not going to join in the commission; but subsequently the Plaintiff did join in the commission. His Attorney wrote to the Registrar asking for leave to join in the commission and such leave was given, and the commission was sent out to Moulmein on the 23rd of January. The practice in this Court is that when a commission issues in this way the parties have to appear before the commissioner and get a date fixed for the examination of the witness. It appears that a summons in this case was issued on Capt. Haines on the 15th of February at the instance of the Defendants' lawyers. The Plaintiff did not appear on that occasion, or on any other. He was not present, nor was he represented. He made no attempt to appear before the commissioner. He did not even communicate with him. The examination was fixed for the 19th February and the commission was returned on the 28th of February 1912. During this time no attempt was made by the Defendant to take any steps for the cross-examination of the witness, and although the case was not heard till long afterwards, no application was made by him, either for the purpose of being allowed to cross-examine Capt. Haines, or for

getting an order that his evidence could not be used, as he alleged he had no notice when the commission had issued. He had joined in the commission and it was incumbent upon him to communicate with the commissioner if he intended to appear. I think that the Plaintiff allowed this witness to go un-cross-examined in the hope of getting his evidence rejected by not appearing at Moulmein. Having regard to the case, *Gregory* v. *Dulichand* (1), in which it was held that the opposing party had a right to notice of every proceeding held under a commission, I was at first inclined not to admit this evidence, but having regard to the facts subsequently elicited, I have allowed it. My conviction is that it was a deliberate omission on the part of the Plaintiff not to take any steps for the cross-examination of Capt. Haines. The evidence of Capt. Haines, if accepted, is almost conclusive. He speaks about the discovery of the plug and the conclusion one must draw from the facts stated by him is that the boat must have been scuttled. The plug must have been deliberately removed, it could not have been forced out of its place by the water coming in. But although I have admitted the evidence of Captain Haines, I do not think it is safe to rely upon it without corroboration. It is un-cross-examined testimony. I have, therefore, to consider the evidence of Metcalfe and Mathieson. Metcalfe speaks about finding the plug, and I do not see any reason why he should be disbelieved. His account is very clear. He mentions who the persons were, who were present on that occasion and how the plug was found and the only ground suggested for disbelieving this witness is the allegation that Capt. Haines has some improper relationship with this man's sister, a married sister, with whom he does not correspond. I think it is a cruel suggestion to make, and not at all a worthy one. There is no evidence in support of it except a statement by the Plaintiff that Capt. Haines at one time lived in a room, which belonged to Mrs. Elder, Metcalfe's sister, in a house which the Plaintiff was occupying. With regard to Mathieson also I see no reason for disbelieving him. His recollection is not quite clear as regards the things found on the occasion he says he was present. He spoke about a spanner, a gland, a plug &c. being found His impression is that all the things were found at the same time, one after the other. This does not agree with the version of Metcalfe who speaks to the plug being found in his presence, and the other things later. No reason has been suggested why Mathieson should be disbelieved. He holds a respectable position, under a well-known firm in Calcutta and appears to be an independent witness. Except for this discrepancy as to the time when all these articles were found, there is nothing against his evidence. A pencil entry in his log-book is also challenged as suspicious. He says that he wanted to keep a record of what happened, but as it was not official he made a note in pencil. As to the note I am not inclined to give it much weight, but I see no reason to doubt his veracity. There is also the evidence of Captain Stewart who did not see any leaks or cracks in the plate, and speaks to the hold being water-tight. Taking all this evidence together I hold the plug was out of its place, that it was found in the bottom of the boat and had been removed and that the removal of the plugs caused the boat to sink.

As against this evidence we have the evidence of a man of the name of Domingo. He was a very unsatisfactory witness, and

(1) 14 W. R. (O. S.), p. 17 (1868).

although he did not show any signs of being drunk, it was suggested by the Plaintiff's Counsel in his reply that he must have been drunk. He was for a considerable time in the witness-box and appeared to me to be entirely unreliable and untruthful. He said that he was asked by Captain Haines to find a plug and gland, as they would be necessary for the Insurance Company, suggesting by that, that he had been asked by Captain Haines to remove these things and that they were going to be utilised for making a case that the sea-cocks had been left deliberately open. He says that when he was cleaning the mud out of the boat, after it had been raised, he saw these things in their place. He mentioned the matter to Captain Haines, but to his astonishment next morning these things had disappeared. He informed Captain Haines that they were gone, which made Captain Haines very angry. He stated that he believed that Captain Haines had deliberately caused the disappearance of these things. He subsequently withdrew from that, but came back to it again, and charged Captain Haines with having engineered this incident. It appears to me that the Plaintiff felt that some answer should be given about the plug not being found in its proper place and that Domingo was put forward to supply that evidence. He was discovered by a man of the name of Murray who stated that he had at one time been a partner of Capt. Haines. His evidence was simply that he went to see this boat after it had been raised, and found Domingo working there. He did not go on the boat, and knew nothing about its condition. One day Domingo casually met him, long after the date of his visit to the boat. Murray took him home, and had a talk with him about the accident and thought that his evidence would be useful for the Plaintiff. He sent Domingo with a letter to the Plaintiff and the Plaintiff sent him on to his Attorney to make a statement. On Domingo being asked if he had mentioned any of the facts stated by him in the witness-box to Murray he at first said "No," but within a minute afterwards he said he had made a complete statement to Murray. I entirely disbelieve the evidence of Domingo as regards the charges made against Captain Haines and the way he says the plug disappeared from its place.

Upon this evidence, I am inclined to believe that the Plaintiff knew how the plug had been removed. It is unnecessary for me to deal with this matter at any length, as I consider that the case is not covered by the terms of the policy. It is an insurance against perils of the seas, and there is abundant authority for holding that a boat sinking under these circumstances in fair weather and smooth water did not sink by a peril of the sea. The term "perils of the seas" refers only to fortuitous accidents or casualties of the sea. It does not include the ordinary action of the wind and waves It is well settled that it is not every loss or damage of which the sea is the immediate cause, that is covered by these words. They do not protect for example against the natural and inevitable action of the winds and waves, which result in what may be described as wear and tear. There must be some casualty, something which could not be foreseen, as one of the necessary accidents of adventure. See Lord Herschell's judgment in *The "Xantho"* (2).

Reference was made to the case of *Anderson* v. *Morice* (3) and also to the

(2) 12 A. C. 503 at p. 509 (1887).
(3) 10 Com. Pleas 58 (1874).

cases of *Gibson* v. *Small* (4), *Thompson* v. *Hopper* (5), *Fawens* v. *Sarsfield* (6) in support of the proposition that there is no implied warranty of seaworthiness in Time policies.

In *Anderson* v. *Morice* (3), the boat went down in fine weather, but there was a large body of evidence given as to the cause of the accident, and upon that evidence the jury came to the conclusion that it was covered by the terms of the policy.

It is unnecessary to deal with the other cases which were referred to during argument, except *Blackburn* v. *The Liverpool and Brazil River Plate Steam Navigation Company* (7). That was a case of injury to goods which were insured. A plug had been left open and water came in, and damaged the goods. The case depended on what is known as the "negligence clause." Lord Halsbury held upon the facts that the injury was covered by the words "perils of the seas." He however affirmed the principle laid down in *Hamilton* v. *Pandorf* (8), that there must be something fortuitous and unexpected, that wear and tear did not come within the words "perils of the seas." If the boat was not deliberately scuttled, the only other explanation offered is that the bottom plate had corroded, through natural causes.

I hold that the Plaintiff's suit fails and dismiss it with costs on scale No. 2.

Mr. Pearson—The costs will include the costs of the commission and the *De bene esse* examination.

THE COURT.—Yes.

(3) 10 Com. Pleas 58 (1874).
(4) 4 H. L. C. 353 (1853).
(5) 6 El. and Bl. 172 (1856).
(6) 6 El. and Bl. 192 (1856).
(7) [1902] 1 K. B. 290 (1901).
(8) 12 A. C. 518 (1887).

Messrs. Chunder, Law & Co., Attorneys for the Appellant.

Messrs. Pugh & Co., Attorneys for the Respondents.

M. N. M.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDERS
NOS. 355 AND 356 OF 1912 AND
RULE NO. 4081 OF 1912.

BRETT, J.
CHAPMAN, J.
1912,
Heard,
31, July.
Judgment,
5, August.

THE EASTERN MORTGAGE AND AGENCY COMPANY, LIMITED, Plaintiffs, Appellants,
v.
RAKKA KHATUN and others, Defendants, Respondents.

Civil Procedure Code (Act V of 1908), sec. 94 (d), Or. 40, r. 1—Receiver, appointment of, in mortgage suit—Mortgagee's right—Court's discretion—Interest and Government revenue left in arrears, if sufficient ground—Nomination of Receiver.

Though the appointment of a Receiver pendente lite *is a matter entirely within the discretion of the Court, it must in the exercise of that discretion be guided by the circumstances of each particular case; and it has been laid down as a general rule that the appointment of a Receiver will be made as a matter of course on the application of a mortgagee if the interest payable under the security is in arrear.*

Where it appeared that the original mortgage debt sued upon had trebled and no interest whatever had been paid to the mortgagees and that on the other hand the mortgagees had been compelled to advance money to pay the Government revenue on the mortgaged properties in order to save them from sale for arrears and that to recover the sums so advanced they had been compelled to bring another suit:

THE EASTERN MORTGAGE AND AGENCY COMPANY, LIMITED *v.* RAKEA KHATUN.

Held—*That it was a fit case for the appointment of a Receiver.*

As a general rule the right to propose a person for appointment as Receiver belongs to the party interested in obtaining the appointment and effect will be given to his nomination. But if the Court appoints a Receiver at the instance of a mortgagee—the mortgagee not having, without the assistance of the Court, power to appoint a Receiver—then the Court exercises its discretion as to who shall be appointed Receiver and appoints the Receiver whom, having regard to the interest of both mortgagee and mortgagor, the Court considers the best person.

These were Appeals preferred on the 26th of June 1912 against the order of Babu Lal Behari Bhaduri, Subordinate Judge, 1st Court of Zillah Backergunge, dated the 10th of June 1912.

The material facts will appear from the jndgment.

Mr. B. C. Mitter, Babus Provash Chunder Mitter and *Ambica Pada Chowdhury* for the Appellants.

Babus Jogesh Chunder Roy and *Gunada Charan Sen* for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

These two Appeals, Nos. 355 and 356 of 1912, are directed against two orders passed by the Subordinate Judge of Backergunge in two mortgage suits brought by the present Appellants, the Eastern Mortgage and Agency Co., Ld., against the Defendants-Respondents, Rakea Khatun, widow of the late Tajamal Ali Choudhury and others, to recover the principal and interest due on two mortgage bonds executed by Tajamal Ali Choudhury and others on the 18th September 1896 and the 9th September 1897 respectively. The former bond covered a loan of Rs. 8,800 and the latter a loan of Rs. 3,50,000 and contained a proviso that Rs. 1,00,000 should be afterwards lent if the conditions under which the original loan was made were complied with. One of the conditions imposed in the mortgage deeds was that Messrs. Garth and Weatherall were to be appointed managers on behalf of the mortgagors of the mortgaged properties and that they were to pay off the mortgage debt with interest out of the profits of the mortgaged properties and also to take their own commission. These two gentlemen were duly appointed managers and the additional Rs. 1,00,000 was afterwards advanced. Obstruction to the management is said to have been offered by the mortgagors with the result that the managers were unable to collect the rents from the mortgaged properties or to pay to the mortgagees any portion of the mortgage debt or of the interest.

Meanwhile in consequence of quarrels between the mortgagors and their co-sharers in the properties covered by the mortgages as well as in other properties belonging to the family, on the 14th December 1901, Messrs. Garth and Weatherall applied to the Collector of Backergunge asking that steps should be taken to prevent a breach of the peace and to enable them to obtain possession of the properties covered by the mortgages. The Collector sent on the application to the District Judge in whose Court it was numbered as Misc. Case No. 74 of 1901. The result of the proceedings taken on this application in the Court of the District Judge was that on 27th March 1902, he called on the co-owners in the estate to appoint a common manager. They failed to do so and, on the 1st May

THE EASTERN MORTGAGE AND AGENCY COMPANY, LIMITED *v.* RAKEA KHATUN.

1902, the District Judge passed an order under sec. 95, cl. 2 of the Bengal Tenancy Act directing that the management of the estate should be taken over by the Court of Wards; and as a temporary arrangement he appointed, on the 12th August 1902, Abdul Ali Chowdhury as common manager of the estate. On the 23rd December 1902, the Court of Wards declined to take over the management and Abdul Ali Chowdhury was allowed to remain on as common manager. On the 8th May 1903, the District Judge removed Abdul Ali Chowdhury from the managership as his management was not satisfactory and as he was related to some of the co-owners. The Judge on the application of Messrs. Garth and Weatherall then appointed Babu Nibaran Charan Dass as common manager but, on the 9th September 1903, another application was made by Messrs. Garth and Weatherall that the estate should be placed under the management of the Court of Wards.

On the 16th September 1903, the Court of Wards agreed to take over the management subject to the condition that the Eastern Mortgage and Agency Co, Ld., would remit the sum of Rs. 1,50,000 from their debt subject to the condition that the loan was paid off within a certain time. This was agreed to and the estate was under the management of the Court of Wards from the 17th September 1903 to the 15th May 1912. The Court of Wards on the 15th March 1912 gave notice that they would give up the management on that date.

Meanwhile, on the 11th September 1911, no payments having been made up to that date in discharge of the mortgage debt or the interest, the Eastern Mortgage and Agency Co., Ld., instituted the two suits to recover the whole sum due on the mortgage bonds with interest to date and also another suit on a promissory note for money advanced by the company to pay the Government revenue which had fallen due on the mortgaged properties.

After receipt from the Court of Wards of the intimation that it proposed to give up the management on the 15th May 1912, notices were issued by the District Judge to the co-owners of the estate to show cause why a common manager should not be appointed and no cause having been shewn the District Judge on the 7th May 1912 appointed Babu Debendra Nath Dutt, a pleader of his Court, as common manager of the Estate.

On the 5th June 1912, application was made by the Eastern Mortgage and Agency Co., Ld., to the District Judge to set aside the order appointing the manager on the ground that it had been made without notice to them though they were co-proprietors having purchased 87 items of property in the estate but on the same date the District Judge passed an order refusing the application.

On the 28th June 1912, a Rule was obtained from this Court on the mortgagors and other co-owners of the estate to show cause why the order of the District Judge of the 5th June should not be set aside on the ground that it appeared to have been passed without sufficient evidence and without any notice to the Petitioners. This Rule is Rule No. 4081 of 1912.

On the 5th June 1912, applications were made to the District Judge in both of the suits (Nos. 442 and 444 of 1911) brought on the mortgages, for the appointment of a Receiver pending the disposal of the two suits. These applications were disallowed by the Subordinate Judge

in a long order recorded on the 10th June 1912.

Appeals from Orders Nos. 355 and 356 of 1912 are against these two orders.

At the request of the parties the hearing of these two Appeals and of the Rule No. 4081 of 1912 have been expedited and all these will be disposed of in this judgment.

Dealing first with the two Appeals we are of opinion that the grounds given by the Subordinate Judge in his order of the 10th June 1912 are not sound and cannot be maintained. It appears from the statements of the learned Counsel for the Appellants that the original mortgage debt of Rs. 4,50,000 has trebled and has now risen to over Rs. 12,00,000. Meanwhile no interest whatever appears to have been paid to the mortgagees and on the contrary the morgagees appear to have been compelled to advance money to pay the Government revenue on the mortgaged properties in order to save them from sale for arrears, and to recover the sums so advanced they have been compelled to bring another suit on the promissory note.

Though the appointment of a Receiver *pendente lite* is a matter entirely within the discretion of the Court it must in the exercise of that discretion be guided by the circumstances of each particular case; and it has been laid down as a general rule that the appointment of a Receiver will be made as a matter of course on the application of a mortgagee, if the interest payable under the security is in arrear (see Coote, Law of Mortgages, page 946, and the leading cases referred to therein).

Disagreeing therefore with the Subordinate Judge we hold that in the case of the applications with regard to which these two appeals have been brought the mortgagees are entitled to have a Receiver of the properties covered by the mortgage appointed pending the disposal of the two suits.

We understand that the Subordinate Judge who recorded the judgment in which the order was passed disallowing the application has retired. It is therefore not necessary for us to express at any length our opinion on the language and substance of his judgment. We need only observe that the learned pleader for the Respondent has not attempted to support the grounds on which the Subordinate judge has based his order and in our opinion they are altogether insufficient, and many of the suggestions made in his judgment appear to have no foundation in any facts.

We therefore decree both the Appeals and set aside the order passed by the Subordinate Judge refusing the applications made by the mortgagees.

As to the selection of a Receiver the parties before us have differed in opinion. Dealing with this question we have to observe that as a general rule the right to propose a person for the appointment of a Receiver belongs to the party interested in obtaining the appointment, and effect will be given to his nomination. Also if the Court appoints a Receiver at the instance of a mortgagee, the mortgagee not having, without the assistance of the Court power to appoint a Receiver, then the Court exercises its discretion as to who shall be appointed Receiver, and appoints the Receiver whom it thinks best to appoint for the interest of the mortgagee and of the mortgagor, a person whom having regard to the interests of both the Court considers the best person :—(Coote, [illegible] Mortgage, page 958).

Before us both parties are agreed that it is desirable that the gentleman appoint-

ed as Receiver should be one fully acquainted with and experienced in the management of Estates, and that the selection of a member of the bar who has no such experience or knowledge should not be approved. They are also agreed that in the interest of both parties it is much to be desired that the offices of common manager and Receiver should be united in one individual.

The learned Counsel for the Appellant has suggested on behalf of his clients that Mr. Thomas Cunliffe Tweadie, who has considerable experience and knowledge of zemindari management, should be selected as Receiver of the properties covered by the mortgages, and from the testimonials which have been filed we agree that that gentleman would be a suitable selection.

On behalf of the mortgagors exception to his appointment is taken on the ground that Mr. Tweadie is managing other Estates on behalf of the mortgagees. This however does not appear to us to constitute any valid objection to his being appointed as Receiver in the present suits. Certainly he would be the person best suited for the appointment in the interest of the mortgagees and in these suits the interests of both parties are in fact identical, namely, to secure a careful and firm management of the property and a proper collection and appropriation of the profits.

In our opinion therefore the application of the mortgagees should be granted and Mr. Tweadie should be appointed Receiver of the properties covered by the mortgage bonds pending the disposal of the suits.

[illegible] now to deal with the Rule [illegible] 1912 which is directed against the [illegible] the District Judge appointing [illegible] ndra Nath Dutt as common manager. Neither party have expressed any opinion against the character and probity of this gentleman but both are agreed that it is desirable in the interests of the Estate that a gentleman, having greater knowledge and experience of the management of Estates than he has, should be appointed as common manager. In these circumstances we think that the Rule should be made absolute and the order of the District Judge appointing him as common manager should be set aside. We have received from the learned pleader who represents the Respondents in Appeal No. 356 of 1912 a list containing the names of four gentlemen who are suggested for the appointment of common manager. They are M. Najimuddin Ahmed, Babus Benoy Bhusan Gupta, Upendra Nath Sen, Basanta Kumar Guha.

The learned Counsel for the Appellants has not offered any objection to the second-named. It must however be left to the District Judge to make his own selection from these gentlemen and Mr. Tweadie ; and in doing so we think he should endeavour to make such an appointment as will be best for the interests of the Estate and of both parties.

The Appellants are entitled to their costs in these two Appeals. We fix the hearing-fees at three gold mohurs in each. Each party will bear their own costs in the Rule.

Let the records be sent down to the lower Court without delay.

Appeals allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1827 OF 1909.

CARNDUFF, J.
CHAPMAN, J.
1912,
Heard,
17, June.
Judgment,
25, June.

MUNSHI MOSUFUL HUQ, Plaintiff, Appellant,
v.
SURENDRA NATH RAY and others, Defendants, Respondents.

Decree, if may be set aside as fraudulent, on proof that it was based on perjured evidence—Res judicata, *bar of—Review of judgment upon newly discovered evidence showing previous evidence perjured.*

A decree obtained in a suit cannot be set aside in a subsequent action brought for that purpose on mere proof that the previous decree was obtained by perjured evidence.

If evidence not originally available comes to the knowledge of a litigant and he can show thereby that evidence on which a decree against him was obtained was perjured, his remedy lies in seeking a review of judgment. But the rule of res judicata *prevents him from re-agitating the matter on the same materials, or on materials which might have been laid before the Court in the first instance.*

ABDUL HUQ *v.* ABDUL HAFEZ (3) *followed.*

LAKHMI CHURN SAHA *v.* NUR ALI (4), VENKATAPPA NAICK *v.* SUBBA NAICK (5) *dissented from.*

FLOWER *v.* LLOYD (2), PATCH *v.* WARD (10), BAKER *v.* WORDSWORTH (11) *relied on.*

ABOULOFF *v.* OPENHEIMER (6), VADALA *v.* LAWES (7), PRIESTMAN *v.* THOMAS (8), COLE *v.* LANGFORD (9) *referred to.*

This was an Appeal preferred on the 27th of August 1909 against the decree of Mr. F. Roe, District Judge of Zillah 24-Pergunnahs, dated the 7th of June 1909, affirming the decree of Babu Raj Krishna Banerjee, Subordinate Judge of that District, dated the 28th of January 1909.

The appeal arose out of a suit brought by the present Plaintiff who was the Defendant in a previous suit for ejectment instituted in 1906 by the present Defendants as Plaintiffs, to set aside an *ex parte* decree passed against him in that suit on the ground that the decree had been obtained by fraud. The fraud complained of was, (1) that the present Defendants had in their plaint in the suit for ejectment included lands which did not in fact belong to them, and (2) that the evidence on which the Defendants had obtained that decree was, to their knowledge, false. The Plaintiff alleged that he had, as the Defendants well knew, a *mourasi mokurari* tenancy, or at any rate a good *raiyati* right, in the land in suit, and he prayed for a decree declaring his right of occupancy in the land, for a declaration that the decree in the ejectment suit was illegal and fraudulent and fit to be set aside, for a perpetual injunction restraining the Defendants from executing that decree and for other reliefs.

On this occasion also Plaintiff appears not to have been ready to go on with his case on the day fixed for hearing, and the Munsif had to decide the case without any evidence adduced by the Plaintiff.

(2) L. R. 10 Ch. D. 327 (1879).
(3) 14 C. W. N. 695 (1910).
(4) I. L. R. 38 Cal. 936 : s. c. 15 C. W. N. 1010 (1911).
(5) I. L. R. 29 Mad. 179 (1905)
(10) 3 Ch. App. 203 (1867).
(11) 67 L. J. R. Q B D. 301 (1898).

(6) L. R. 10 Q. B. D. 295 (1882).
(7) L. R. 25 Q. B D. 310 (1890).
(8) 9 P. D. 210 (1884).
(9) L. R. [1898] 2 Q. B. 36.

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The Munsif found in the materials before him that the decree in the ejectment suit had been passed *ex parte* against the Plaintiff because an application for time made by him on an adjourned date of hearing had been refused, and, not being ready to go on with the case, he had retired and abstained from cross-examining his adversaries' witnesses. The Plaintiff had thereupon preferred an appeal against that decree on all the grounds specified in his present plaint, but without success, and a second appeal to the High Court was also dismissed. He had also preferred an application under sec. 108 of the Code of Civil Procedure of 1882, also unsuccessfully, and had carried that matter up to the Appellate Court but without success.

On the 4th September 1908, he instituted the present suit. The Munsif observed that in this case the Plaintiff did not even allege that he had been prevented from substantiating his defence in the ejectment suit by any fraud of his adversaries, that both the so-called grounds of fraud alleged in the present plaint were really grounds of defence in the previous suit and had in fact been relied upon by him in that suit. Under the circumstances, he was of opinion that the suit was not maintainable. He accordingly dismissed the snit.

On appeal this judgment was affirmed by the District Judge who in the course of his judgment observed: "He now appeals on the ground that he was prepared to prove that the ejectment decree was obtained by perjury. If this was all he was required to prove, he would be able to keep this question of ejectment going in the Courts for the whole of his natural life and bequeath it to his heirs as a pastime for generations. He is required also to prove that by fraud the Court was prevented from detecting the perjury. This has not even alleged in his plaint."

The Plaintiff then preferred this Second Appeal.

Mr. B. Chuckerbutty and *Moulvi Nuruddin Ahmed* for the Appellant.

Dr. Rash Behary Ghosh, *Babus Dwarka Nath Chuckerbutty*, *Mohendra Nath Roy*, *Tarak Chandra Chuckerbutty*, *Ramesh Chandra Sen* and *Biraj Mohan Mojumdar* (for the Deputy Registrar) for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is a Second Appeal against the decision of the District Judge of the 24-Pergunnahs, affirming that of the Subordinate Judge and dismissing the Appellant's suit for the setting aside of a decree on the ground of fraud.

In 1906, the Appellant was sued in ejectment by the Respondent, and a decree was obtained against him *ex parte*. An application for the discharge of that decree and the re-hearing of the suit was made under sec 108 of the Code of Civil Procedure of 1882 ; but it was refused and the refusal was affirmed on appeal. A regular appeal against the *ex parte* decree was next preferred ; but it was dismissed by the first Appellate Court, and a second appeal to the High Court was equally unsuccessful. The suit out of which the present second appeal arises, was then instituted : and the only fraud complained of in it is that the description in the plaint of the subject-matter of the Respondent's suit of 1906, and the evidence on which the Respondent obtained the *ex parte* decree against the Appellant, were alike false. Both the Courts below have held that this suit was not maintainable,

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and the short point raised before us is as to whether an action will lie for the setting aside of a decree merely on the ground that it was based upon perjured evidence.

In *Mahomed Golab* v. *Mahomed Sulliman* (1), Petheram, C. J., laid it down that where a decree has been obtained by a fraud practised on another whereby that other has been prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit ; but that "it is not the law that, because a person against whom a decree has been passed, alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party, which is of course fraud of the worst kind, he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given." "To so hold would," the learned Chief Justice continued, "be to allow defeated litigants to avoid the operation, not only of the law which regulated appeals, but also of that which relates to *res judicata* as well ;" and reference was made to the reasons why this could not be, given by James, L. J., on behalf of himself and Thesiger, L. J., in *Flower* v. *Lloyd* (2) : "Where," Lord Justice James enquired, "is litigation to end, if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, ... ? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting and must be on one side or other wilfully and corruptly perjured. In this case, if the Plaintiffs had sustained in their appeal the judgment in their favour, the present Defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury ; and so, the parties might go on *ad infinitum*. . . . . Perjuries, falsehoods, frauds, when detected, must be punished and punished severely : but in their desire to prevent parties litigants from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply infinitely the mass of those very perjuries, falsehoods and frauds."

It is true that the observations of Sir Comer Petheram in *Mahomed Gulab's* case (1) are not binding upon us because the actual decision in it reduced them to the level of *obiter dicta*. But the view his Lordship expressed was cited and acted upon by a Division Bench of this Court in *Abdul Huq* v. *Abdul Hafez* (3), and, as that decision is precisely in point, it is an authority which we must, under Rule 1 in Chap. V of the Appellate Side Rules, follow or make the subject of a reference to a Full Bench. Another Division Bench, it appears, has recently in the case of *Lakhmi Churn Saha* v. *Nur Ali* (4) refused to be so bound, because, the learned Judges (D. Chatterjee and N. R.

(1) I. L. R. 21 Cal. 612, 619 (1894).
(2) L. R. 10 Ch. D. 327 (1879).
(1) I. L. R 21 Cal. 612, 619 (1894).
(3) 14 C. W. N. 695 (1910).
(4) I. L. R. 38 Cal. 936 : s. c. 15 C. W. N. 1010 (1911).

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Chatterjea, JJ.), said, "the authority on which the judgment of Sir Comer Petheram, C. J., was based, has never been recognised as an authority in England," and, therefore, neither it nor any case based upon it was, in their opinion, binding upon them. We are not disposed to adopt this reasoning; and, in any case, having the two opposing rulings before us, we prefer to follow *Abdul Huq* v. *Abdul Hafez* (3). We find that a Division Bench of the Madras High Court has, in *Venkatappa Naick* v. *Subba Naick* (5), taken the contrary view and ruled tha a suit will lie to set aside a judgment on the ground that the Defendant had obtained it by fraud in that he had committed deliberate perjury and suppressed evidence. The learned Judges (Boddam and Moore, JJ.) there declare that the law in England has been authoritatively and finally laid down in *Abouloff* v. *Oppenheimer* (6) and *Vadala* v. *Lawes* (7), and that it is the same in India. With all deference, be it said, we doubt the completeness and finality, even in England, of these two cases. They are, of course, very high authorities: but in each of them the judgment impeached is a foreign judgment, and foreign judgments unquestionably stand on a footing of their own. *Priestman* v. *Thomas* (8) and *Cole* v. *Langford* (9) are the only English cases we know of which at all support the Appellant. In respect of the judgments of our own Courts—and neither of these seems to us to be a very clear or very decided authority on the point now before us—in the former there was an alleged collusive compromise followed by an order for probate, and the case is relevant only in so far as it shows that probate may be revoked on the ground that it was the result of a fraudulent compromise. Such a fraud would probably be within the meaning of the word as explained by Chief Justice Petheram in *Mahomed Golab's* case (1), and moreover the revocation of probate is governed by a law of its own. And the judgment of Ridley and Phillimore, JJ, in *Cole* v. *Langford* (9) is a very bare pronouncement following *Priestman* v. *Thomas* (8).

On the other hand the case of *Patch* v. *Ward* (10), which relates to an English judgment and was referred to and relied upon in *Mahomed Golab's* case (1), tends in the same direction as *Flower* v. *Lloyd* (2), while in *Baker* v. *Wordsworth* (11), Wright and Darling, JJ., were guided by the remarks of James and Thesiger, L., JJ., in *Flower* v. *Lloyd* (2), and held that a judgment in an action could not be set aside on a subsequent action brought for that purpose on mere proof that the judgment was obtained by perjury on the part of the Plaintiff in the former action.

Our conclusion is that the maxim *interest reipublicæ ut sit finis litium* should prevail, and that the view taken by both the Courts below is sound and should be affirmed. If evidence not originally available comes to the knowledge of a litigant and he can show thereby that the evidence on which a decree against him was obtained, was perjured, his remedy lies in seeking a review of judgment; but the rule of *res judicata* prevents him

(3) 14 C. W. N. 695 (1910).
(5) I. L. R. 29 Mad. 179 (1905).
(6) L. R. 10 Q. B. D. 295 (1882).
(7) L. R. 25 Q. B. D. 310 (1890).
(8) 9 P. D. 210 (1884).
(9) L. R. [1898] 2 Q. B. 36.

(1) I. L. R. 21 Cal. 612, 619 (1[illegible]
(2) L. R. 10 Ch. D. 327 (1879).
(9) L. R. [1898] 2 Q. B. 36.
(8) 9 P. D. 210 (1882).
(10) 3 Ch. App 203 (1867).
(11) 67 L. J. R. Q. B. D. 301 (1898).

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from re-agitating the matter on the same materials or on 'materials which might have been laid before the Court in, the first instance.

We may add that the present suit might apparently have been disposed of without the raising of the general question which we have been discussing ; and this was, indeed, pressed upon us on behalf of the Respondents. For the Plaintiff-Appellant failed to adduce any evidence on the date fixed for the hearing, his application for an adjournment was refused, and his suit might have been dismissed for want of prosecution under sec. 102 of the Civil Procedure Code of 1882. But this course was not taken, and the application for an adjournment was thrown out on the same ground as the suit itself, namely, on the ground that no such suit was maintainable and, on the pleadings, further proceedings would be futile. That being so, we felt it incumbent upon us to deal with the important question of law raised by the judgments of the Courts below.

The result, as we have already foreshadowed, is that this appeal must, in our opinion, fail, and it is dismissed with costs.

Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 4601 OF 1911.

BRETT, J.
SHARFUDDIN, J.
1912,
20, May.

MR. K. B. DUTT and another, Receiver, Gopal Lal Seal's Estate, Decree-holders, Petitioners,
v.
GOSTHA BEHARY BHUIYA and others, Judgment-debtors, Opposite Party.

Bengal Tenancy Act (VIII of 1885), sec. 148A, 158B, Sch. III, Art. 6—Decree by co-sharer landlord for share of rent if a rent decree—Limitation, special, if applies.

A decree for rent obtained by a co-sharer landlord in a suit not brought under sec. 148A or sec. 158B of the Bengal Tenancy Act is a money decree and the special limitation applicable to applications for execution of rent decrees does not apply to such a decree.

This was a Rule granted on the 14th of August 1911 against the order of T. S. Macpherson, Esq., District Judge of Zillah Hughly, dated the 26th of April 1911, affirming the orders of Babu T. P. Chatterjee, Munsif of Uluberiah, dated the 3rd of September 1910.

The facts of the case were briefly as follows :—

The Petitioner brought a suit in the Court of the first Munsif of Uluberiah, for recovery, as a co-sharer landlord, of a sum of Rs. 26 6-6 (and costs) due from the Defendants on account of his share of the rent and cesses and obtained a decree.

In that suit the other co-sharer landlords of the Plaintiff were not joined as parties, and the claim was a claim for money on account of Plaintiff's share of the rent and cesses.

An application for execution of the said decree was dismissed on the 21st September 1908 for default in Execution case No. 315 of 1908.

On the 14th July 1910, another application for execution was made in the Court of the second Munsif of Uluberiah, in which it was prayed that the Petitioner's claim under the decree might be realised by attachment and sale of the moveable and immoveable properties, and if necessary, by the arrest, of the judgment-debtors.

On the objection of one of the judgment-debtors, the learned Munsif, Babu

MR. K. B. DUTT *v.* GOSTHA BEHARY BHUIYA.

T. P. Chatterjee, dismissed the application with costs as barred by limitation, under the special provisions of the Bengal Tenancy Act, Sch. III, Art. 6. An appeal to the District Judge against this order was dismissed and the Petitioners moved the High Court and obtained this Rule.

Mr. S. P. Sinha and *Babus Provash Chandra Mittra* and *Norendra Chandra Bose* for the Petitioners.

No one appeared for the Opposite Party

The JUDGMENT OF THE COURT was as follows :—

No one appearing to oppose the Rule, we are of opinion that it should be made absolute and for the reason that the suit in which the decree was obtained by the Petitioners was a suit to which the provisions of the Bengal Tenancy Act did not apply. The suit was not one brought by the present Petitioners as co-sharer landlords under the provisions of sec. 148A or sec. 158B of the Bengal Tenancy Act and, in such circumstances, the decree which they obtained was a simple money decree and, so far as we can ascertain from the materials before us, there is nothing to indicate that, in that decree, the Petitioners invoked the application of the provisions of any section of the Tenancy Act. In our opinion, the present case is distinguishable from the case of *Thakumoni Dasi* v. *Mohendra Nath Dey* (1) on which the lower Courts relied, so that, even if we were prepared to follow the decision in that case, as to which it is not necessary for us in this case to express any opinion, it would not, in our opinion, be applicable to the facts of the present case. The result, therefore, is that we make the Rule absolute, set aside the orders of the lower Courts and direct that the execution do proceed according to law. As there has been no appearance on the part of the Opposite Party in this Court, we make no order as to the costs of this Rule; but in the lower Courts, the Petitioners will be entitled to recover their costs from the Opposite Party.

Rule made absolute.

(1) 10 C. L. J. 463 (1909).

[CRIMINAL REVISIONAL JURISDICTION.]

REVISION NO. 634 OF 1912.

HOLMWOOD, J. IMAM, J. 1912. 30, May.	MEAJAN and others, Accused, Petitioners, *v.* SHARAFATULLAH KHAN, Complainant, Opposite Party.

Penal Code (Act XLV of 1860), sec. 441—Criminal trespass, distinguished from civil trespass—Placing haystacks and manure on another man's land—Intention to cause annoyance, must be found.

The placing of haystacks and manure on another man's land may be civil trespass. It may cause annoyance in fact, but the act cannot be treated as criminal trespass unless it is found that it was intended by the accused to be annoyance.

"*The distinction between civil and criminal trespass is one which is lost sight of by too many of the subordinate Magistrates.*"

One Sharafatullah Khan complained to the Sub-Divisional Magistrate of Feni, District Noakhali, that the three Petitioners with others were about to take forcible possession of a tank, owned and possessed by him in *mourashi niskar* right, by erecting 12 haystacks on its bank and depositing cowdung there. The defence was that from the time of their ancestors the accused were possessing the disputed land by putting haystacks there and using the water of the tank for drinking purposes. The Sub-Divisional Magistrate in

a summary trial convicted the three Petitioners under sec. 447, I. P. C., and sentenced them to a fine of Rs. 100 each, in default one month's rigorous imprisonment and directed Rs. 60 to be paid out of the fine as compensation to the Complainant. The Magistrate recorded the following reasons :—

"Admittedly the tank belongs to the complainant. It has been in his possession from the time of their ancestors. The tank and the bank were recorded in the name of the complainant's father during the cadastral survey operations of chakla Roshanabad. From the evidence of D. W. 2 Bhairab Saha it will appear that there was a dispute between the parties before the Assistant Settlement Officer Annada Babu. The tank and the bank therefore appears to have been recorded in the possession of the complainant's father after deciding a dispute by the Assistant Settlement Officer. Hence I am not prepared to believe that the accused had their haystacks on this bank from a very old time as alleged. The accused Meajan appears to have been convicted for cutting a tree from the bank of this tank. Another accused Ahmed Ali appears to have cut a tree on another occasion, and he paid the cost and compromised the case. Thus it will appear that the tank and the bank have always been in possession of the complainant, and that the accused have never been in possession though they have made attempts now and then to take forcible possession. Hence I find the accused guilty under sec. 447, I. P. C. A deterrent punishment seems to be necessary to put a stop to this sort of affairs."

The Petitioners then moved the Sessions Judge for referring their case to the High Court, but without success. They then moved the High Court and obtained a Rule on the ground that there was no finding of anything constituting criminal trespass and that the dispute was purely of a civil nature.

Babu Ramdoyal Dey (with *Babu Pramatha Lal Dutta*) for the Petitioners.

No one appeared to show cause.

The JUDGMENT OF THE COURT was as follows :—

This Rule must be made absolute on the ground on which it was issued. The explanation of the Magistrate admits that there is no finding that the accused's claim was in the nature of a sham or pretext. It may have been or it may not have been so, the only finding is that the land was in the possession of the complainant. The placing of haystacks and manure in another man's land need not necessarily be annoyance. It is not annoyance in law. It may be annoyance in fact. If it is annoyance in fact, then it must be clearly found in the judgment not only that it is annoyance but that it was intended by the accused to be annoyance. There is no such finding in this judgment and there is no other possible ground upon which a purely civil trespass can be treated as criminal trespass. The distinction between civil trespass and criminal trespass is one which is lost sight of by too many of the subordinate Magistrates.

The conviction and sentence are set aside and the fine if paid will be refunded.

Rule made absolute.

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NOTES.

High Court Notices.

ORIGINAL SIDE

The High Court, Original Side will be closed for the Annual Vacation including Ead ul Fitr, Mohalaya, Durga Lakshmi and Kali Pujahs, Bhatriditiya and Kartik Pujah on and from Friday, the 6th September to Saturday, the 16th November 1912, both days inclusive, and also on and from Monday, the 18th to Thursday, the 21st November 1912 both days inclusive, on account of Jagadhatri Pujah and Eed uz-zoha, and will resume its sittings on Friday, the 22nd November 1912.

The offices of the High Court, Original Side, will be closed for general business for the Annual Vacation on and from Saturday the 21st September to Saturday the 16th November 1912, both days inclusive, and will also be closed on and from Monday, the 18th to Thursday the 21st November 1912, both days inclusive, on account of Jagadhatri Pujah and Eduzzoha.

One Judge will remain in town for urgent business and arrangements will be made for the attendance of such superior and subordinate officers as may be required for the disposal of urgent business.

The first motion day after the holidays will be Wednesday, the 27th November 1912, for Court No 1, and Friday the 29th November 1912, for Court No. 2.

By order,

HIGH COURT, O. S. } J. H. HECHLE,
The 22nd August 1912. } *Registrar.*

APPELLATE SIDE.

It is hereby notified that the High Court, Appellate Side, will be closed for the Annual Vacation from Friday, the 6th September, to Saturday, the 16th November 1912, both days inclusive.

The Hon'ble Mr. Justice Chitty and the Hon'ble Mr. Justice Richardson will sit as the Vacation Judges, except during the following Court and Gazetted (Executive) holidays, *viz.*—

Court holiday on account of Ed ul-Fitr	Friday and Saturday, the 13th and 14th September 1912.
Gazetted holiday on account of Mohalaya	Thursday, the 10th October 1912.
Gazetted holiday on account of Durga and Lakshmi Pujahs	Tuesday, the 15th October to Saturday, the 26th October 1912.
Gazetted holiday on account of Kali Pujah	Friday and Saturday, the 8th and 9th November 1912.
Court holiday on account of Bhatriditiya	Monday, the 11th November 1912.
Court holiday on account of Kartik Pujah	Friday, the 15th November 1912

Notice as to the days on which the Vacation Bench will sit for the hearing of motions and cases in which vakils are engaged and as to the distribution of business will be given from time to time

The Offices of the Appellate Side will be closed for the vacation from Thursday, the 10th October to Monday, the 11th November 1912, both days inclusive

Such Translators, Examiners, Copyists and Assistants of the Record Department as may be required, will attend throughout the vacation, except on the Court's sanctioned holidays and the Gazetted holidays above specified.

HIGH COURT, APPELLATE SIDE } H. T. CULLIS,
The 28th August 1912. } *Registrar*

WE HAVE NOW GOT THE FULL TEXT OF THEIR Lordships Woodroffe and Coxe, JJ's judgment in the Midnapur case. We find that the fact that Akshaya Pal has since been convicted of forgery in another case is noticed in their Lordships' judgment There was no reference to this fact in the newspaper reports of the judgment and we are sorry to have been misled by them. We regret also that in this connection we inadvertently made use of expressions which we are sure on further consideration we would have omitted. We take this opportunity of rectifying the above error and withdrawing the expressions used in its connection.

WE PUBLISH IN ANOTHER COLUMN AN ARTICLE reviewing the law of gaming and betting in India with reference to the *Cotton Figure Case.* In our opinion, as we have said before, the decision of Holmwood and Imam, JJ, was strictly in accordance with the existing provisions of the law and we do not think that their Lordships would have been justified in stretching the law to meet the cases. All the same it may serve a useful purpose, especially in view of prospective legislation, to have a general review of the case-law in connection with the questions raised in that case.

That strictness of a general rule of law leads at times to hardship has seldom been so glaringly illustrated as in a recent case disposed of by Carnduff and Imam, JJ. [Reference No 18 of 1912, and Appeal No. 433 of 1912] In this case five accused persons had been tried and convicted of dacoity with murder by the Sessions Judge of Chittagong who upheld the verdict of the jury and sentenced two of the accused to death and the three others to transportation for life. The evidence as to the facts on which the accused were convicted was practically the same for all but the remedy that they had on appeal was different. On the capital sentence case being referred to the High Court for confirmation of the death sentence, their Lordships considered the whole of the evidence and acquitted the men. The appeals on behalf of the three other persons were also before the same learned Judges, but notwithstanding the view of the facts that they had taken in the capital sentence case their Lordships felt bound to dismiss the appeal on behalf of these persons because there was no point of law or misdirection by the Judge made out in the case which would give them jurisdiction to interfere with the verdict of the jury accepted by the Sessions Judge.

The only course thus left to the Appellants was to appeal to His Excellency The Governor for mercy, and we are sure that His Excellency will give the most careful consideration to the case. But we should like also to point out that an amendment of the law seems to be called for for meeting cases of this kind. It is singularly anomalous that where the High Court has jurisdiction to enter into and decide on the facts of the case on appeal by one of the accused in a case, they should be precluded from giving the benefit of their findings to other accused in the same case for the simple reason that capital sentence had not been passed on them. Where more than one person are tried together and one of them is sentenced to death no technical bar ought to prevent the learned Judges of the High Court from hearing the whole case for all the accused on the same footing and giving the relief to all the accused without distinction, to which they may be found to be entitled on a consideration of the evidence.

The law allowing persons in indigent circumstances to sue as paupers is, as it is, very stringent and its rigour surely requires some relaxation in order to afford any real relief to people who cannot pursue their legal remedies owing to poverty. Pending more liberal legislation in this direction, we expect the Courts of Law to take an equitable view of the existing law and not to bar such remedies as at present exist on technical or fanciful grounds. In *Rao Saheb Manger* v. *Khandoo Baloo*, I. L. R. 36 Bom. 279, Davar, J, of the Bombay High Court has laid down that even this privilege is a purely personal one and passes away with the death of the pauper. If the pauper has left a will, the executor, the learned Judge holds, must prove himself to be a pauper to enable him to carry on the litigation as such. In other words, the pauper testator must either appoint a pauper executor, or find another who will be ready to pursue his testator's claim at his own expense. It is always difficult to find executors who would take the personal trouble of looking after testators' affairs and the possibility of finding executors who would be prepared to finance suits on behalf of pauper testators is very remote indeed. The effect of the decision will therefore be that the pauper's right to sue, obtained after submitting himself to a very humiliating inquisition, mus die with him.

In *Bhagbut Dass* v. *Buloram Dass*, 3 W. R. (Mis.) 20, which his Lordship calls "a very ancient case," a Bench of Judges of the Calcutta High Court had actually held that as there was no provision in the Code of Civil Procedure for an enquiry as to whether the applicant who claimed to be the representative of an admitted pauper was a pauper or not, such an applicant ought to be allowed to continue the suit in *forma pauperis*. With reference to this case his Lordship says: "This is a case which I have tried to understand the reasoning of and I regret to say I have failed. . . . . . I confess I absolutely fail to grasp the reasoning of the decision. I should have thought that the absence of such provision in the Code was a very strong argument for holding the other way," and his Lordship added whatever might be the meaning of that judgment he was not prepared to follow it. The reasoning which His Lordship confesses to have failed to follow is, however, so obvious that no explanation seems to us to be needed to make it more intelligible. That a legal representative stands in the shoes of the deceased is a very elementary proposition. This most modern style of criticism by Davar, J., of an "ancient decision" of some judges, who are certainly entitled to respect, is more bold than judicious since all its sarcasm which is so singularly misplaced only serves to make the observations all the more ridiculous.

COTTON FIGURE GAMBLING

Whether Legislation is necessary.

The comments now submitted to the public on the decision in the Cotton Figure Gambling

case, *Emp.* v. *Rampertab Neemani*, are somewhat late, but inasmuch as the Legislature has not as yet drafted a Bill to amend the Police Act, it is hoped that these comments may prove of some use to the law-givers in considering the necessity of amending the Act. The decision of the Criminal Bench of the High Court in this case would seem to have for its ultimate authority the case of *Watson* v. *Martin*, 15 Cox. C. C. 3, decided in 1864 by the Court of Queen's Bench, which decision has been adopted as the final authority by the High Court in every case that has come up with regard to "gaming" and "instruments of gaming," and the words or rather the loose remarks of Justices Mellor and Crompton have been quoted with approval, without regard to the relevancy of their remarks and without considering the advance in legal ideas that has been made since 1864. The case of *Watson* v. *Martin* was under the Vagrant Act (5 Geo. 4, c. 83, s. 4) passed in the reign of George IV. The Judges who have followed it religiously seem to have overlooked the fact that that case was a case of very little authority inasmuch as it was not argued by counsel on both sides as only the accused was represented.

There were, in all, three cases in the Bombay High Court in which the case of *Watson* v. *Martin* was looked upon as a binding authority with respect to "instruments of gaming." They are as follows :—

(1) *Reg.* v. *Rama Zelu*, (an unreported case, decided in June 19th, 1873, by West and Nanabhai, JJ. It was a case under sec. 11 of the Bombay Gambling Act III of 1866).

(2) *Imperatrix* v. *Vithal Bhaichand*, 6 Bom. 19 (1881).

[This case was also under sec. 11, Bom. Gambling Act III of 1886, and decided by Melvill and Pinhey, JJ].

(3) *Queen-Empress* v. *Govind*, 16 Bom. 283 (F. B.) [1891].

[This case was under sec. 12, Bom. Gambling Act IV of 1887 as amended by Bom. Act I of 1890, and decided by Birdwood, Jardine and Parsons, JJ.].

In all these cases the point for determination was whether *coin* was an "instrument of gaming" within the meaning of the Gambling Act ; and it was held, on the authority of *Watson* v. *Martin*, that it was not, and that the expression "instruments of gaming" as used in the Act means instrument "devised or intended for that purpose."

With all respect to the learned Judges who decided these three cases, we are constrained to say that it is impossible to accept their view. Coin may be an instrument of gaming by being perverted to a use for which originally it was certainly not intended. Take for instance when a rupee is tossed and the game is to successfully guess whether head or tail will turn up ; or if six rupees are shaken in a dice-box and thrown down to guess the number of heads or tails that turn up. Here it is just as if the rupees took the place of dice and the heads and tails, the black spots of the dice. All will agree that dice are "instruments of gaming," and will any one deny in the instance put that rupees are not instruments of gaming ? It is for this reason we do not agree with the views expressed either by the Bombay High Court, or of the case of *Watson* v. *Martin*, on which the Bombay cases are founded. We cannot overlook the fact that later Acts, both in England and Bombay, have not only included *coin* within the expression "instruments of gaming" but have given much wider significance to the expression ; and this is as it should be. And the learned Judges of the Criminal Bench (Holmwood and Imam, JJ.), who are not bound to follow the Bombay High Court, would have done well in reasoning out the question for themselves on broader principles.

Their Lordships have not thought it fit to exercise their own free judgment in following the Bombay High Court in the case of *Queen-Empress* v. *Narotam Dass Motiram*, 13 Bom. 681 (1889), which lays down that there is a distinction between "betting" and "gaming." This case considers that betting is not prohibited in India but gaming is ; that there must be a game before there is gaming, and to constitute a game there must be a contest and an active participation of certain persons. The Judges held that these tests were wanting in the case before them where the accused were charged under the Bombay Act IV of 1887 with keeping a shed for the purpose of a "common gaming house." Keeping a common betting house is not an offence in India but keeping a common gaming house is. Therefore the *ratio decidendi* in this case is based on the distinction between gaming and betting. The Judges have tried to find a distinction by referring to Wharton's Law Lexicon and Johnson's Dictionary. The conclusion to which the learned Judges arrive is that rain-betting is not a game and the place not a common gaming house. The error in the judgment and the reasoning on which it is founded is so subtle that at first sight it is impossible to detect the error and we are inclined to yield to the conclusion although our moral sense does not accede to it.

The difference between betting and gaming is only in the lettering, and not in the meaning. The author of the article "Gaming and Wagering" in the Encyclopædia Britanica very properly says that these terms are so closely allied that it is impossible to differentiate between them. The ingenuity of man is so great that even an operation of nature can be used for purposes of gaming. It is therefore necessary to take a broader and a deeper view in dealing with the

prevention of such social mischiefs and see what the Legislature intends to prevent, and it is the duty of the Judge to give effect to the intention of the Legislature, even if the gambling be under the plea of amusement, when the chances are not equal. See *Roberts* v. *Harrison*, 101 L. J. R. 540 (1909). The Judges in the Bombay case referred to lay down a test and by that measure the facts before them, and by this process of reasoning the mistake they make is that the test is not comprehensive standard. For instance, playing with dice is allowed to be gaming between two persons who stake money on the throw of the dice, and the keeper of a house or room where such playing is carried on is properly in law amenable for keeping a common gaming house. But if the keeper keeps the dice and dice-box in the house and the public are admitted and the keeper shakes and throws the dice, and the visitors bet with each other as to the result of the throws, the winners paying a commission on the money won, is not this gaming although the persons betting do not use the dice or dice-box? Will the law be so impotent as to say this is "betting" and the house, a "common betting house"? We respectfully beg to differ and therefore we morally and legally refuse to give our consent to the correctness of the decision in I. L. R. 13 Bombay series.

In the twentieth century a legal mind finds it difficult to draw the fine distinctions which lawyers attempted to make between the words "gaming" "betting" and "wagering." The more the old cases are examined the less satisfactory do they now appear. The Act of 1710 draws a distinction between gaming and other bets or wagers. The Vagrants Act of 1873 provides: "Every person playing or betting by way of wagering or gaming...with any table or instruments of gaming or any coin, card, taken or other article used as an instrument or means of gaming at any game of chance........" Here we find all the three words "gaming" "wagering" "betting" used. In our dictionaries gaming is defined as playing for stakes; gambling; Carruthers, J., says more specifically "any sport or play carried on by two or more persons depending on skill or chance on the occurrence of an unknown future event on the result of which some valuable thing ...is transferred from one to the other."

Mr. William Feilden Craies, Bar-at-Law, in his article in the last edition of the Encyclopædia Britanica on "Gaming and Wagering" says: "It is somewhat difficult exactly to define or adequately to distinguish these terms of allied meaning." The learned Judges (Holmwood and Imam, JJ.) have quoted from this article, describing the author as the "well-known authority on the interpretation of statutes." As a matter of fact Mr. W. F. Craies (and not "C. F. Craes" as appears in the judgment) is not the original author of the work which now bears his name, but Mr. Henry Hardcastle was the original author. Mr. Craies has only revised and edited Hardcastle's Statutory Law. The last edition (1911), which is Mr. Craies' Second Edition, is "founded on and being the fifth edition of Hardcastle on Statutory Law."

We would not have troubled ourselves with Mr. Craies so much but for the fact that the learned Judges have fallen into the error, *first*, in regarding him as the well-known authority (sic) on interpretation of statutes, and, *secondly*, in adopting Mr. Craies' remarks as "their own on the subject." Our readers may judge for themselves how far their Lordships were justified in adopting Mr. Craies' remarks as their own views in a case of such considerable importance. We have already said that their Lordships were wrong in following the Bombay rulings in giving too narrow a meaning to "instruments of gaming" which meaning was based on *Watson* v. *Martin*, an *ex parte* decision of little value. We have shown also that their Lordships have not exercised proper discretion in adopting the remarks of Mr. Craies on the distinction between gaming and wagering. We have also shown the unsubstantial nature of the distinction drawn by the Bombay High Court in *Narotam Das'* case. Now let us see what the English Judges say and how they have dealt with such cases and with the Statutes. In the case of *Roberts* v. *Harrison*, 101 Law Journal Report 540, Lord Alverstone, C J, said: "The players gambled for amusement or money's worth and I see no reason why this way of wasting money should be encouraged." Mr. Justice Jelf said: "It encourages the spirit of gambling in the boys who play it." "Did the facts which were placed before them show that the gambling was or was not within the mischief aimed at by the statute." He was of opinion that it was. The grounds for the learned Judges' decision of the case may be shortly stated thus:—(*i*) Persons cannot gamble even for amusements. The spirit of the statute is against it; (*ii*) gambling even for amusement where it leads to waste of money should not be encouraged; (*iii*) that if the facts disclose that the game is within the mischief aim at by the statute, then the court will use its power to stop it; (*iv*) that the spirit of gambling in whatever form it assumes should not be encouraged, and the arm of the law is long enough to seize and crush it. Our Indian Judges have not followed these sound principles in crushing what Mr. Justice Holmwood declared as "a most pernicious form of gambling."

In *Smith's case*, 4 Ch. at p. 614 (1869), Selwyn, L J., remarked. "It is not the duty of a Court of Law to be astute to find a way in which the object of an Act of the Legislature may be defeated."

In *Collier's* Case, Sir R. Palmer speaking in Parliament, February 1872, laid down that "the meaning and spirit of a Statute is as much law as what is within the very letter of it, and that which is not within the meaning and spirit, though it seems to be within the letter, is not the law. That effect must be given to the object, spirit and meaning of the Statute is a rule of legal interpretation."

We would also say a word or two as to the interpretation of penal Acts. It has been said that penal statutes must be construed strictly. This means "that when the Legislature imposes a penalty the words imposing it must be clear and distinct." [*Willis* v. *Thorp*, (1675) L. R. 10 Q. B. 383 at p. 388.] "A hundred years ago" said the Court in *Lyon's* case, (1858) B. C. C. 38, 45, "Statutes were required to be perfectly precise and resort was not had to a reasonable construction of the Act and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the Legislature. It comes to this: that penal provisions like all others are to be fairly construed according to the legislative intent as expressed in the enactment, the Court refusing on the one hand to extend the punishment to cases which are not clearly embraced in them and on the other equally refusing by any mere verbal nicety, forced construction or equitable interpretations to exonerate parties plainly within their scope." [*Vide* Craies' Statute Law, pp. 459-460 (1911)]. Taking the section enacted against gambling and construing it on the principles now adopted by Judges, can it be maintained that the accused in the cotton figure gambling case does not come within the provisions of the section? The words, dice, cards, are not exhaustive and are not the only instruments. The Legislature could not enumerate all the possible forms which the ingenuity of man can devise.

We doubt not that if the principles enumerated above had been placed before the learned Judges who heard the Cotton Figure Gambling Case they might have decided against the accused who was instrumental in introducing amongst the Calcutta public "a most pernicious form of gambling" and their decision and their interpretation of the ambiguous section would have been in conformity with the principles which have actuated their English confreres to put down gambling.

R. BRAUNFELD.

CURRENT CRIMINAL CASES.

III.—THE INDIAN PENAL CODE.

Sec. 4—Effect of the section.

Sec. 4 cannot affect a specific statute of Parliament and under 57, 58 Vict., c. 60 (The Merchant Shipping Act) the substantive law applicable to the case of a British Indian who is on his trial in the High Court of Calcutta for having committed murder on a British vessel in the Red sea is the English law.

EMPEROR *v.* SALIMULLA, 16 C. W N. 471.

Sec. 99—Right of private defence.

Even if the accused does not specifically plead private defence he may be acquitted if the evidence shows that he was acting in self-defence.

VURANA NADAN, 1 Mad. W. N. 1912, p. 404.

Sec. 124A—Sedition—Publication.

Sending a seditious matter by post addressed not to a private individual but to the representative of a large number of men (e. g., Captain of a school) amounts to publication if it is opened by anybody.

SURESH CHANDRA SANYAL, 16 C. W. N. 812.

Sec. 147—Rioting—Right of person in actual possession.

If the persons who have actually grown the crop on the disputed land were no parties to the civil suit for possession which was decreed against their landlord or to the delivery of possession of the land, they are justified in claiming the crop they have grown and in resisting the action of the complainant in attempting to take possession under the decree of the Civil Court.

GOGENDRO GORAI, 15 C. L. J. 80.

Sec. 154—Persons liable under the section.

It is impossible to punish in every case under sec. 154, I. P. C., every person who has any interest in the land. The responsibility must depend upon the fact of the person who caused the riot being himself the person who has an interest in the land or an agent or manager of such person.

SIVA SUNDARI CHAUDHURANI, 16 C. W. N. 768. (see also BROJENDRA KISHORE ROY CHOWDHURY, 16 C. W. N. 255 N.).

Sec. 225—Illegal arrest—Rescue.

It is no offence under the section to rescue a person arrested by a constable without giving any intimation to the person arrested as to the provision for bail in the warrant on the authority of which the arrest is made.

SHYAMA CHARAN MAJUMDAR, 16 C. W. N. 549.

Sec. 235—Case where the section does not apply.

This section was held not to apply to a case where the accused coined false rupees not for the purpose of making gain by passing them off on the public as good coins but for the purpose of putting them into the house of their enemies and thus getting them implicated.

LALCHAND, 13 Punj. L. R. 129.

Sec. 292—Test of obscenity—Religious or classical work.

The test of obscenity is whether the tendency of the matter charged as obscene is to deprave and corrupt those into whose hands the publication might fall. A religious or classical work does not become obscene simply on account of its containing some objectionable passages because the tendency of such publications is not to deprave or corrupt morals:

KHERODE CHANDRA ROY CHOWDHURY, I. L. R. 139 Cal. 377.

Sec. 296—Offence under the section.

Where certain people who with the sanction of the public authorities had been carrying flags to a temple in procession through a public street were attacked by persons who objected to the procession it was held that such attack constituted a disturbance of the performance of a religious ceremony within the meaning of the section

EMPEROR v MASIH, I. L R 34 All 78.

Sec. 301—Offence under the section

The accused gave some sweetmeat with poison intermixed to A with a view of causing A's death A ate a little and threw it away and, it was picked up by R without the knowledge of the accused and eaten by her and as the result thereof R died

Held per *Benson, A Rahim, JJ.* (*S Nair J*, dissenting) that the accused was guilty of murder

EMPEROR v MUSHNOORI SURYANARAYANA MURTHY, 22 Mad L. J. 333.

Sec. 304A —Offence under the section Administration of love potion.

The mere administering of a love potion which a person thinks might be beneficial is not in itself an offence, but when it is supposed to have effect upon persons with whom the paramour of the accused had enmity and when she administers it without due care and caution or any enquiry as to what it really is her act falls within sec 304 A, I P C

PIRA BEWA, 15 C L. J 51[illegible]

Review.

HINDU LAW as administered in British India *By Sir Ernest John Trevelyan, D C. L., late Judge, High Court, Calcutta Fellow of all Soul's College and Reader in Indian Law in the University of Oxford.* *Thacker, Spink & Co, Calcutta.*

This work is a complete exposition of the whole body of Hindu Law as administered in British India parts of which the learned author dealt with in his well-known volumes on Hindu Family Law and Hindu Law of Inheritance. In this work he has incorporated these two works with up to-date references to decisions and has dealt with some other subjects such as Gifts in the chapter on Will, and has added a chapter on Religious Endowments. To those of our readers who have had occasion to carefully study the previous works of the author this volume would require little introduction. The work of revising the original works and the treatment of additional subjects now incorporated have been done with the same painstaking care and scrupulous accuracy that has won for the earlier works such a ready welcome with the profession. We have looked up many of the matters dealt with in this volume and have found the case-law thoroughly up-to-date, complete and comprehensive. The real point in the decision which throws light on any question is brought out with an amount of care and accuracy which we have seldom seen in any other work. A no less remarkable feature of this treatise is the terseness of expression in the exposition of legal principles. The thoroughly systematic and artistic arrangement of the subject-matter combined with the above noticed features of the work makes it an invaluable book of reference for the practitioner.

The author's attempt has been to systematically state the existing case-law and although he has very judiciously avoided any elaborate criticism and discussion of debatable points yet in cases of conflict between decisions he has not hesitated to indicate which of the views is in the author's opinion the more reasonable.

The author, although he is unacquainted with the Sanskrit language, has taken pains to give copious references to the texts which are available in translations Where the author has had to deal with matters involving a knowledge of Sanskrit, the author has mainly preferred to follow treatments of those subjects by English and Indian authors of repute But with all the care that the author has evidently exercised he has through want of familiarity with the Sanskrit texts in the original not been able to avoid some slips in the preliminary portion of the subject. Thus in dealing with the sources of Hindu Law, (at p. 7), the author distinguishes between *Smritis* and *Sutras* and *Sastras*. There is no such class of works as *Sastras* in Sanskrit. The word is a generic name for what might perhaps be loosely called science. *Dharma Sastras* are not any department of any specific branch of sacred or legal works called *Sastras* The *Dharma Sutras* and works like the *Manava Dharma Sastra* are themselves *Smritis* We are not aware of any extant works other than these *Sutras* and *Dharma Sastras* that are called by the name of *Smriti* in law We have also noticed an occasional misprint for instance at p 54, the words "Brahmins" occurs for "Brahmas" But such errors are rare and so far as we have been able to trace of very little importance and do not in any way detract from the great value of the work. We have pointed them out to help the author in removing them from future editions.

Notes of Cases.

ENGLISH LAW COURTS.

HOUSE OF LORDS.—*Lloyd* v. *Grace Smith & Co.* Before THE LORD CHANCELLOR, LORDS HALSBURY, MACNAGHTEN, ATKINSON AND SHAW. 18th July 1912.

Solicitor's responsibility and liability for the frauds committed by his managing clerk.

This was an Appeal from an order of the Court of Appeal. The facts, admitted or proved, were as follows: -

The Appellant, Mrs. Lloyd, had bought some property, and thus had come to know of the De-

fendant, a Solicitor. She had doubts about having got her money's worth, and went to the Defendant's office to inquire. When there, she saw one Sandles, the Defendant's managing clerk, and was induced by him to give him instructions to sell or realize this property, and for that purpose to give him the deeds and to sign two documents which she neither read nor knew the tenor of, but which put into Sandles' possession her interest therein. She gave him the deeds as the Defendant's representative. Having got them and the signed documents, he dishonestly disposed of this lady's property and pocketed the proceeds.

The Court dismissed the appeal. In the course of his judgment LORD LOREBURN said :—

It is clear, to my mind, upon these simple facts that the jury ought to have been directed if they believed them to find for the Plaintiff. The managing clerk was authorized to receive deeds and carry through sales and conveyances and to give notices on the Defendant's behalf. He was instructed by the Plaintiff, as the representative of the Defendant's firm—and she so treated him throughout—to realise her property. He took advantage of the opportunity so afforded him as the Defendant's representative to get her to sign away all that she possessed and put the proceeds into his own pocket. In my opinion, there is an end of the case. It was a breach by the Defendant's agent of a contract made by him as Defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal.

At the hearing the learned Judge, no doubt, with a view to avoiding the risk of a new trial in so small a case, appears to have been prevailed upon to put no less than six questions, with subdivisions making in all ten questions, to the jury. Some of them were quite immaterial. Others were framed in order to raise a point of law supposed to be affirmed by Mr. Justice Willes in the case of *Barwick* v. *The Joint Stock Bank*, L. R. 2 Ex. 259, and admitted of more than one meaning. The meaning of the answers depends upon how the jury understood the questions, and we were not told how they were explained to the jury. That Sandles committed this fraud in order to steal the money for himself is obvious, and any jury must so find. That he did it in the sense in which Mr. Justice Willes means the word "benefit" is not true upon the admitted facts. Mr. Justice Willes cannot have meant that the principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud. Nearly every rogue intends to do that. If the agent commits the fraud purporting to act in the course of business such as he was authorized, or held out as authorised, to transact on account of his principal, then the latter may be held liable for it. And if the whole judgment of Mr. Justice Willes be looked at instead of one sentence alone, he does not say otherwise.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CARNDUFF and IMAM, JJ. CRIMINAL REVISION No. 1071 OF 1912. DEPUTY SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, Petitioner *v.* KEDAR MIRZA, Opposite Party. 28th August 1912.

Criminal Procedure Code, secs. 110, 112, 117, 118, 123—Order under sec. 112 describing accused as a thief and murderer by general repute—Final order on the ground of accused being so by habit, if legal.

The Opposite Party was required by the Sub-Divisional Magistrate of Tamluk, under sec. 110, Cr. P. C, to give security to be of good behaviour for two years for being by habit a thief and murderer. The case was referred to the Sessions Judge under sec. 123, Cr. P. C., who while holding that there was good evidence for binding down the Opposite Party set aside the order of the Sub-Divisional Magistrate on the ground that in the order under sec. 112, Cr. P. C, the Opposite Party was informed that it appeared to the Magistrate that he was by general repute a thief and murderer and he was required as such to show cause why he should not give security. The point taken before the Sessions Judge was that as he was not called upon to show cause as being by habit a thief and murderer he could not be bound down under that description.

The Local Government moved the High Court and obtained a Rule.

Their Lordships observed : "We find that the evidence was directed merely to show that he was a habitual thief and murderer and his cross-examination was directed to refute the evidence to that effect. Moreover we are not prepared to hold that an enquiry under secs. 117, 118, Cr. P. C., is limited strictly to the order passed under sec. 112, Cr. P. C."

The Rule was made absolute and the order of the Sub-Divisional Magistrate was restored.

Babu Srish Chandra Chowdhury for the Petitioner.

Babu Khirod Lal Sen for the Opposite Party.

S. C. M. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before D. CHATTERJEE, J. APPEALS FROM APPELLATE DECREES NOS 2259 AND 2552 OF 1910. SARIPANNESSA KHATUN AND OTHERS, Plaintiffs, Appellants *v.* SAFERUDDI AND OTHERS, Defendants, Respondents. 16th August 1912.

Tenant executing separate kabuliyats *in favour of co-sharer landlords—Joint landlords—Application under sec. 105 of the Bengal Tenancy Act—Bengal Tenancy Act, sec. 188.*

The Defendants owned an occupancy holding. The interest of the landlord passed to two persons in two moiety shares, each of the new owners of the land in suit took separate *kabuliyats* from the Defendants in respect of his share of the holding. These *kakuliyats*, however, were not in respect of equal areas but of areas differing slightly in quantity, the reason assigned being that one of the landlords had made a measurement according to which the land was a little more than that for which rent had been originally paid. By these *kakuliyats* the Defendants agreed to pay separate rent to their new landlords and to allow them to treat them as separate tenants in respect of measurement and other proceedings. During the cadastral survey under Chap. X of the Bengal Tenancy Act, each of these landlords made an application under sec. 105 for the settlement of fair rent in respect of his 8 anna share covered by the *kabuliyats* of the Defendants. An objection was taken that the applications could not be made separately. Upon that the two landlords applied that if their applications could not be dealt with separately they might be dealt with together and assessment of fair rent might be made. The Settlement Officer, however, treated the two applications as separate applications and made assessment of fair rent separately in respect of the lands covered by the two *kabuliyats*. There was an appeal to the Special Judge and he reversed the order of the Settlement Officer on the ground that the application could not be entertained under sec. 105 by reason of the provisions of sec. 188 of the Bengal Tenancy Act.

Held, that when a tenant of a co-sharer landlord executed a *kabuliyat* in favour of that landlord in respect of his share of the lands in his holding and entered into a separate agreement with him for the purpose of a tenancy such co-sharer landlord was not a joint landlord with his co-sharer in respect of the tenancy under the *kabuliyat* but a separate landlord.

That sec. 188 of the Bengal Tenancy Act was no bar to the maintenance of the application under sec. 105.

Babus Dwarka Nath Chuckerbutty (for *Babu Kumar Sankar Roy*) and *Ram Charan Chatterjee* for the Appellants.

Babus Basanta Kumar Bose and *Bhupendra Chandra Guha* for the Respondents.

Appeal allowed: Case remanded.

A. T. M.

CIVIL APPELLATE JURISDICTION. Before MOOKERJEE and BEACHCROFT, JJ. APPEAL FROM APPELLATE DECREE NO. 3164 OF 1909. NABADWIPENDRA MOOKERJEE, Appellant *v.* MADHU SUDAN MONDAL, Respondent. 9th May 1912.

Declaratory suit—Pleading and proof, variance between—Dispossession, specific point of time of.

The Appeal was on behalf of the Plaintiff in a suit for declaration of title to immoveable property and for recovery of possession thereof. The Plaintiff alleged title by purchase at a sale in execution of a mortgage decree. He further stated that when he took delivery of possession through Court he was opposed by the Defendant, which led to a proceeding under sec. 335 of the Code of Civil Procedure of 1882. The Plaintiff interpreted the decision in that proceeding as adverse to him and asserted that he lost possession thereby; he, therefore, claimed to recover possession from the Defendant. The Defendant traversed the claim on the merits, put the Plaintiff to the proof of his title, and alleged that his possession was sustained by virtue of the proceedings under sec. 335 mentioned in the plaint. The Court of first instance dismissed the suit without trial on the merits, because in its opinion the effect of the order under sec. 335, C. P. C, was not to dispossess the Plaintiff. Upon appeal, the District Judge affirmed that order of dismissal.

Held, every variance between pleading and proof is not material and does not justify a dismissal of the claim.

"The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, *first*, to apprise the Defendant, distinctly and specifically, of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise, and, *secondly*, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. The particular mode in which the ouster of the Plaintiff took place, or the specific point of time when it happened, was not material. The Plaintiff had to prove his title first; if he did so, he had further to prove his possession within 12 years prior to the suit.

Babus Mohendra Nath Roy and *Krishna Prosad Sarbadhikary* for the Appellant.

Babus Dwarka Nath Chuckerbutty and *Ramani Mohon Chatterjee* for the Respondent.

Appeal allowed: Case remanded.

A. T. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1912,
30, July.

SHAMU PATTER,
Plaintiff, Appellant,
v.
(1) ABDUL KADIR RAVUTHAN and others; and
(2) ABDUL RAJAK SAHIB and others, Defendants, Respondents.

Transfer of Property Act (IV of 1882), sec. 59—Mortgage deed—"Attestation," meaning of—Attestation upon acknowledgment, if sufficient—Issues, framing of additional, after arguments heard and judgment reserved—Court's inherent jurisdiction—Court's duty to raise issues necessary for determining controversy—Civil Procedure Code (Act XIV of 1882), sec. 149.

The "attestation" of certain mortgage deeds by two witnesses required by sec. 59 of the Transfer of Property Act is attestation of the actual fact of the execution.

GANGA DEI *v.* SHIAM SUNDAR (9) *overruled.*

Where in a suit to enforce a mortgage, after arguments had been heard and judgment reserved, it appeared from the evidence of the witnesses of the mortgage deed that they were not present at the execution but had put their names on the document at the acknowledgment of the mortgagors, and the Court framed a supplemental issue as to whether the deed had been properly attested:

Held—***That the Court was empowered to frame and try the additional issue under sec. 149 of the Civil Procedure Code of 1882.***

Held, further, ***that apart from that section, every Court trying civil causes has inherent jurisdiction to take cognisance of questions which cut at the root of the subject-matter of controversy between the parties.***

Whilst the first part of sec. 149 of Act XIV of 1882 leaves it in the discretion of the Court to frame such additional issues as it thinks fit, the latter part makes it imperative on the judge to frame such additional issues as may be necessary to determine the controversy between the parties.

These are consolidated Appeals from two decrees and a judgment [reported, *Shamu Patter* v. *Abdul Kader* (10)] of the High Court of Judicature at Madras, dated the 28th January 1908, affirming the decrees of the Subordinate Judge of Palghat. The facts of the case are sufficiently stated in their Lordships' judgment. The question for decision was whether the mortgage deed sued upon was "attested" as required by sec. 59 of the Transfer of Property Act, 1882. There were two witnesses. Both deposed at the trial that the mortgagors did not sign in their presence, but that they affixed their signatures on the subsequent admission of the executants. Both the lower Courts held that the instrument was not properly attested. On the present appeals (which were heard *ex parte*),

Mr. L. DeGruyther (with him *Mr. Kenworthy Brown*) for the Appellant submitted.—There were two questions:—1. Whether the Court was competent to decide upon a point which was not raised by the Defendants, and 2. Whether the decision is right in law. As to the first, only one issue was originally framed by the Subordinate Judge, namely, "was the deed executed for consideration?" The evidence of the attesting witnesses was recorded, and no questions as to attestation were put to them in their cross-examination. The Subordinate Judge framed a new issue after the evidence had been closed. If the point had been put in issue at an earlier stage we

(9) I. L. R. 26 All. 69 (1903).

(10) I. L. R. 31 Mad. 215 (1908).

might have given other evidence as to proper execution.

[LORD SHAW.—Was any request made to the Court that additional evidence might be taken ?]

There is no record of that. As to the second point I submit that attestation by witnesses on the acknowledgment of execution by the mortgagor is sufficient "attestation" within sec. 59, Transfer of Property Act.

There is a conflict of authority both here and in India. Under sec. 5 of the Statute of Frauds which required a will to be "attested and subscribed in the presence of the devisor by three or more credible witnesses," it was held that attestation on such acknowledgment was sufficient: *Grayson* v. *Atkinson* (1), *Ellis* v. *Smith* (2). The interpretation put in these cases was adopted by the Indian Legislature. See sec. 50 of the Indian Succession Act, 1865. That section requires an attesting witness either to see the testa or sign or to receive from him personal acknowledgment of his signature. Two Acts were passed in 1882, *viz.*, Acts IV and VI. Secs. 11 and 39 of the latter Act (VI of 1882) used the words "shall be signed by each subscriber in the presence of, and be attested by, one witness at the least." There could be no doubt that in these sections attestation on acknowledgment was sufficient, otherwise the words "in the presence of" would be superfluous. There was no reason to suppose that the Legislature did not intend to attach the same meaning to the same word "attested" which occurs in the other Act passed in the same year (*i.e.*, Act IV of 1882). The circumstances of India are also similar to those stated in *Grayson* v. *Atkinson* (1). In the case of a *purdanashin* lady witnesses can only attest on acknowledgment of the lady. Reliance was also placed on the following authorities: *White* v. *The Trustees of the British Museum* (3), *Girindra Nath* v. *Bejoy Gopal* (11), *Ramji* v. *Bai Parvati* (12), *Ganga Dei* v. *Shiam Sundar* (9). Roscoe's Nisi Prius (last edition), pp. 135 and 136. Reference was also made to the following cases and it was submitted that they did not decide that attestation on the executant's acknowledgment was not sufficient. *Seal* v. *Claridge* (13), *Sharpe* v. *Birch* (14), *Ford* v. *Kettle* (15), *Roberts* v. *Phillips* (6), *Casement* v. *Fulton* (4), *Bryan* v. *White* (5), *Burdett* v. *Spilsbury* (7)

Mr. Kenworthy Brown followed. He submitted that it was not competent for the Subordinate Judge to raise a new point at such a late stage of the proceedings. Sec. 149 of the Code of Civil Procedure, 1882, applies to a case where issues already framed under sec. 146 require to be amended. The Defendants must raise the point before a Court and frame an issue thereon.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—These are two consolidated Appeals from certain judgments and decrees of the High Court of Madras,

(1) 2 Ves. Sen. 454 (1752).
(2) 1 Ves Jun. 11 (1754).

(1) 2 Ves Sen. 454 (1752).
(3) 6 Bing. 310 (1829).
(4) 3 M I. A. 395 (1845).
(5) 2 Rob (Eccl.) 315 (1850).
(6) 4 E. & B. 450 (1855).
(7) 10 Cl. & F. 340 (1843).
(9) I. L. R. 26 All. 69 (1903).
(11) I. L. R 26 Cal. 246 (1898).
(12) I L. R. 27 Bom. 91 (1902).
(13) 7 Q. B D. 516, 519 (1881).
(14) 8 Q. B. D. 111, 114 (1881)
(15) 9 Q. B. D. 139 (1882).

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dated the 28th of January 1908, affirming the decisions of the Subordinate Judge of South Malabar at Palghat; and the sole question for determination in both cases turns upon the meaning to be attached to the word "attested" in sec. 59 of the Indian Transfer of Property Act (IV of 1882), the first clause of which provides that where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

The Appellant, Shamu Patter, as the representative of one Appu, deceased, brought a suit on the 18th of July 1902 in the Court of the Subordinate Judge of South Malabar, to enforce a mortgage alleged to have been executed in favour of Appu by the Ravuthan Defendants. The other Defendants to Patter's action were certain attaching creditors of the Ravuthans, who are Respondents in the present appeals, and who challenged the mortgage on the ground, *inter alia*, that it was in fraud of creditors and without consideration. Their attachment on the mortgaged properties appears to have been partially removed at the instance of Patter, and they accordingly brought a suit some time in 1903 in the Court of the District Munsif of Palghat for a declaration that the mortgage transaction was fraudulent and without consideration, and ineffective so far as their rights were concerned. This suit was afterwards transferred to the Court of the Subordinate Judge and was tried with Patter's action, the evidence in one being taken as evidence in the other.

The trial began, as appears from the Order Sheet, on the 7th of September 1903; arguments were heard on the 16th and 17th of November, and judgment was reserved. On the same date, it appearing, from the evidence of the witnesses to the mortgage deed that they were not present at its execution but had put their names on the document on the acknowledgment of the Ravuthans, the Subordinate Judge framed a supplemental issue in these terms: "Is it (meaning the mortgage deed) valid under sec. 59 of Transfer of Property Act?" And on the 19th of November, holding that the document was invalid under that section, he dismissed Patter's suit (save as regards a personal decree against the Ravuthans) and by a separate judgment decreed the action of the creditors.

From these two decrees Patter appealed to the High Court of Madras, which has upheld the Lower Court's decisions.

In the present Appeals the judgments of the Courts in India have been challenged on two grounds, first, that the Subordinate Judge acted irregularly and without jurisdiction in framing an issue after the close of the arguments and deciding the case on it; and, secondly, that the Courts are in error in holding that the word "attested" in sec. 59 of the Transfer of Property Act implies the witnessing of the actual execution of a document.

With regard to the first point their Lordships are of opinion that sec. 149 of the Civil Procedure Code (Act XIV of 1882) which is applicable to the proceedings, is conclusive. That section declares that the Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the controversy between the parties shall be so made or framed.

SHAMU PATTER *v.* ABDUL KADIR RAVUTHAN

The first part of the section leaves it in the discretion of the Court to frame such additional issues as it thinks fit, whilst the latter makes it imperative on the Judge to frame such additional issues as may be necessary to determine the controversy between the parties. The Subordinate Judge was, therefore, fully empowered to frame the issue on which he decided the case.

Even had there been no such express provision in the Code, their Lordships consider every Court trying civil causes has inherent jurisdiction to take cognisance of questions which cut at the root of the subject-matter of controversy between the parties.

The substantial ground, however, on which the decrees of the High Court are impugned, has reference to the interpretation put upon sec. 59 of the Transfer of Property Act. It is contended on the authority of *Grayson* v. *Atkinson* (1) and *Ellis* v. *Smith* (2), which was followed in 1829 in *White* v. *The Trustees of the British Museum* (3), that the learned Judges of the Madras High Court were in error in holding that the word "attested" in the section under reference means the witnessing of the actual execution of the document by the person purporting to execute it.

The construction put in those cases on the word "attested" occurring in sec 5, cl. 3, 29 Car. II. (the Statute of Frauds) no doubt supports the contention of the Appellant that attestation upon the acknowledgment of the executant is equivalent to being present at and witnessing the execution. They related, however, to the due execution of wills, and though

(1) 2 Ves. Sen. 454 (1752).
(2) 1 Ves Jun 11 (1754).
(3) 6 Bing 310 (1829).

the language of Lord Hardwicke in *Grayson* v. *Atkinson* (1) was sufficiently wide to cover other deeds, his interpretation has not passed without question in later cases. The eminent Judges who decided *Grayson* v. *Atkinson* (1) and *Ellis* v. *Smith* (2) themselves doubted the correctness as well as the expediency of widening the meaning of the word "attested," but felt overborne by authority. In the latter case the exact question for determination was whether a testator's declaration before three witnesses that it is his will is equivalent to signing it before them. Chief Baron Parker began his judgment with the following important observation :—

. . . .

"I confess, if this had been *res integra*, I should doubt whether the testator's declaration is a proper execution within the 5th clause because, I think, an admission that is sufficient tends to weaken the force of the statute, and let in inconveniences and perjuries."

Willes, C. J., observed that he was not satisfied in his own mind that the testator's acknowledgment was sufficient, but he added "authorities bear me down and I must yield." And the Master of the Rolls pronounced the extended construction to be "a dangerous determination and destructive of those barriers the statute erected against perjury and frauds." The learned Judges, however, felt bound by the previous decisions, and proceeding on the principle of *stare decisis* decided in favour of the view now pressed before their Lordships regarding the construction of a section of the Indian Statute relating to a totally different subject.

As the question involved in these Appeals is of considerable importance and

(1) 2 Ves. Sen. 454 (1752).
(2) 1 Ves. Jun. 11 (1754)

SHAMU PATTER *v.* ABDUL KADIR RAVUTHAN.

there seems to be some divergence of opinion between the Indian High Courts, their Lordships do not desire to pass altogether unnoticed the other authorities discussed at the Bar as well as in the well-reasoned judgments of the learned Judges in the Madras High Court.

In *Casement* v. *Fulton* (4), which was decided in 1845, the question for decision was whether the signatures of two witnesses who had subscribed a will at different times but the first had acknowledged to the second that he had signed the the same, amounted to sufficient compliance with the provisions of sec. 7 of the Indian Wills Act of 1838. Lord Brougham, in delivering the judgment of the Judicial Committee, observed that—

"The Statute of Frauds (29 Car. II., cl. 3, sec 5) requires the will to be signed by the testator. in the presence of the witnesses, nevertheless, the construction put upon that important provision has been that an acknowledgment is equivalent to a signature. How far this latitude of interpretation was justified in principle we need not now stop to inquire, else it might well be suggested that to do an act in the presence of a witness, and to acknowledge having done it when the witness was not present, are two entirely different things, as different as the witnessing a fact or act, and the witnessing a confession of that fact or act."

And after referring to the hesitation with wich the decision had been arrived at in *Ellis* v. *Smith* (2), refused "to carry one step further a construction which so great a weight of authority lamented and showed to have been ill-advised in its inception."

The later cases are still more direct in the interpretation of the words "attestation" and "attested." In *Bryan* v. *White* (5), Dr. Lushington in 1850 laid down that "attest means the persons shall be present and see what passes, and shall, when required, bear witness to the facts." In 1855 Lord Campbell, Chief Justice, in *Roberts* v. *Phillips* (6), enunciated the same rule as regards the word "attested," that the witnesses should be present as witnesses and see it signed by the testator. And the principle was given effect to in the House of Lords in *Burdett* v. *Spilsbury* (7). The Lord Chancellor summed up the conclusion in these words :—"The party who sees the will executed is in fact a witness to it; if he subscribes as a witness he is then attesting witness."

The meaning of the words "attest" and "attestation" has also been before the Courts under the Bills of Sale Act of 1878 (41 & 42 Vict., c 31, ss. 8 & 11) and the interpretation put on them in *Roberts* v. *Phillips* (6) and *Bryan* v. *White* (5) has invariably been followed.

Sec. 50 of the Indian Succession Act (X of 1865) was referred to in support of the Appellant's contention regarding the meaning of the word "attested" in sec. 59 of the Transfer of Property Act. The phraseology of the two sections is quite different, as different in fact as the objects of the two statutes.

Sec. 2 of Act XXV of 1838 (The Indian Wills Act) declared that after the passing of that Act, 29 Car. II. "shall cease to have effect" except to a limited extent within the territories of the East India Company. In sec. 7 the word "attested" is left out, but it is provided that the testator's signature "shall be made or acknowledged by him in the presence of two or more witnesses present at the same

(2) 1 Ves. Jun. 11 (1754).
(4) 3 M. I. A. 395 (1845).
(5) 2 Rob. (Eccl.) 315, 317 (1850).
(5) 2 Rob. (Eccl.) 315 (1850).
(6) 4 E. & B. 450 (1855).
(7) 10 Cl & F. 340 (1843).

time." The latter words gave rise to the question in *Casement* v. *Fulton* (4). Act X of 1865 (The Indian Succession Act) has substantially taken the place of the Indian Wills Act of 1838, and embodies the rules which constitute the law applicable in India to cases of intestate or testamentary succession, excepting as regards Mahommedans, for the major portion of this Act was made applicable to Hindus by the Hindu Wills Act. Sec. 50 provides for the due execution of what are called unprivileged wills, and para. 3 declares—

"The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

It will be noticed that the word "attested," which was omitted in sec. 7 of the Act of 1838, is re-introduced in sec. 50, and it is expressly provided that attestation may be effected on the acknowledgment of the testator. Had the word "attested" by itself conveyed the meaning that attestation upon the acknowledgment of the executant was sufficient, there would have been no reason for making an express provision in the section. The inference to be drawn from it is obvious. The Legislature considered it expedient in the case of wills to permit of witnesses "attesting the document," in other words, of testifying to its due execution, on the acknowledgment of the testator that it was in his hand, and as the word "attest" was not sufficient to validate such attestation, introduced an express provision to that affect. Sec. 68 of the Indian Evidence Act (I of 1872) which declares that "if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution," appears to their Lordships to indicate that the Indian Legislature used the word "attested" in the sense in which it has been construed through a series of decisions in the English Courts. Sec. 59 of the Transfer of Property Act in requiring that in a certain class of cases a mortgage "can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses," could only mean that the witnesses were to attest the fact of execution. Any other construction in their Lordships' opinion would remove the safeguards which the law clearly intended to impose against the perpetration of frauds.

The Calcutta High Court has in three cases arising under sec. 59, taken the same view as the Madras High Court has expressed in the present case. And although in one instance the Bombay High Court had extended the meaning of the word "attested" to include attestation upon acknowledgment, in *Ranu* v. *Laxmanrao* (8), the learned Judges, on the authority of *Burdett* v. *Spilsbury* (7), arrived at the same conclusion as the two other Presidency High Courts. The Allahabad High Court, however, in the case of *Ganga Dei* v. *Shiam Sundar* (9), has taken a different view. The learned Judges seem to consider the introduction of the words "personal acknowledgment" in sec. 50 of the Indian Succession Act

(4) 3 M. I. A. 395 (1845).

(7) 10 Cl. & F. 340 (1843).
(8) I. L. R. 33 Bom. 44 (1908).
(9) I. L. R. 26 All. 69 (1903).

SHAMU PATTER *v.* ABDUL KADIR RAVUTHAN.

as an interpretation of the word "attest." They say as follows :—

*   *   *   *

"It seems to us reasonable to suppose that the interpretation put upon the word 'attest' in that section, in the absence of good technical or substantial reason to the contrary, should be taken to be the meaning in which the word is used in sec. 59 of the Transfer of Property Act."

With respect, their Lordships are wholly unable to follow the reasoning. As already observed, the provision as to attestation upon the testator's personal "acknowledgment" was quite a separate condition and in no sense an interpretation of the word "attest." In fact, it was provided that the witnesses might attest the document on witnessing the actual execution or on the personal acknowledgment of the testator of the execution. But that, in their Lordships' judgment, affords no warrant for extending the meaning of the word "attest." Nor do their Lordships agree with the view expressed by the learned Judges regarding the policy of placing a larger construction on the word in consequence of the "social institutions of the country." Those very institutions their Lordships consider make it necessary that "the barriers against perjury and fraud," to use the language of the Master of the Rolls in *Ellis* v. *Smith* (2), should not be removed upon speculative considerations.

On the whole their Lordships are of opinion that the judgment of the High Court of Madras is right, and that these Appeals ought to be dismissed and they will humbly advise His Majesty accordingly.

Solicitor : *Mr. Douglas Grant* for the Appellant.

B. D. *Appeal dismissed.*

(2) 1 Ves. Jun. 11 (1754).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER
No. 195 OF 1910.
WITH RULE NO. 3035 OF 1910.

CARNDUFF, J.
CHAPMAN, J.
1912,
Heard, 24 and 25, June.
Judgment, 25, June.

BENOD BIHARI BHADRA Decree-holder, Opposite Party, Appellant,
v.
RAM SARUP CHAMAR, Judgment-debtor, Petitioner, Respondent.

Civil Procedure Code (Act V of 1908), secs. 115, 104, sub-sec. (2), *154, Or. 21, r. 90, Or. 43, r. 1, cl.* (j)—*Sale in execution, application to set aside on ground of fraud before new Code came into force—Order passed since if open to second appeal —General Clauses Act (X of 1897), sec. 6, cl.* (c)—*Retrospective operation of repealing statute—Revision—Erroneous decision on question of limitation—Limitation Act (IX of 1908), secs. 7, 9.*

An application to set aside an execution sale which took place on the 17th September 1900, on the ground of fraud and material irregularity in publishing and conducting it, was made on the 23rd July 1907 and allowed on the 6th July 1908, but the order was set aside on appeal and the case remanded on the 6th November 1908. On the 12th June 1909 the application was again dismissed but on appeal the order was set aside and the case once more remanded on 29th January 1910 :

Held—*That a second appeal against the order of remand did not lie under the new Code [Act V of 1908, Or. 21, r. 90 and sec. 104, sub-sec.* (2) *read with Or. 43, r. 1, cl.* (j)] *which applied to the case.*

The right of second appeal which the judgment-debtor would have (by reason of repealed provisions of the old Code relating to appeals continuing to govern pending cases), had sec. 6, cl. (c) *of the General Clauses Act of 1897 alone applied, must*

BENOD BIHARI BHADRA *v.* RAM SARUP CHAMAR.

be held to have been taken away by the express terms of sec. 154 of the new Code.

The words "present right of appeal" means only a right existing on the 1st of January 1909 to appeal against a particular order passed under the former Code and subsisting on that date.

THE COLONIAL SUGAR REFINING COMPANY, LIMITED *v.* IRVING (1), HORNSEY LOCAL BOARD *v.* MONARCH INVESTMENT BUILDING SOCIETY (2) *referred to.*

Where the lower Appellate Court had held that the application was not time-barred as the applicant was a minor, overlooking the fact that when the sale took place the father of the applicant was alive so that limitation had already begun running against him

Held—*That the fact that the lower Appellate Court overlooked the applicability of sec. 9 of the Limitation Act to the case was not sufficient to justify interference in revision by the High Court.*

This was an Appeal from an order of Babu S. K. Nag, Subordinate Judge of Pabna and Bogra, dated the 29th of January 1910, reversing an order of Babu Bejoy Gopal Chatterjee, Munsif of Bogra, dated the 12th of June 1909.

The facts of the case material to this report will appear from the judgment.

Babu Shama Charan Roy for the Appellant.

Babu Bepin Behari Ghosh for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal against an appellate order, which reversed an order of the Court of first instance setting aside a sale in execution on the ground of fraud and material irregularity in publishing and conducting it, and remanded the case for further consideration.

A preliminary objection is taken that no such appeal lies under the present Code of Civil Procedure. This objection undoubtedly must prevail if the present Code applies: for, under it fraud is put on the same footing as material irregularity by Or. XXI, r. 90, and sec. 104, sub-sec. (2), read with Or. XLIII, r. 1, cl. (*j*), makes it clear that there is now no second appeal in a case such as this.

Under the Code of 1882, a sale could be impeached for fraud under sec. 244 thereof, and therefore a second appeal lay. The sale with which we are here concerned was held on the 17th September 1900, that is to say, under the old Code. The first application for setting it aside was made on the 23rd July 1907, and allowed by the first Court on the 6th July 1908; but the order was set aside on appeal and the case remanded on the 6th November 1908. On remand the application was dismissed by the Court of first instance on the 12th June 1909. There was an appeal, and on the 29th January 1910 the original order was once more set aside and the case again remanded. The present second appeal is against the remand.

The new Code came into force on the 1st January 1909, and, therefore, both the original order and the appellate order with which we are now dealing, were made under it. The question is whether the matter of appeal is governed by it or by the old Code.

The learned Vakil, who appears on behalf of the Appellant relies on sec. 6, cl. (*c*), of the General Clauses Act of 1897, and on the decision of the Judicial

(1) [1905] A. C. 369.
(2) 24 Q. B. D. 1 (1889).

BENOD BIHARI BHADRA *v.* RAM SARUP CHAMAR.

Committee in *The Colonial Sugar Refining Company, Limited* v. *Irving* (1).

The case referred to is, no doubt, the highest authority for holding that the disturbance of an existing right of appeal is not a mere alteration of procedure, and that litigants have from the time they come into Court a vested right to any appeal then provided by law. Consequently the general rule against the retrospective operation of a repealing Act applies, and, unless it is otherwise expressly provided, the repealed provisions relating to appeals continue to govern pending cases. Now, the law in India against the retrospective construction of a repealing enactment is to be found in sec. 6 of the General Clauses Act above referred to and, that section (we quote only so much as is necessary) provides that where an Act repeals any enactment, then, "unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed, or affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation or liability as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced as if the repealing Act had not been passed." If the matter stood there, we are inclined to think that we should be constrained by the decision of the Privy Council to overrule the preliminary objection. But we must not overlook the words "unless a different intention appears," which control sec. 6 of the General Clauses Act, 1897, and the provisions of sec. 154 of the Code of Civil Procedure, 1908, which provides that nothing in the new Code "shall affect any present right of appeal which shall have accrued to any party at its commencement." It seems to us that a "present right of appeal," can mean only a right existing on the 1st January 1909, to appeal against a particular order passed under the former Code and subsisting on that date. The words "present right" are well understood. The meaning to be placed upon them is clear, and in this connection we need only refer to the remarks of Lord Esher, M. R., in *Hornsey Local Board* v. *Monarch Investment Building Society* (2). Having regard, then, to the express term of sec. 154 of the new Code, we are of opinion that there is here evidenced a distinct intention to limit the operation of the provisions of sec. 6 of the General Clauses Act, 1897, quoted above.

The preliminary objection, therefore, prevails, and this Appeal must be dismissed with costs, as being incompetent. We assess the hearing fee at two gold mohurs.

Rule No. 3036 of 1910.

There remains an application that we should move in revision under sec. 115 of the Civil Procedure Code or sec. 15 of the Charter Act.

The first Court took all the applicant's evidence and dismissed the application on the ground of limitation, and also on the merits. The lower Appellate Court pointed out, however, that the applicant was a minor, and that, therefore, he was entitled to the benefit of sec. 7 of the Indian Limitation Act of 1877, which corresponds with sec. 6 of the present Indian Limitation Act of 1908. The order was consequently set aside, and, as we have said in dealing with the appeal, the case was remanded for fresh consideration. The contention on behalf of

(1) [1905] A. C. 369, 372.

(2) 24 Q. B. D. 1, 6 (1889)

the Petitioner before us is that the learned Subordinate Judge was clearly wrong in his decision on the point of limitation, the error being caused by his having obviously overlooked the provisions of sec. 9 of the Limitation Act, under which when once limitation has begun to run, no subsequent disability can stop it.

It appears that the original judgment-debtor, the father of the Opposite Party, died some time after the sale, and, therefore, time began to run. That being so, the learned Subordinate Judge does seem to have made a mistake; but the question is whether the mistake is one which can be put right by us in revision. The learned Vakil's argument is this that, if a suit or an application is really barred by limitation, then sec. 4 of the Limitation Act lays it down that the Court is bound to dismiss it. If, then, the Court makes a mistake and fails to dismiss a suit which is in fact out of time, then it may be said to have acted without jurisdiction. This, no doubt, was the view expressed by Oldfield and Mahmood, JJ, in *Har Prosad* v. *Jafar Ali* (3): but precisely the contrary view was taken by Edge, C. J, and Banerjee, J., in *Sundar Singh* v. *Doru Shankar* (4). We find it exceedingly difficult to hold that a Court which has jurisdiction to decide a case, can be said to have acted without jurisdiction, or illegally or with material irregularity in the exercise of its jurisdiction, where it makes a mistake in law through failure to appreciate the whole of the law on the subject, and we are inclined to follow the opinion recently expressed on the Original Side of this Court in *Ramgopal Jhoonjhoonwalla* v. *Joharmal Khemka* (5), to the effect that an error in applying the law of limitation is not an error which can be corrected on revision.

We have been pressed with a number of other decisions of this Court, and particularly with that of *Mohunt Bhagawan Ramanuj Das* v. *Khetter Moni Dassi* (6), where the learned Judges expressed the opinion that sec. 622 of the Code of 1882, with which sec. 115 of the present Code corresponds, is evidently intended to authorise the High Court to interfere with, and correct gross and palpable errors on the part of the subordinate Courts so as to prevent injustice in non-appealable cases. We have no desire to say anything which might tend to limit by defining our powers under the section; but we hesitate to accept this ruling in so far as it draws a distinction between gross and palpable errors and other errors. All that we need say is that the fact that the lower Court seems to have overlooked sec. 9 of the Limitation Act is not, in our opinion, sufficient to justify us in exercising our revisional powers.

We have assumed so far that sec. 9 of the Limitation Act does apply; but that section has been the subject of not a few decisions, and its applicability is not always obvious, so that, for ought we know, the learned Subordinate Judge may have noticed it, but come to the conclusion that it was not applicable, and he may possibly be right, although on facts, so far as they appear now, he would seem to have been wrong.

The result is that the Rule also must be discharged. We make no separate order as to costs.

Appeal dismissed:
Rule discharged.

(3) I. L. R. 7 All. 345 (1885).
(4) I. L. R. 20 All. 78 (1897).
(5) I. L. R. 39 Cal. 473 (1912).
(6) 1 C. W. N. 617, 627 (1896).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 385 OF 1908.

COXE, J.
IMAM, J.
1912,
Heard, 28, March and 2, April.
Judgment, 12, April.

BALKI MAHAPATRA and another, Plaintiffs, Appellants,
v.
BROJOBASI PANDA and another, Defendants, Respondents.

Transfer of Property Act (IV of 1882), sec. 85—Mortgage by Mitakshara co-parceners—Suit for foreclosure in which sons of a mortgagor not joined—Decree if extinguishes son's right—Representation of son's interest by father, when debt not charged as immoral.

The Plaintiffs' father amongst other co-parceners of a joint Mitakshara Hindu family executed a mortgage by conditional sale the term of which expired in 1888, whereupon the mortgagee instituted a suit for foreclosure against the mortgagors and obtained delivery of possession in 1889, in execution of the decree in that suit. The Plaintiffs were not made parties in that suit, the mortgagee not having had notice of their interest at the time and they brought the present suit in 1907 for redemption:

Held—*That in the absence of allegation by the Plaintiffs that the debt was an immoral debt, the father of the Plaintiff sufficiently represented the Plaintiffs in the previous suit, and with the extinction of the father's right to redeem, the son's right of redemption was also extinguished.*

BUNSEE DAS *v.* GENA LAL JHA (8), RAM TARAN GOSWAMI *v.* RAMESWAR MALIA (9) *referred to.*

This was an Appeal from a decision of Babu Purna Chandra Mitra, Subordinate Judge of Sambalpur, dated the 23rd of June 1908.

On the 22nd October 1880, Plaintiffs' grandfather, father and certain other persons who were co-parceners in a joint Mitakshara Hindu family executed a mortgage by conditional sale in favour of Kapileshwar who on the expiry of the term of the mortgage in April 1888, brought on the following month a suit for foreclosure without making the Plaintiffs parties Defendants, obtained a decree on 20th June 1888, which was subsequently made absolute and possession of the property delivered to Kapileshwar on 4th February 1889 Plaintiffs brought the present suit for redemption of the mortgage on 25th November 1907, on the allegation that Kapileshwar was aware of the interest owned by the Plaintiffs in the mortgaged property and having failed to make the Plaintiffs parties to his suit for foreclosure, the Plaintiffs' right to redeem was not affected by the decree. The Defendants who were successors and representatives of Kapileshwar denied that Kapileshwar had any knowledge of Plaintiffs' interest in the mortgage during the pendency of the foreclosure suit, and pleaded that the decree in that suit was a bar to the present and they further pleaded limitation.

The Court of first instance found on the evidence that Kapileshwar had no knowledge of the Plaintiffs' interest in the mortgaged properties when he instituted his foreclosure suit, and held on the authority of *Ram Taran Goswami* v. *Rameswar Malia* (9), that the Plaintiffs were not entitled to institute a suit for redemption without first setting aside the foreclosure decree and the proceedings subsequent thereto; that the Plaintiffs' suit was further barred by limitation. In the result he dismissed the suit.

The Plaintiffs appealed to the High Court.

(8) 14 C. L. J. 530 (1911).
(9) 11 C. W. N. 1078 (1907).

(9) 11 C. W. N. 1078 (1907).

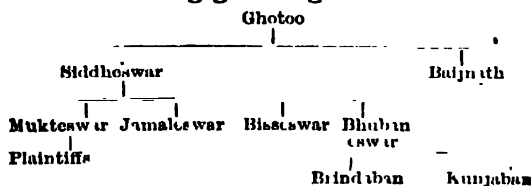
BALKI MAHAPATRA *v.* BROJOBASI PANDA.

Babus Sarat Chandra Roy Chowdhuri and *Charu Chandra Bhattacherjee* for the Appellants.

Dr. Rash Behary Ghosh and *Babu Atulya Charan Bose* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for redemption. The ancestor of the Plaintiff was one Ghotoo, and the family is shown in the following genealogical tree.



The mortgage sought to be redeemed was executed by Siddheswar, Mukteswar, Jamaleswar, Brindaban, and Kunjaban. It was a mortgage by conditional sale, and the term expired in April 1888. The next month the mortgagee instituted a suit for foreclosure, and in February 1889 he obtained delivery of possession. The present suit was instituted at the end of 1907.

The learned Subordinate Judge has dismissed the suit, holding that the Plaintiffs have no right to redeem, unless and until the foreclosure decree is set aside and, *secondly*, that the suit is barred by limitation. The Plaintiffs appeal.

The Plaintiffs were not parties to the former suit, and it appears to us that the first question to be decided is whether the mortgagee had notice of their interests within the meaning of sec. 85 of the Transfer of Property Act, 1882. This is a question of fact alone and after reading the evidence we think that, although the point is not free from doubt, we should not be justified in overruling the finding of the learned Subordinate Judge, before whom the witnesses deposed. The burden of proof is, of course, entirely on the Plaintiffs. The facts of the case that are not disputed are against the supposition that the mortgagee had notice, as has been pointed out by the learned Subordinate Judge. The mortgagee lived about 17 miles distant from the Plaintiffs' family, and the only connection between them was that mortgagee's mother and the Plaintiffs' aunt had some kind of semi religious friendship. The mortgagee was energetic in enforcing his rights and the learned Subordinate Judge considers that he would have made the Plaintiffs parties, to secure his own interests, if he had known of them, an inference that does not seem unreasonable. The evidence which the Plaintiffs have adduced to prove that the mortgagee knew about their existence is to the effect that he attended a family ceremony shortly after the first Plaintiff's birth. Now apart from the improbability of the witnesses remembering who were the guests on a not very important occasion thirty years ago, almost all this evidence is open to the criticism that the witnesses have their own reasons for deposing adversely to the Defendant, and are probably animated by ill-will towards him. The only two witnesses, of whom perhaps this should not be said, are Dasserath Ganda and Sapna Ganda and Sapna Gountia. The former is the local chowkidar and seems so unintelligent that his recollection of this particular incident is somewhat surprising. His answers to questions put to him in cross-examination to test the quality of his memory are not satisfactory. Sapna lives 14 miles away and this was the only ceremony he ever attended in the Plaintiffs' village. He cannot re-

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collect any of the other guests. This evidence cannot but be regarded as very weak. That for the defence perhaps is not much stronger, though it may be said that the witnesses Parikhit Barik, Kuber Prodhan, Samo Gauntia, Gadadhar Misser and Bhogirathi Bohidar have not been cross-examined with the view of showing that they are biassed or partisan witnesses. On the whole therefore we agree with the learned Subordinate Judge that the Plaintiffs have failed to discharge the burden of proving that the mortgagee had notice of their interests or existence, when he sued for foreclosure.

The question then remains whether, when a mortgagee has obtained a foreclosure decree on a mortgage by conditional sale against the head of a Hindu family governed by the Mitakshara, a son who was not a party to the foreclosure decree can afterwards redeem, if he is unable to show that the mortgagee had notice of his interest at the time of the foreclosure suit. The point seems to be well settled in Allahabad. The case of *Ram Prasad* v. *Man Mohan* (1) is perhaps somewhat in the Plaintiffs' favour, though in that case the mortgagee had notice of the son's interest, but that case was dissented from in *Sheodial* v. *Jagat Nath* (2), and held not to be in accordance with the principles underlying the leading Full Bench case in Allahabad, *Debi Singh* v. *Jia Ram* (3).

We may refer also to *Lal Singh* v. *Pulandar Singh* (4) in which indeed the mortgagee had notice of the son's interest, and to *Jadu Kuar* v. *Seosankar Ram* (5), *Bulwant Singh* v. *Aman Singh* (6) and *Kehri Singh* v. *Chunni Lal* (7). These cases show that in Allahabad the point is now well settled.

The precise point does not seem to have arisen in any case in this Province. The case of *Bunsee Das* v. *Gena Lal Jha* (8) was a suit in which redemption was sought, among other reliefs, by a puisne mortgagee, whose position of course would be wholly different from that of a Hindu son. The learned Judges distinguished the case of *Ram Taran Goswami* v. *Rameswar Malia* (9), which is wholly against the present Plaintiffs, by observing that in that case the person not made a party to the former suit might be deemed to be sufficiently represented by the actual parties. It is evident that this observation would apply with still greater force to the present suit.

On general principles it would seem that, if the father of a Hindu family can sell ancestral property to pay off debts and the sale cannot be questioned by the son if the debts are not immoral, the same result would naturally follow if the father mortgaged the property by conditional sale and then suffered the mortgage to be foreclosed. The father could not afterwards redeem, and if the son could not impugn the debt as immoral and was therefore bound by it, it would seem that he would be fully represented by his father in the foreclosure proceedings, and would have no more right than his father to redeem subsequently. If the right to repudiate immoral debts is the sole distinction between a father's position and that of a son in attacking an alienation by the father, it would

(1) I. L. R. 30 All. 256 (1908).
(2) 8 A. L. J. 922 (1910).
(3) I. L. R. 25 All. 214 (1902).
(4) I. L. R. 28 All. 182 (1905).
(5) 7 A. L. J. 945 (1909).
(6) I. L. R. 33 All. 7 (1910).
(7) I. L. R. 33 All. 436 (1911).
(8) 14 C. L. J. 530 (1911).
(9) 11 C. W. N. 1078 (1907).

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seem that where this right is not in question the extinction of the father's right to redeem must carry with it the extinction of the son's right also.

We think therefore that the Plaintiffs have no right to redeem in the present case and that the suit must fail. We need not therefore discuss the other questions that have been argued in the appeal.

The Appeal is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO. 45 OF 1911.

JENKINS, C. J. N. R. CHATTERJEA, J. 1912, Heard, 1 and 8, July. Judgment, 8, July.	SANTO PROSAD SINGH, Petitioner, Appellant, *v.* SHEW NARAIN SINGH and others, Opposite Party, Respondents.

Civil Procedure Code (Act V of 1908), Or. 21, r. 90—Sale, application to set aside—Irregularity and consequent inadequacy of price established—Real value of the property found not to exceed decree which could not be further executed owing to limitation—Substantial injury whether made out—Debtor's right.

Where it was found that there had been irregularities in conducting and publishing a sale of immoveable property in execution of a decree and that the property was sold at an inadequate price in consequence, the mere fact that the real value of the property sold did not exceed the amount of the decree, and that the unsatisfied balance of the decree could not be realised from the judgment-debtors by reason of limitation, would not bring the case within the proviso to Or. 21, r. 90.

A debtor is entitled to have those steps taken for which provision is made by the Code for the purpose of ensuring that his property will realise an adequate price and so enable him to pay off his debt in money or money's worth.

This was an Appeal preferred on the 31st of January 1911 against an order of Babu Tarak Nath Dutt, Subordinate Judge of Zillah Patna, dated the 21st of December 1910.

The Appellant was a judgment-debtor whose immoveable property had been sold in execution. He applied for setting aside the sale under Or. 21, r. 90. The Subordinate Judge found that there were irregularities in conducting and publishing the sale, that no notice had been served as required by Or. 21, r. 66; that there was no publication of sale-prolcamation; that the price stated in the proclamation was inadequate and the price actually realised at the sale was in fact inadequate. He found, however, that the real value of the property would in no case exceed the amount of the decree; that the unsatisfied balance of the decree could no longer be realised as any application for execution which the decree-holder might prefer was barred by limitation. Under the circumstances he held that the judgment-debtor had suffered no substantial injury and that in consequence the application must fail. He accordingly dismissed the application. The judgment-debtor preferred this appeal.

Babus Umakali Mukherjee, Rajeshur Proshad and *Harihar Proshad Singh* for the Appellant.

Babus Mohendra Nath Roy and *Chandra Sekhar Proshad Singh* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—This Appeal from Order

arises out of proceedings in execution. The application which initiated the present proceedings was one under Or. XXI, r. 90 to set aside a sale on the ground of irregularity. The case has been argued before us on the basis of the judgment of the Subordinate Judge which has been taken by both sides as a correct presentation of the facts, but it is maintained that the conclusion of law at which he arrived on those facts is erroneous. The facts found by the Subordinate Judge were succinctly and at the same time clearly placed before us by Mr. Mohendra Nath Roy in the course of his argument. His submission was that six separate facts were found (1) that the notice required by r. 66 had not been served; (2) that the proclamation had not been published; (3) that an inadequate price was stated in the proclamation; (4) that an inadequate price was in fact realised; (5) that the value of the properties would not exceed the amount under the decree; and (6) that the Defendant's liability under the decree had ceased. The position constituted by the first four of these facts then is this; that there was a group of irregularities; that there was an inadequacy of price, and, according to the concession made before us, that this inadequacy was to be attributed to irregularities. But it was argued, and argued with very considerable ingenuity that the fifth and sixth findings of fact saved the position, because they brought into play the saving operation of the proviso to r. 90. That proviso is in these terms: "Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud." It is said that there was no substantial injury, because in the first place the value of the property would not exceed the amount due under the decree, and secondly because the Defendant's liability had ceased. The conjoint operation of this, it is said, is such that it would be impossible to affirm that the applicant had sustained substantial injury. Ingenious as the argument is, I think it cannot be supported. A debtor is entitled to have those steps taken for which provision is made by the Code for the purpose of ensuring that his property will realize an adequate price and so enable him to pay off his debt in money or money's worth. It is no answer to him to say, it is quite true there have been irregularities and a consequent inadequacy of price which has prevented you from paying off your debt in full, but you have the satisfaction of a shelter behind the statute of limitation. That is not all the satisfaction an honest debtor desires and I do not think that the argument and the considerations involved in it are sufficient to enable a decree-holder and purchaser in a case like the present, to say that substantial injury has not been suffered simply because further remedies may be barred by some technical rule of law.

I, therefore, feel bound to come to the conclusion on the first four findings of fact, that there has been,—as indeed it is conceded, for the purposes of the argument before us—an inadequacy of price resulting from irregularities in the conduct of the sale and that this has occasioned a substantial injury to the applicant which has not been removed. I come to this conclusion not without some regret because the decree-holder purchaser was perfectly willing to allow the sale to be treated as one for a value that would enable the judgment-debtors to say that

in fact the debt had been paid off in full. But the judgment-debtor did not see his way to accepting this offer made by the decree-holder, and the result is that we must set aside the sale and the case must go back to the lower Court where the proceedings in execution must be renewed.

The Opposite Party, Respondents, must pay the costs in the Court below and in this appeal. We assess the hearing-fee in this appeal at two gold mohurs.

N. R. CHATTERJEA, J.—I agree.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 228 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.
1912,
21, June.

MADAN MOHAN NATH SAHI, Judgment-debtor, Appellant,
v.
PROTAP UDAI NATH SAHI, Decree-holder, Respondent.

Chota Nagpur Landlord and Tenant Procedure Act (I, B C of 1879), sec 123—Rent decree, execution—Exemption of portion of tenure from sale by Commissioner—Remaining portion if may be sold as in execution of rent-decree—Rent Recovery Act (VIII of 1865), sec. 16.

Where the Commissioner exempted certain portions of a tenure from sale in execution of the landlords' decree for rent, under sec. 123 of the Chota Nagpur Landlord and Tenant Procedure Act (I, B. C. of 1879), the decree-holder would be entitled to execute his entire decree as a decree for rent against the unexempted portion of the tenure and the auction-purchaser would acquire the status of a purchaser under sec. 16 of the Bengal Rent Recovery Act of 1865.

Quære—*Whether there would be an apportionment of the tenure and of the rent, in consequence of such a sale, between the holders of the exempted portion and the purchaser of the unexempted portion.*

This was an Appeal preferred on the 10th of May 1912, against the order of Babu Charu Chandra Mukerjee, Deputy Collector of Zillah Ranchi, dated the 8th of May 1912.

The material facts will appear from the judgment.

Babu Bepin Chunder Mullick for the Appellant.

Babu Jogesh Chunder Dey for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal raises a question of first impression as to the construction of sec. 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879 It appears that the Respondent obtained a decree for rent against the Appellant in respect of a tenure on the 19th April 1905. On the 28th November 1910, the application for execution, now under consideration, was presented. The judgment debtor, tenure-holder, had created, on a part of his tenure, encumbrances by way of maintenance grants in favour of his dependants. The properties of these maintenance holders were at the time under the charge of the Encumbered Estates Act authorities. They applied for exemption of the villages comprised in the maintenance grants under sec. 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879. Upon the recommendation of the Deputy Commissioner, the order of exemption was made by the Commissioner on the 30th March 1911. The question in controversy now is, what is the precise effect of this order of exemption.

Before we determine this question, it is necessary to consider in the first instance

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by what statutory provisions the matter before us is governed. The Commissioner made his order for exemption ostensibly under sec. 208 of the Chota Nagpur Tenancy Act, 1908. In our opinion, the order in question could not have been made under that section ; but this does not affect the validity of the order inasmuch as it could have been made under sec. 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879. Sub-sec. (1) of sec. 208 of the Chota Nagpur Tenancy Act, 1908, shows that the provisions contained therein apply to cases of execution of decrees passed by the Deputy Commissioner under that Act. The decree now under execution was passed prior to the commencement of the Chota Nagpur Tenancy Act, 1908. Consequently, under sec. 8, cl. (*e*) of the Bengal General Clauses Act, 1899, the provision applicable is that contained in sec. 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879, and the effect of that section we now proceed to consider.

Sec. 123 provides that if the decree of which execution is sought is for arrears of rent in respect of a tenure, the decree-holder may make application for the sale of such tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the provisions for the sale of under-tenures contained in the Bengal Rent Recovery Act, 1865 ; and all the provisions of that Act shall, as far as may be, apply. This is followed by a proviso to the effect that the Commissioner may by order, in any case in which he may consider it desirable so to do, prohibit the sale of any tenure or portion thereof.

On behalf of the judgment-debtor, it has been contended that the effect of an order of exemption of a portion of a tenure by the Commissioner is to make it impossible for the decree-holder to execute the decree as a decree for rent under the Bengal Rent Recovery Act, 1865. It is plain that the effect of an order of exemption of a part of the tenure is not to deprive the decree-holder entirely of his right to execute the decree ; for if that had been the consequence, the effect would have been the same as if the entire tenure had been exempted from sale. We take it, therefore, that, notwithstanding the order for partial exemption, it is open to the decree-holder to execute his decree. The real question in controversy is, whether, on an order for partial exemption, the decree is to be executed as a decree for money or as a decree for rent. On behalf of the Appellant it has been argued that the order for exemption can be made in respect of a part of the tenure only where the decree-holder seeks to execute a decree for rent of a fraction of a tenure, and in support of this view, reference has been made to the case of *Dwarka Nath* v. *Dhun Monee* (1). That case, in our opinion, has no application, it merely shows that where a share of a tenure has been treated as an independent and self-contained tenancy, in an execution of a decree for rent due in respect thereof, the property may be sold as if it were an entire tenure. But it is plain that the provisions of sec. 123 cannot be restricted in the manner suggested, because if that was the only case where an order for partial exemption could be made, that would really be a case for application for sale of what constituted an entire tenure ; and the prohibition would in substance be of the sale of such a tenure. Sec. 123 plainly covers a case of the description now before us, when an applica-

(1) 15 W. R. 524 (1871).

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tion is made for the sale of all the villages comprised in a tenure, but the Commissioner, for reasons sufficient in his opinion, directs the exemption of some of the villages from the sale. In such a case, it is plain that the sale of the unexempted portion is still to take place under the Bengal Rent Recovery Act of 1865; in other words, the restrictions in the proviso do not affect the provisions in the substantive part of the section for the sale of the property. Reliance, however, has been placed upon secs. 4 and 16 of the Bengal Rent Recovery Act, 1865, to show that the Legislature contemplated that sales under that Act should be sales of entire tenures. It may also be conceded as laid down by the Full Bench in *Sham Chand Mitter* v. *Juggut Chunder Sarcar* (2), that ordinarily when a sale takes place of an entire tenure under the Bengal Rent Recovery Act, 1865, the purchaser acquires the property free of all encumbrances. But there is, in our opinion, no inconsistency between the proviso to sec. 123 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879, and the provisions of the Bengal Rent Recovery Act, 1865. It was competent to the Legislature to lay down that a sale under sec. 123 would be a sale under the Bengal Rent Recovery Act of 1865, notwithstanding the fact that what was sold was not the entire tenure but only the unexempted portion thereof. This, we think, is the result of the legislative provisions on the subject. If the contrary view were maintained, the result would be that by an order of exemption the landlord decreeholder would be practically deprived of his security for the rent. If the sale of the unexempted portion was merely the sale of the right, title and interest of the judgment-debtor, the property might not be saleable at all, and a purchaser might not be found willing to bid a sufficient sum for the satisfaction of the judgment-debt. The Legislature could not have intended that because, as in the case before us, an order of exemption is made for the benefit of persons whose title has been created by the Defendant under circumstances which could not be controlled by the landlord, the landlord practically loses his security for the arrears of rent due to him. We hold, accordingly that the effect of a sale of the unexempted portion is to pass the property to the purchaser free of all encumbrances. When the purchaser has obtained the property, what his precise position will be, that is, whether he will be, jointly with the holder of the exempted portion of the property, liable for the whole rent is a matter which does not require considerations at this stage. It is conceivable that the purchaser may, with good reason, contend that as the landlord, though under compulsion, has brought to sale some only of the villages, included in the tenure, he is bound to apportion the rent: the consequence of such a sale, if the view suggested is well-founded, may be that the tenure is ultimately split up into two distinct tenures. These, however, are matters which must be left open for consideration, if and when the contingency arises. It is sufficient for us to hold now that the entire decree may be executed as a decree for rent against the unexempted portion of the tenure, and that the auction-purchaser will acquire the status of a purchaser under sec. 16 of the Bengal Rent Recovery Act, 1865. The view put forward by the judgment-debtor Appellant, therefore, cannot be accepted.

A minor question has been raised in

(2) 22 W. R. 541 (1874).

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the appeal and requires only a brief consideration. It has been suggested that the sale proclamation was not properly drawn up and that it was not competent to the decree-holder to set out in the sale proclamation the amount of rent that might be legitimately levied from the villages sought to be sold, and the villages exempted, respectively. Reference has been made in this connection to sec. 5 of the Bengal Rent Recovery Act, 1865. That section provides that "the notice of sale shall specify, in the words used in the plaint in the suit in which the decree was made, the name of the village, estate and purganah or other local division, in which the land comprised in the said under-tenure is situated, the yearly rent payable under the said under-tenure and the gross amount recoverable under the said decree." It is clear that in the case before us the decree-holder was not bound to apportion the rent that might be leviable from the exempted and unexempted villages respectively. He would have strictly complied with the provisions of sec. 5 if, in the words of the section, he had stated the yearly rent payable in respect of the entire tenure together with a note that the villages named were exempted from sale under the order of the Commissioner. The judgment-debtor therefore cannot reasonably complain of what has been done by the decree-holder. At any rate, as a new sale proclamation is to be issued, we direct that it be drawn up in strict conformity with sec. 5 of the Bengal Rent Recovery Act, 1865. The rent will not be apportioned; the rent payable annually in respect of the whole tenure will be stated together with a note that certain specified villages were exempted for sale.

The result is that this appeal fails and is dismissed with costs. We assess the hearing-fee at ten gold mohurs.

Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 5862 OF 1911.

BRETT, J.
CARNDUFF, J.
1912,
Heard, 12 & 13, February.
Judgment, 14, February.

HIRA LAL MITRA, Defendant No. 1, Petitioner,
v.
UDOY CHANDRA DEY, Plaintiff, Respondent.

Civil Procedure Code (Act V of 1908), Or. XXIII, r. 1, sub-r. (2)—Withdrawal of suit when to be allowed.

Courts in India have no general power of dismissing a suit with liberty to the Plaintiff to bring a fresh suit on the same matter. The only power they have in this respect is that given by Or. XXIII, r. 1, sub r. (2), C. P. C.

It is not the object of that Rule to enable the Plaintiff, after he has failed to conduct his suit with proper care and diligence and after his witnesses have failed to support his case, to obtain the opportunity of commencing the trial afresh in order to avoid the result of his previous misconduct of the case and so to prejudice the Opposite Party.

This was a Rule granted on the 27th of November 1911 against an order of Babu P. N. Bhuttacharjee, Munsif of Howrah, dated the 29th of August 1911.

The facts of the case material to this report will appear from the judgment.

Babus Mohendra Nath Roy, Krishna Prashad Sarbadhikary and *Monmotha Nath Roy* for the Petitioner.

Babus Dwarka Nath Chuckerbutty and *Hari Bhusan Mukherjee* for the Plaintiff.

The JUDGMENT OF THE COURT was as follows:—

The facts of the case in respect of which

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this Rule has been issued are as follows :—Shaikh Porabaddi, the owner of certain property, sold it on the 9th March 1893 to the Defendant No. 2 who again sold it to the Defendant No. 1 on the 10th November 1909. Defendant No. 3, the son of Shaikh Porabaddi, after Porabaddi's death, sold the same property to the Plaintiff on the 9th November 1909. The Plaintiff sued to recover the property from the Defendant No. 1 on the ground that the sale to the Defendant No. 2 by Shaikh Porabaddi was a benami transaction. The suit was instituted on the 1st October 1910 and, on the 9th December 1910, the plaint was amended on the prayer of the Plaintiff. The issues were settled on the 20th January 1911 and adjournments were taken for various reasons by the Plaintiff up to the 31st May 1911. There were adjournments after that date, and on the 14th August 1911 the Plaintiff applied for the examination of his principal witness, Chaddar Shaikh, on commission. The application was granted and, after that witness had been examined on the 19th August, the case came on before the Court for final disposal on the 29th August 1911. On that date, the Plaintiff put in an application before the Court praying for the withdrawal of the suit with liberty to bring a fresh suit. The application purported to have been made under Rule 1, sub-rule (2) of Order XXIII of the Code of Civil Procedure. On that application, the Munsif passed the following order :—"The Plaintiff has prayed for withdrawal of the suit with liberty to bring a fresh suit but the Defendant has objected to the withdrawal. The ground on which the Plaintiff prays for withdrawal is, I think, an adequate one and hence the Defendant's objection cannot be allowed to prevail. Ordered :—The Plaintiff is permitted to withdraw from the suit with liberty to bring a fresh suit, if not time-barred. The Defendant will, however, get the costs of the suit."

On the 27th November 1911, the Defendant No. 1, the present Petitioner, applied to this Court and obtained this Rule on the Opposite Party, the Plaintiff in the suit, to show cause why the order of the Court below purporting to have been made under Order XXIII, Rule 1, Civil Procedure Code, should not be set aside on the ground that there was no formal defect or other sufficient ground justifying the same. In the case of *Watson* v. *The Collector of Rajshahye* (1), the Privy Council pointed out that there is no general power in the Country Courts in India similar to that which the Courts of Equity in England occasionally exercise of dismissing a suit with liberty to bring a fresh suit for the same matter. It is clear therefore that the only power under which the Munsif could pass the order complained against was that given by Order XXIII, Rule 1, sub-rule (2) of the Code of Civil Procedure.

In support of the Rule, reliance is placed on the decisions of this Court in the cases of *Kharda Co.* v. *Durga Charan* (2) and *Ramdeo* v. *Gonesh* (3). We are of opinion, however, that, in the present case, it is not necessary to rely on these rulings and that the Rule must be made absolute on the simple ground that the application on which the order of the Munsif was passed fails to disclose any formal defect in the suit or other sufficient grounds by reason of which it should be granted. In the applications of the

(1) 13 M. I. A. 160 (1869).
(2) 11 C. L. J. 45 (1909).
(3) 12 C. W. N. 921 (1908).

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Plaintiff for withdrawal there were various reasons given, namely, that owing to a mistake several important matters were not mentioned in the plaint, that some important documents were not filed on behalf of the Plaintiff, that witnesses to the principal document were not called to prove its *benami* character and that important witnesses were not summoned. But the application does not state what the important matters were or how their omission would affect the result of the case. Moreover it appears that, after the plaint was filed, it was amended on the prayer of the Plaintiff and no reason is given in the application why then the important matters, if any, referred to in the application were not included in the plaint. Documents appear to have been filed to the number of 5: by the Plaintiff on three different occasions on which adjournments were taken and it is not stated what important documents were omitted and for wha reason they were not filed. There were eight adjournments at the Plaintiff's instance for the production of witnesses and it is not stated in the application why the Plaintiff failed to take out processes to secure the attendance of the important witnesses. On the contrary, it appears that the principal witness on whom the Plaintiff relied in support of his case that the sale by Shaikh Porabaddi to the Defendant No. 2 was a *benami* transaction was examined on commission and that he gave evidence in favour of the Defendant. The object of Rule 1 of Order XXIII is not, in our opinion, to enable a Plaintiff, after he has failed to conduct his suit with proper care and diligence and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous misconduct of the case and so to prejudice the Opposite Party. We think the Rule must be made absolute on the ground on which it has been granted. We accordingly make the Rule absolute, set aside the order of the Munsif and direct that he do proceed to deal with the case from the stage at which it had reached when the order was made. The Petitioner is entitled to his costs which we assess at five gold mohurs.

Rule made absolute.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 5466 OF 1911.

MOOKERJEE, J.
CARNDUFF, J.
1912,
16, April.

GOPAL CHANDRA MUKERJEE, Petitioner,
v.
NOTOBAR KUNDU, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. XXI, rr. 58, 59, 60, sec. 115—Claim petition if may be determined after property attached is sold—Revision.

The Court acted in excess of its authority and in violation of the express provisions of the Statute in allowing a claim petition preferred under Or. 21, r. 58, after the property attached was sold, and the order allowing the claim was liable to be set aside on revision.

This was a Rule granted on the 20th of November 1911 against an order of S. N. Ghose, Esq., Munsif of Kotalpur, dated the 21st of August 1911, allowing with costs the claim of the Opposite Party.

The material facts will appear from the judgment.

Babu Abani Bhusan Mukerjee for the Petitioner.

Babu Jnanendra Nath Sarkar for the Opposite Party.

GOPAL CHANDRA MUKERJEE *v.* NOTOBAR KUNDU.

THE JUDGMENT OF THE COURT was as follows:—

The question of law raised in this Rule is whether it is competent to an execution Court to proceed with a claim application under r. 58 of Or. 21 of the Code of 1908 after the execution sale has actually taken place.

The Petitioner in execution of a decree, dated the 4th April 1910, against one Kali Dasi Debi attached certain properties. On the 23rd February 1911, the present Opposite Party preferred a claim but the claim was not adjudicated upon till the 21st August 1911. Meanwhile, the property had been sold on the 25th April 1911 and purchased by the decree-holder. On behalf of the decree-holder auction-purchaser it has been contended that after the sale had taken place the Court was no longer competent to proceed with the application under r. 58 and to make on the basis thereof an order under r. 60. In our opinion this contention is manifestly well-founded and must prevail.

R. 60 of Or. 21 provides that where upon the investigation contemplated in rr. 58 and 59 the Court is satisfied that the claim ought to be allowed, it shall make an order releasing the property wholly or to such an extent as it thinks fit from attachment. It is thus plain that an order under r. 60 must be made before the sale has taken place. This is also made clear by sub-r. (2) of r. 58 which provides for the adjournment of a sale pending the investigation of the claim preferred under sub-r. (1). But it has been argued by the learned Vakil for the Opposite Party that the Court below had, under sec. 155 of the Code, inherent power to allow the claim after the sale and to set aside the sale which had already taken place and had been confirmed. In support of this view, reference has also been made to the cases of *Tufuzool Husain* v. *Rughoo Nath Prosad* (1), *Hiralal Mukerjee* v. *Premmoyee Debi* (2) and *Gurdeo Singh* v. *Chandikah Singh* (3). It is clear, however, that the doctrine of inherent power has no application to a case of this description. That doctrine is applied when the Court finds it necessary for the ends of justice or to prevent an abuse of its process to make an order for which no express provision has been made by the Legislature. *Panchanan* v. *Dwarka Nath* (4), *Hukum Chand* v. *Kamalanand* (5). In the case before us, r. 60 plainly indicates that an order upon an application under r. 58 must be made before the sale has taken place; upon the sale the application by which the claim has been preferred *ipso facto* terminates. The effect of these statutory provisions cannot be frittered away by an earnest appeal to the doctrine of inherent powers, specially as the objector is not without a remedy. It is open to him to proceed under r. 99 and r. 100 after the property has been sold and an attempt is made by the purchaser to obtain delivery of possession thereof. It is also open to him to institute a regular suit for the declaration of his right which, if his allegations be true in fact, has not been affected by the execution sale. This therefore is a case where the Court would not exercise its inherent power in contravention of the express provisions of rr. 58, 59 and 60 of Or. 21 of the Code of 1908.

It has finally been contended on the strength of certain observations in the

(1) 14 M. I. A. 40 (1871).
(2) 2 C. L. J. 309 (1905).
(3) 5 C. L. J. 611 (1907).
(4) 3 C. L. J. 29 (1905).
(5) 3 C. L. J. 67 (1905).

GOPAL CHANDRA MUKERJEE *v.* NOTOBAR KUNDU.

case of *G. Cooke* v *The Equitable Coal Co.* (6), that this Court ought not to interfere in the exercise of its revisional jurisdiction in a case of this description. But the case of *Brajabala Debi* v. *Gurudas Mundul* (7) shows that where a subordinate Court has acted clearly in excess of jurisdiction and in violation of an express provision of the Code, this Court will not hesitate to interfere.

The result is that this Rule is made absolute and the order of the Court below discharged on the ground that the Court had no jurisdiction to make it after the property had been sold. The Petitioner is entitled to his costs of this Rule. We assess the hearing-fee at one gold mohur.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REVISION NO. 32 OF 1909.

CASPERSZ, J.
RYVES, J.
1909,
5, May.

HEM CHANDRA KAR, and others, Petitioners,

MATHUR SANTHAL, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 526—Stay of proceedings pending Rule issued by the High Court—Refusal of Magistrate to act on reliable information thereof—Bias.

Where after a Rule was issued by the High Court and further proceedings were stayed, a telegram from the Petitioners' Vakil in the High Court intimating the orders of the High Court was filed before the trying Magistrate who refused to stay proceedings:

Held—*That the Magistrate acted injudiciously, and this would justify the Court in transferring the case.*

(6) 8 C. W. N 621 (1904).
(7) 3 C. L. J. 293 (1906).

Held further—*That if the Magistrate had really any suspicion or doubt in the matter he might have asked the mukhtear who made the application to verify the telegram and to satisfy him as to whether the Vakil in the High Court was acting under instructions in the case.*

The facts of the case material to the report are these. The Opposite Party brought two criminal cases, one against the Petitioners under sec. 143, I. P. C., for having formed an alleged unlawful assembly with the common object of taking away the paddy crop from a plot of land which the Opposite Party claimed to be in possession of, and another against some men of the Petitioners under sec. 379, I. P. C, for having removed the paddy crop from the said plot of land. Both cases were on the file of the Sub-Deputy Magistrate at Bishnupur.

The Petitioners moved the High Court for transfer of the case under sec. 143, I. P. C., against them and obtained a Rule which was ultimately discharged. After the Rule was issued by the High Court the Sub-Deputy Magistrate disposed of the case under sec. 379, I. P. C., against the tenants by convicting them. The Petitioners again moved the High Court for transfer of the case under sec. 143, I. P. C, against them and a Rule was issued calling upon the District Magistrate to show cause why the case should not be transferred from the file of the Sub-Deputy Magistrate on the ground that he had arrived at findings adverse to the Petitioners in the case against the men of the Petitioners, already disposed of by him. All further proceedings in the case were also stayed pending the hearing of the Rule. The Vakil for the Petitioners sent a telegram to the address of the Petitioners intimating the orders of the

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High Court issuing the Rule and staying further proceedings. This telegram was filed before the Sub-Deputy Magistrate and an application was made for stay of proceedings but the Magistrate refused to act on the telegram which he returned to the Petitioners and went on with the examination of the witnesses.

On the Rule coming on for hearing a supplementary affidavit was filed by the Petitioners in the High Court stating what had taken place in the lower Court after the issue of the Rule and it was contended on the authority of *Ratnessari Pershad* v. *Empress* (1), *In the matter of Surjya Narayan Singh* (2), that apart from anything else the case should be transferred having regard to the fact that the action of the Magistrate in not staying further proceedings when the telegram from the Petitioners' Vakil was filed before him, showed bias.

Babus Dasarathi Sanyal and *Suresh Chandra Mukherji* for the Petitioners.

Babus Srish Chandra Chowdhury and *Jnanendra Nath Sircar* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

A criminal case against the Petitioners is pending on the file of the Sub-Deputy Magistrate of Bishnupur (Babu K. C. Haldar), who disposed of another case, apparently relating to the same dispute between the parties on the 21st December 1908. This Rule is for transfer of the said case. Cause is shown by Babu Srish Chandra Chowdhury, junior Government Pleader, and by Babu Jnanendra Nath Sarkar, Vakil.

The Rule was issued for the transfer of the pending case on the ground [illegible] Sub-Deputy Magistrate had arrived [illegible] findings adverse to the Petitioners in the case disposed of by him on the 21st December 1908.

Babu Dasarathi Sanyal, who appears in support of this Rule, has informed us that the Sub-Deputy Magistrate did not pay any heed to the telegram which was sent by him intimating the direction given by this Court to stay further proceedings. A supplementary affidavit, with the original telegram, has been put in, and the learned Vakil has called our attention to two cases in the Law Reports in which the learned Judges commented somewhat severely on the action of the Magistrate in disregarding a similar intimation, and, in both these cases, this Court held that the conduct of the Magistrate indicated clearly the bent of his mind and his bias against the accused.

If the Sub-Deputy Magistrate had really any suspicion or doubt in the matter, he might have asked the Muktear who made the application to verify the telegram and to satisfy him as to whether the learned Vakil in this Court was acting under instructions in the case. We think that the Sub-Deputy Magistrate acted injudiciously in going on with the case on his file without paying any attention to the direction of his Court to stay proceedings.

The facts of the case are somewhat complicated, but we do not think it necessary to go into details. We have already expressed our opinion in regard to the action of the Sub Deputy Magistrate, and that would certainly justify us in [illegible] the transfer prayed for, but [illegible] peare to us on the papers [illegible] cases are somehow [illegible] not in fact, probably, in [illegible]

(1) 2 C. W. N. 498 (1898).
(2) 5 C. W. N. 110 (1900).

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NOTES

THE PRESIDENCY SMALL CAUSE COURTS AMENDMENT Bill proposes to extend the jurisdiction of Presidency Small Cause Courts over suits for ejectment. At present the Courts have jurisdiction over such cases where the annual value at a rack rent does not exceed one thousand rupees. It is now proposed to raise the limit to Rs. 2,000. We see no objection for this extension of the jurisdiction of the Court in this respect to the limit of its ordinary jurisdiction.

WE HAVE RECEIVED A DRAFT BILL TO AMEND THE Indian Extradition Act which makes the comparatively unimportant change of extending to Presidency towns the provision of sec. 7 of the Act under which Magistrates may in certain cases execute warrants issued by Political Agents. This amendment is of a technical character and there can hardly be any objection to the amendment. But we should like to point out that this is not the only change which recent cases have shown to be necessary. There are one or two other matters which require clearing up in the Extradition law of [illegible] and which it would be advantageous [illegible] deal [illegible] in this connection.

IN A [illegible] IT HAS BEEN HELD BY THE [illegible] that the High Court has [illegible] proceedings before [illegible] v. *Emperor*, 15 C. W. N. [illegible] the decision was published we expressed the opinion that the position created by it was far from satisfactory. Although extradition proceedings are on a different footing from ordinary criminal trials by reason of questions of international policy involved in them, yet it is now a-days well recognised by all Powers that extradition can only take place by complete enquiry according to the law of the land. So that no exaggerated apprehensions on the score of international considerations need stand in the way of allowing a prisoner to have a fair chance and of insisting on a clear *primâ facie* case being established before extradition is granted. If that be so there is no reason why the judicial enquiry before the Magistrate should not be subject to revision by the High Court. We think that the present opportunity should be availed of to clearly state the law on the subject.

THE CASE OF *Stallman* IN ITS LATER STAGE [*In the matter of Stallmann*, 15 C. W. N. 1053] also opens up a number of questions in relation to extradition law which would it be worth while considering in this connection. The questions as to how far the English Extradition Act applies to India and how far the preliminary enquiry according to law before the Magistrate is a condition precedent to the exercise of the powers of the Government in extradition have been settled so far as Calcutta is concerned by the judgments of Woodroffe and Mookerjee, JJ., in that case. But it would in our opinion be more advantageous to have the principles embodied in the Statute itself.

NUNCUPATIVE WILLS IN INDIA.

From the solemn will and testament, oppressively formal and fastidiously artistic, to the most elusive will of hardly palpable existence a will by a gesture of almost passive response to an interrogation—Courts of Law have to deal with and give effect to wills of all conceivable shades of formality. The greater its compliance with the somewhat exacting formalities of the law the less of scrutiny is a will subjected to. Barring this difference in the character and quantum of evidence required a noncupative will, where the testator possesses the necessary capacity, is quite as good a testament as the most formal will ever engrossed on parchment.

In England, the Wills Act, 1 Vict., chap. 26, while enacting (sec. 9) that no will would be valid unless it is made in conformity with the rules therein laid down, provides (sec. 11) that a soldier in actual military service or a mariner being at sea may dispose of his personalty by an informal will. The statute law of England, while recognising the common law privilege of soldiers and seamen, makes no inconsiderable inroad into the domain of privileged wills. Notable mention may be made of the Statute of Fraud and of the Navy and Marines (Wills) Act. It would appear, however, that a soldier on an expedition and a seaman on maritime service are the only persons entitled under the English law to make nuncupative wills.

Similar provisions have been incorporated in the Indian Statute book. The Indian Succession Act, Act X of 1865, divides wills into privileged and unprivileged wills. Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or a mariner at sea, must execute his will according to the provisions of sec. 50 of the Act, these provisions being much the same as those of sec. 9 of the English Wills Act. Sec. 52 of the Succession Act lays down that an adult soldier or seaman may make a disposition of his property by what is called a privileged will.

In matters of testamentary succession, the Succession Act governs, (1) Europeans by birth or descent domiciled in British India; (2) Europeans not having an Indian domicile except as to moveables which go by the domicile; (3) Parsees, Armenians and Jews; (4) Native Christians; (5) Indians other than Hindus, Mahomedans and Buddhists and not exempted under sec. 332 of the Act. The Succession Act primarily does not apply to Hindus, Mahomedans and Buddhists. The Hindu Wills Act, Act XXI of 1870, extended the operation of sec. 50 of the Succession Act to all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist residing in the Presidency of Bengal or in the Presidency towns of Madras and Bombay. Secs. 52 and 53 which recognise the privileged wills of soldiers and seamen have however not been extended to these persons.

Under sec. 331 of the Succession Act, Hindus, Mahomedans, &c., are not touched by the provisions of the Act. Except in the cases to which the operation of sec. 50 of the Succession Act has been extended, a Hindu or a Mahomedan testator is left to make his will under any provisions of his own personal law. The ancient Hindu Law did not contemplate wills, and consequently there are no directions in that law as to the formalities necessary to execution, attestation or revocation of wills. No particular formalities being necessary, a Hindu, not governed by the Hindu Wills Act, can make a nuncupative will in respect of either moveable or immoveable property. Again a will so made may be revoked by parol, and such revocation would be sufficient although the instrument was not in fact destroyed. We thus see that no formalities are required for the execution of Hindu Wills which are not governed by the Hindu Wills Act. A Benares Hindu for instance can make his will by word of mouth. It would also appear that statute law has not yet made any inroads upon the testamentary law of a Mahomedan. It would seem that oral wills are the only kind directly sanctioned by the Koran. A Mahomedan Will may be either oral or written. If oral it would probably require the presence of two witnesses. If written its genuineness may be proved in any of the ways sanctioned by the Evidence Act for the proof of facts in general, and it need not be written in any particular form or attested in any particular manner.

The question that the commentators of the Hindu Wills Act raise in this connexion, *viz.*, whether a Hindu or a Mahomedan soldier can execute a privileged will, is more or less of academic interest. For it would seem that he can make a nuncupative will unless in the case of the Hindu soldier, he is further an inhabitant of the Presidency of Bengal or of the towns of Madras and Bombay. On a construction of the statute, however, it would seem that the privilege of making a soldier's or a seaman's will has not been extended to Hindus and Mahomedans; sec. 52 of the Succession Act has not been incorporated in the Hindu Wills Act. Therefore a Hindu or a Mahomedan soldier cannot make a privileged will. Messrs. Phillips and Trevelyan put the query here, whether this valued right can be lost. But that would raise a question of wider and more general importance—whether he can claim the privilege under the Common Law,—in other words whether the Common Law of England applies to a Hindu or Mahomedan soldier in the King's Army in India. It would seem as indicated above, that the privilege has not been extended to these cases and it cannot be availed of even by a Hindu soldier governed by the Hindu Wills Act who is thereby incapacitated from making a nuncupative will under his own personal law as it stood before the Hindu Wills Act. Reliance has sometimes been placed on the doctrine that the general principles of testamentary law would always apply though particular provisions of the Succession Act have not been extended to any particular class of cases. This argument would hardly further the contention as it is an accepted canon of construction that a statute is to be taken as exhaustive in matters in respect of which it declares the law and, secondly, that a privilege which has advisedly been withheld cannot be invoked under the general principles.

S. L.

CURRENT CRIMINAL CASES.

Sec. 379—Theft of water of a canal.

Where the accused by raising the door of a sluice on a canal without the permission of the officers of the Government diverted more water to their fields than they would otherwise receive and were convicted of theft :

Held—It should be regarded in this country that water in rivers, channels, etc., can be the subject of property of the Government and thus the subject of theft.

CHOCRALINGAM PILLAI, 1 Mad. W. N. 1912, p. 119.

Elements necesssary to constitute larceny.

In order to constitute larceny there must be an intention to take entire dominion over the preperty, *i.e.*, the taker must intend to appropriate the property to his own use, but there may be theft without an intention to deprive the owner of the property permanently.

Where a person snatched away some books from a boy as he came out of school and told him that they would be returned when he came to his house it was held that the offence of theft had been committed.

EMPEROR *v.* NANSHU ALI KHAN, I. L. R. 34 All. 89.

Sec. 397—Lathi if a deadly weapon.

(Held by the Punjab Chief Court)

It is doubtful if a lathi can be rightly described as a deadly weapon within the meaning and for the purpose of sec. 397.

LAD KHAN, 13 Ind. Cas. 998.

Sec. 400—Gist of the offence.

The offence contemplated in the section is one of a very special character and entirely the creature of statute and should therefore be strictly construed.

Association for the habitual pursuit of dacoity is the gist of the offence punishable under the section.

KADER SUNDER, 16 C. W. N. 69.

Sec. 411—Retaining stolen property.

Where the accused produced the stolen property from a nullah in a jungle which was neither in his possession nor under his control, it was held, that such production was insufficient to establish his guilt under sec. 411.

PIR BAKSH, 13 Punj. L. R. 140.

Sec. 427—Act intentionally done, with innocent motive.

Where tenants finding their fields flooded cut a channel through a railway in order to let the water run off their fields it was held that the act having been intentionally done amounted to mischief and it was no defence to say that their motive in doing it, namely, to free their fields from water, was an innocent one.

DEPUTY LEGAL REMEMBRANCER *v.* CHULAN AHIR 16 C. W. N. 263.

Sec. 457—Intent to annoy.

An intent to annoy under sec. 457 is established if annoyance in the ordinary course of events is known by the person committing the act to be the natural consequence of such act.

(Per *Benson, J.*) SELLA MUTHU SERVAIGARAN, I. L. R. 35 Mad. 186.

Although the act complained of necessarily involves annoyance yet unless the intention of the accused was to annoy the act cannot be said to have been committed with intent to annoy.

(Per *Sankaran Nair, J.*) SELLA MUTHU SERVAIGARAN, I. L. R. 35 Mad. 186.

Sec. 471—User within the meaning of the section.

Where the accused during the course of a criminal trial against him of rioting and theft of crops handed over to his master a forged rent receipt bearing a counterfeit seal of the landlord to prove his possession and the latter put the same to a witness and questioned him as to its genuineness but as the witness alleged that it was a forgery the trying Magistrate took it, initialled it and placed it on the record, it was held, that there was a user of the document within the meaning of the section.

RATI JHA, I. L. R. 39 Cal. 463.

No user.

The mere production of a forged document by a witness in Court in obedience to a summons and the giving of false evidence with respect to it do not constitute user of the document within the meaning of the section.

MUTHA CHETTY, 1 Mad. W. N. 1913, p. 455.

Sec. 494—Marriage during iddut.

Under the Mahomedan law the marriage of a man who subsequently embraces Christianity becomes *ipso facto* void notwithstanding his reconversion to Islam during the period of *iddut* and the wife in contracting a second marriage during such period does not commit bigamy

ABDUL GHANI, I. L. R. 39 Cal. 409 : S. C. 16 C. W. N. 451 : S. C. 15 C. L. J. 263.

Sec. 499—Prosecution to prove publication.

In a prosecution for defamation it is incumbent on the prosecution affirmatively to prove that the accused published the libel complained of.

JEREMIAH *v.* VAS, 22 Mad. L. J. 73.

Statement not privileged.

A defamatory statement made by a person opposing the registration of a will in his petition to the Registrar objecting to the registration is not absolutely privileged so as to exempt the party making it from liability to be punished for an offence under sec. 499, I. P. C.

KRISHNAMAL, 1 Mad. W. N. 1912, p. 473 (F. B.).

IV. OTHER ACTS.

Bengal Excise Act (V (B. C.) of 1909), sec. 2 (14)—Meaning of "Liquor."

Liquor as defined in the section must be intoxicating liquor and the enumeration of all the liquors that follow does not make them liquor unless they are intoxicating.

EMPEROR v. MOTI LAL CHUNDER, 16 C. W. N. 785.

Sec. 2 (20)—Cocoanut juice.

The expression "juice drawn from any cocoanut" does not mean the milk of the cocoanut but the juice of the tree.

EMPEROR *v.* MOTI LAL CHUNDER (*ante*).

Sec. 36—Liability of master.

To support a conviction of the master under sec. 36 it is necessary to show not only that a servant was in the employ of the master but also that he was acting within the scope of his employment and for the benefit of the latter.

UTTAM CHAND, I. L. R. 39 Cal. 344 : S. C. 16 C. W. N. 551.

Calcutta Municipal Act (III (B. C.) of 1899), sec. 3 (39a)—Re-erection.

The repairing or renewing of the roof of a shed consisting of four posts and a tin roof is not re-erection within the meaning of the section.

TRIPUNDESHWAR MITTER, I. L. R. 39 Cal. 84 : S. C. 16 C. W. N. 23.

Sec 495— Sale of adulterated article

This section like the corresponding section of the English statute is positive in its prohibition of the sale of adulterated articles and when a servant sells such articles it is the master firm or beneficial owner who is liable to punishment and this would be so even when the servant adulterates the articles himself and sells without the knowledge or connivance of the master firm or owner

SEW KARAN, 16 C W N 455

Calcutta Police Act [IV (B C) of 1866, as amended by Act III of 1897 (B C)]—Cotton gambling

No form of betting or wagering without instruments other than rain gambling is an offence as created by the Act Cotton gambling is betting pure and simple Books, papers, notice boards and lists of prices furnish evidence of gambling but are not instruments of gaming

RAMI KOLAI NIMANI, 16 C W N 858

The Indian Railways Act (IX of 1890), sec 125—Liability of owner of cattle

The owner of cattle which have been allowed to stray upon a railway in consequence of the negligence of the person actually in charge of them on the owner's behalf is not liable to punishment under the section

EMPEROR v GURU PROSAD CH I L R 34 All 91

Legal Practitioners Act—Reinstatement of a legal practitioner

A legal practitioner who when yet a comparatively young man had been dismissed from the rolls for misconduct was after five years reinstated on his furnishing certificates showing that during the interval his conduct has been so irreproachable that notwithstanding his previous delinquency he could be entrusted with the affairs of clients and admitted to an honourable profession without that profession suffering degradation

In re HARA KUMAR CHATTERJI, 16 C W N 857

Printing Presses and Book Act (XXV of 1867), secs 1 3—Definition of "Book."

The word book as defined in sec 1 of the Act includes part of a volume or pamphlet Therefore the printer of a portion of a pamphlet is bound to print thereon his name and the place of printing and failure to do so constitutes a breach of the provisions of sec 3 of the Act

EMPEROR v HORI GOVIND LIMAYE, 14 Bom L R 40.

Public Gambling Act (III of 1867), sec 12—Game of chance

A game which is in fact only to a very slight extent a game of skill and almost entirely a game of chance is not a game which is excluded by reason of sec 12 from the previous provisions of that Act

EMPEROR . AHMAD KHAN, I. L R 34 All 96 (HARI SING v EMPEROR, 6 C L J 708, distinguished)

V MISCELLANEOUS.

Stay of criminal proceedings pending civil suit

Where a person against whom criminal proceedings are started in respect of a matter has instituted a civil suit without waste of time the decision of which is likely to throw considerable further light on the case the criminal prosecution should be stayed pending the decision of the civil suit

BHOJA RAM, 13 Punj L R 348

Local inspection by trying Magistrate

Besides the kind of local inspections authorised by the Code of Criminal Procedure there is a kind of local inspection, not provided for in the Criminal Procedure Code but which in so far as it conforms to the provisions of the Evidence Act cannot be excluded.

ALIAR RAI 16 C W N. 426 S C I L R 39 Cal. 476 S C 15 C. L J 403

Enhancement of sentence.

The High Court refused to enhance the sentence passed on an accused person, on a reference by the District Magistrate after nine months from the date of the conviction on the ground that it was not expedient to enhance the sentence after the lapse of so much time.

ARYA CHALA MAYA, 1 Mad W N. 1912, p 50

Deaf and dumb witness

A witness who is so deaf and dumb that it is impossible to make her understand the questions put to her in cross examination is not a competent witness and her evidence should be struck out of the record, and a conviction based solely on her evidence must be quashed

VENKATAN, 1 Mad W N 1912, p 100

Reviews.

COMPANY LAW AND PRECEDENTS *By Arthur Stiebel, Esq, M A, Bar at Law Publishers Messrs Butterworth & Co, London and 8/2, Hastings Street, Calcutta*

Now that the Company Law is being amended in India on the lines of the English Company Consolidation Act of 1908, we welcome this exhaustive treatise of more than 1500 pages on the English Company Law We find in this work decisions given so late as the 1st of April 1912 incorporated The case-law on the subject is exhaustively dealt with in this treatise, the list of cases alone coming up to nearly 184 pages Reference is given also to every Statute having a bearing on the Company Law, the list of Statutes referred to coming up to nearly 28 pages. One specialty of the work is that the precedent and forms are given immediately after the law on any particular question is dealt with. For instance after dealing with the requisites of a prospectus not only are approved forms of prospectus, and other forms relating to the formation and constitution of the companies given but forms of statements that have to be submitted by banking and other Companies as also statutory statements in lieu of prospectus and other similar forms are all given in their appropriate places. An exhaustive treatise of this kind will not only be found very helpful to those who are intimately connected with Company management but it would be found invaluable by legal practitioners, the Government Departments and officers of Court, as the forms of orders, notices, &c, have been collected from the most approved sources and have been set out *in extenso* We have no hesitation in recommending this work as a very thorough and up-to-date treatise on the subject which would be found to answer the requirements of all who are concerned in any way with the Company Law.

THE GUARDIAN AND WARDS ACT (VIII of 1890). *By S. Srinivasa Iyengar, B. A, B. L. Law Printing House, Madras.*

This work is already known to the profession as one of the series of works styled Lawyer's Companion. The present is a revised edition and we note that case-law on the subject up to the end of 1911 has been incorporated in this edition. The annotations and case-law under each section are well-classified. For instance under sec. 24 dealing wi h the duties of the guardian of the person, under the head of "other matters" those relating to the question of marriage of a minor are separately dealt with by reference to the minor's personal law and the cases in this connection have been classified under the law applicable to Hindus, Mahomedans, Christians and Parsees. The Indian Majority Act (IX of 1875), with annotations forms an appropriate supplement to the work. It will be found a very useful work on the subject.

CRIMINAL EVIDENCE IN BRITISH INDIA AND ITS APPLICATION. *By Dr. J. V. Ryan, L. L, Bar-at-Law. Published by R. Cambray & Co., 9, Hastings Street, Calcutta.*

The idea of this work is to expound the theory of the Law of Criminal Evidence as administered in India and its application to cases cognisable by the Police. The author speaks with authority on the subject, helped by experience of Police work in India, as he is now a member of the Police service at present stationed at Hazaribagh. The Book is divided into four parts. Part I deals with relevancy, in which the arrangement of the Evidence Act has in the main been followed, but in some cases, for the sake of uniformity, sections dealing with similar matters have been grouped together. The author has clearly pointed out the difference between the English and Indian law and the historical development of the existing rules of evidence has been lucidly illustrated. Part II deals with the offences cognisable by the Police and the subject is dealt with under the heads, venue, procedure, commentary and proof. The system of cross-references adopted is sure to prove useful. Part III deals with the powers of the Police outside the Presidency Towns under other Statutes than the Indian Penal Code. The author says that his primary object was to provide a police vade mecum but in its present form the profession will find it in many respects a very valuable work and we commend it to the notice of practitioners in the criminal Courts.

THE LAW OF REVENUE SALES, Part I, the Patni Sale Law. *By J. N. Roy, Bar-at-Law, Additional District Magistrate, Comilla. Published by Thacker, Spink & Co. 1912. Price Rs. 5-8.*

We welcome Mr. Roy as a commentator of law and congratulate him on the selection of his subject and the execution of his plan. The book before us is a very neatly got-up one of some 250 pages embodying the text of Regulations VIII of 1819 and I of 1820 and the Forfeited Deposits Act, 1850. The Rent Recovery Act, 1853, and the Bengal Rent Recovery Act, 1865, with full commentaries thereon. The carefully edited commentaries have been arranged under proper headings so as to save the time of the busy practitioner, who will find the marginal notes on each page equally serviceable. Mr. Roy has drawn not only upon the reported decisions of the Privy Council and the High Court but also upon the recommendations and the decisions of the Board of Revenue which although not binding upon the Civil Courts yet would serve to throw light on the subject. We feel sure, that this last-mentioned feature will make the commentaries more attractive to the legal profession who will thus be able to ascertain the recorded opinions of the highest administrative revenue authority in the province. The detailed subject index at the beginning of the book showing at a glance the commentator's plan of work and the very full general index at the end will be appreciated. We recommend with confidence this nicely got up and useful volume which is practically without a competitor in the field that the learned commentator has chosen.

CASTE IN COURTS. *By L. T. Kikani, Pleader. 1912. Printed at the Ganutra Printing Works, Rajkot. Price Rs. 5.*

This small book deals with a highly important subject which, so far as we are aware, has not received the special treatment it deserves and which has been accorded to it in this book. Not only does the author deal with the subject exhaustively so far as the case-law is concerned, he does so with remarkable insight. Legal practitioners will surely find more light from this book than from the notes to sec. 9 of the Civil Procedure Code in the many commentaries to that Code. Not the least valuable portion of the book is the Introduction in which the principles of the law are admirably summarised. The details of the law are dealt with under different heads in the body of the work with reference to the decided cases on each head. It is altogether an excellent little handbook.

A TREATISE ON PRIVATE INTERNATIONAL LAW. Fifth edition. *By John Westlake, K. C., L.L. D. Assisted by Alfred Frank Topham, L. L. M. London: Sweet and Maxwell, Ld., 3, Chancery Lane. 1912.*

This work, practically the first systematic

treatise on a highly complicated and yet interesting branch of the municipal law of England, saw light in 1858, and the course of development of this branch of the law since has in no small measure been influenced by successive editions of this work. The work has also had the rare good fortune during nearly half a century of its existence to have grown up under the care of the author himself, admittedly the greatest living English authority on this branch of the law. The position which the author occupies enables him to pass judgment upon the pronouncements of Judges and writers of text books with an authority which very few English writers can command. Consistently with this position, the author does not content himself with merely codifying the rules of law deducible from decided cases—were even such a result attainable with any degree of success in view of the conflicting nature of the pronouncements of English Judges on many questions. The arrangement of a codifying body of rules is, however, adopted wherever the nature of the decisions admits of it. But, besides, propositions of a doubtful character, which the author himself considers to be right in principle are formulated in the same manner, though the true bearing of the authorities on the point is also set forth and the authorities themselves examined in a most judicial spirit. The recent decisions of *Ogden* v. *Ogden*, [1908] p. 46, and *Chetti* v. *Chetti*, [1909] p. 67, come in for their due share of criticism, being undoubtedly in conflict with *Mette* v. *Mette*, (1859) 1 S. and T. 416. With reference to the case of *Chetti* v. *Chetti* the learned author puts forward a point of view which certainly was missed by the Judge who decided the case. It is pointed out that Chetti was not even in India under any legal incapacity to contract a monogamous marriage with a Christian, only by doing so he would have lost caste among his co-religionists and in order to do so he might perhaps have had to renounce his religion, and that an obstacle to the performance of any act which the agent is free to get rid of is no personal incapacity. This was exactly the view which we advanced in these columns in commenting on the decision. See 9 C. W. N. xxxviii (38).

We note the author's continued advocacy of the settlement of disputed points of private international law by international conventions, since doctrinal writing alone shows little indication of ever reaching entirely satisfactory results. For our part, we doubt whether the time has really arrived favouring the conclusion of such agreements on an extensive scale, since the various sovereign States themselves are hopelessly at variance as to the principles which should govern matters of private international law. The preliminary doctrinal discussion has not proceeded far enough to admit even of learned men and *savants* of various nationalities passing impartial judgments on the relative merits, to take one instance, of the rival doctrines of nationality and domicile. We hope that the venerable author of this treatise will be spared to carry on this discussion for many years to come as only a scholar of his attainments and authority can by his continued efforts bring nearer the accomplishment of the end for which he has consistently pressed during nearly half a century.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL—*Rex* v. *Mitchell.* Before THE LORD CHIEF JUSTICE OF ENGLAND AND JUSTICES RIDLEY AND AVORY. 17th June 1912.

Evidence necessary to prove that the prisoner is an habitual criminal.

This was an appeal from a conviction for an offence and for additional sentence by way of prevention. The prisoner pleaded guilty to the offence and the question the Court had to decide was—Whether there was any proper evidence to be left to the jury to bring him within the words of sec. 10 (2) (*a*) of the Prevention of Crimes Act, 1908, namely, evidence to show that previously to the commission of the crime to which he had pleaded guilty he was leading persistently a dishonest or criminal life.

The Court held there was not and quashed the conviction. In the course of his judgment MR. AVORY said—

The statute contained two elements necessary to be established to constitute a man an habitual criminal. *First*, proof of three convictions, and, *secondly*, proof that the prisoner was, as above stated, leading a dishonest or criminal life. This second element could not be established by proving that there had been other convictions in addition to the three statutory convictions. That must be proved by evidence, and the attention of the jury must be directed to the period between the commission of the crime with which he stood charged and the last conviction previous to that. He was last released from prison on August 30, 1911, and the offence to which he pleaded guilty was committed on February 10, 1912, the intervening period being 5½ months. If he had been defended at the trial, no doubt it would have been submitted that there was no evidence that during that period he had been leading a criminal life. The learned Judge had informed them in his report that he had grave doubt whether there was any evidence, and that he had left the case to the jury in order that the point might be tested. He said he was satisfied that the Appellant had

been doing honest work in that period, but thought that the fact of his not reporting himself was some evidence of his leading a criminal life.

They were of opinion that there was no proper evidence to be left to the jury. The mere fact, standing alone, that a conviction licence had not reported himself to the police was not sufficient to establish that he was persistently leading a dishonest or criminal life. The record of the Appellant was as bad as it could be, and if the number of previous convictions was sufficient proof, there was no doubt he would come within the subsection. But it was not, and therefore the conviction as an habitual criminal must be quashed.

Mr. Macmorran for the Appellant.

Mr. Cousins for the Crown.

B. D. *Appeal allowed.*

COURT OF APPEAL.—*Padbury* v. *Holliday and Greenwood, Ld. and anr.* Before LORDS JUSTICES FLETCHER MOULTON AND BUCKLEY AND MR. JUSTICE PARKER. 21st June 1912.

Liability of a superior employer for tort committed by sub-contractor.

This was an appllication by way of appeal in an action tried before COLERIDGE, J., and a Jury. It appeared that the Plaintiff, Padbury, was a traveller. On January 4, 1911, while he was passing down Fenchurch-street a piece of iron fell from the third floor of a building then being erected by the Defendants, Holliday and Greenwood (Limited), for the building owners, the City of London Real Property Company, (Limited), on the Plaintiff's head and injured him. The Plaintiff sued.

The learned Judge left certain questions to the jury, and those questions together with the answers of the jury were as follows:—(1) Was the falling of tools something which might reasonably have been foreseen by the Defendants having regard to the character of the work being executed by the sub-contractor?—Yes. (2) Ought the Defendants reasonably to have foreseen such a possibility?—Yes. (3) Did the Defendants take precautions to avoid such a possibility?—No. (4) Damages—£500. On these findings the learned Judge gave judgment for the Plaintiff for £500.

Hence this appeal which was allowed. In the course of, his judgment Lord Justice FLETCHER MOULTON said—

The case thus raised the question of the responsibility of a contractor who employed a subcontractor for injury done to a stranger through the negligence of a servant of the sub-contractor. Although the view which the law of England took of this question had undergone some transformation, he did not think there was any doubt as to the general principle which now prevailed.

In *Dalton* v. *Angus* (6 App. Cas. 740 at p. 829), Lord Blackburn said:—"Ever since *Quarman* v. *Burnett* (6 M. and W., 499) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor."

On that authority he was of opinion that before a superior employer could be held liable for the negligent act of a servant of a sub contractor it must be shown that the work which the sub contractor was employed to do was work the nature of which, and not merely the performance of which, cast on the superior employer the duty of taking precautions. *Penny* v. *Wimbledon Urban Council* [(1899) 2 Q. B., 72], *Rapson* v. *Cubitt* (9 M. and W., 710), and *Holliday* v. *National Telephone Company* [(1199) 2 Q. B., 392].

In this case the tool was not placed on the window-sill in the normal course of doing the work which the sub-contractors were employed to do. The fact that the work which was being done was work to the window seemed to him to be immaterial. He thought that the case would have been the same if the work had been purely internal work. He could see no reason for saying that the operation of putting the casement into the window caused the tool to be placed on the window-sill or to fall off.

The injury here was caused by an act of collateral negligence on the part of a workman who was a servant of Wainwright and Waring and not a servant of Holliday and Greenwood, and Holliday and Greenwood were not liable for the consequences of that negligence.

Messrs. Bower, K. C., and Bevan for the Appellant.

Messrs. Hopler, K. C., and Shakespeare for the Respondents.

B. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CARNDUFF and IMAM, JJ. CRIMINAL REVISION No. 92 OF 1912. MOHUNT SUKDEO DASS, Petitioner *v.* THE DISTRICT BOARD OF MUZAFFERPUR. 27th August 1912.

Criminal Procedure Code, secs. 526, 556—Local Self Government Act (1885, B. C.), sec. 141—Bye-laws of the District Board of Muzafferpur, sec. 6 (1)—Prosecution directed by District Magistrate as Chairman of the District Board—Conviction by Sub-Deputy Magistrate—District Magistrate if competent to hear appeal.

The point for determination in this case was whether a District Magistrate who as Chairman of the District Board sanctioned a prosecution for a breach of one of the Bye-laws framed by the District Board is not disqualified under sec. 556, to hear an appeal against a conviction in the same matter.

The facts are these :—On the report of the District Engineer the District Magistrate of Muzafferpur as Chairman of the District Board sanctioned the prosecution of the Petitioner for a breach of sec. 6 (1) of the Bye law of the District Board of Muzafferpur, for having damaged the District Board road by making a watercourse on it. The Petitioner was tried by a Sub Deputy Magistrate and convicted and sentenced to pay a fine of Rs. 20. Against this conviction and sentence the Petitioner preferred an appeal to the District Magistrate of Muzafferpur.

The Petitioner moved the High Court and obtained a Rule calling upon the District Magistrate to show cause why the appeal should not be transferred to the Court of Sessions.

Their Lordships after hearing both sides observed that having regard to sec. 556, Cr. P. C., and the fact that no prosecution on behalf of the District Board can be instituted without the sanction of the Chairman the appeal should be transferred.

Babu Gour Chandra Pal for the Petitioner.

Babu Monmatha Nath Mukherjee for the Opposite Party.

S. C. M. *Rule made absolute.*

CRIMINAL APPELLATE JURISDICTION. Before CARNDUFF and IMAM, JJ. APPEAL No. 689 OF 1912. SUKNANDAN SING, Petitioner *v.* THE EMPEROR. 28th August 1912.

Criminal Procedure Code (Act V of 1898), secs. 35, 411—Indian Penal Code, sec. 408—Conviction by Presidency Magistrate—Charge with two counts—Concurrent sentence of 6 months on each count—Appeal to the High Court, if lies.

The Petitioner was convicted by the Fifth Presidency Magistrate of Calcutta on a charge under sec. 408, I. P. C., with two counts and sentenced to six months' rigorous imprisonment on each count, the sentences running concurrently. Against the said conviction and sentence the Petitioner filed an appeal in the High Court.

On the application for the admission of the appeal coming on for hearing it was contended on behalf of the Petitioner on the authority of *Bepin Behary Dey*, 15 C. L. J. 82, that in a case like this an appeal lay to the High Court.

Their Lordships rejected the application for the admission of the appeal on the ground that no appeal lay.

Mr. K. N. Chaudhuri with *Babu Monmatha Nath Mukherjee* for the Petitioner.

S. C. M. *Application refused.*

Correspondence.

[TO THE EDITOR, "CALCUTTA WEEKLY NOTES"]

SIR,—I beg leave to bring to your notice the case of *Police Prosecutor, 24-Pergunnahs* v. *Sheikh Idoo*, 16 C. W. N. 983. This case needs commenting upon.

Sheikh Idoo had been committed to the High Court Sessions on charges under secs. 363, 366 and 376, I. P. C. The last charge was struck out in the High Court, but the accused was put upon his trial upon the charges under the two other sections. During the course of the trial the Advocate-General entered a *nolle prosequi* and the result of this withdrawal was *the acquittal of the accused.* Sec. 494, cl. (*b*), Cr. P. C. The effect was not simply as the learned Judges say "an order of discharge." The effect of the *nolle prosequi* being the *acquittal* of the accused on those charges, sec. 403, Cr. P. C, prevented a second trial on the same charges and the order of the Deputy Magistrate was quite right, and the High Court wrong in saying that he had declined jurisdiction which he undoubtedly had.

Yours truly,
P. L. BANERJEE,
Vakil, High Court.

ALLAHABAD,
20th August 1912.

HEM CHANDRA KAR *v.* MATHUR SANTHAL.

being so, we think that the Rule should be made absolute in the following manner:—That the case be transferred for disposal by any competent Magistrate, other than the present Sub-Divisional Magistrate, to be nominated by the District Magistrate of Bankura, or, in the alternative that the District Magistrate do arrange to send some Stipendiary Magistrate (from head-quarters to Bishnupur) who will dispose of the case according to law.

We make the Rule absolute and direct the records to be sent down at once.

S. C. M. *Rule made absolute.*

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1912,
Heard, 18 and 19, June.
Judgment, 12, July.

LALA FATEH CHAND, since deceased (now represented by LALA JUGAL KISHORE and another) and others, Plaintiffs, Appellants,
v.
RANI KISHEN KUNWAR, Defendant, Respondent.

*Civil Procedure Code (Act XIV of 1882), secs. 584, 585—Second appeal—Finding of fact based upon misconstruction of documentary evidence, if conclusive—Construction of document, question of law—*Wajib-ul-arz, *as evidence of proprietary rights—Extension of Chaukidari Act (XX of 1858), to mouzah, if alters proprietary rights.*

The right construction of documents is a question of law which Judges in second appeal are not, by secs. 584 and 585 of the Civil Procedure Code, precluded from considering by any finding of a lower Appellate Court based upon such documents.

Where the Court of first appeal found on its construction of the wajib-ul-arz *and other documentary evidence that the Plaintiffs were the owners of the lands in suit, and the High Court on second appeal, on their construction of the* wajib-ul-arz *and other documents in the suit, held that the Plaintiffs were not the owners:*

Held—*That the Court of first appeal having misconstrued the* wajib-ul-arz *the High Court in second appeal was not bound to accept as correct its finding based upon such misconstruction.*

The wajib-ul-arz *is cogent evidence of the rights as they existed when it was made of those holding proprietary or other rights of property within the mouzah.*

The Government by applying the Chaukidari Act to the mouzah did not alter and could not have altered proprietary rights in the mouzah or any part thereof.

This was an Appeal by special leave, from a judgment and decree of the High Court of Judicature for the North-Western Provinces at Allahabad, dated the 7th of November 1906, which reversed a judgment and decree of the Subordinate Judge of Aligarh, dated the 25th of July 1904, which set aside a judgment and decree of the Munsif of Etah, dated the 22nd of September 1903.

The litigation related to certain lands situate in the town of Rampur, which for convenience may be divided into three groups. Groups No. 1 and 2 were originally the sites of houses in the *abadi* which had since been pulled down or had fallen down, and the lands brought under cultivation. They were sold from time to time till at last the Plaintiffs purchased them by two private sales. The lands of the third group were groves to which also the Plaintiffs derived title by the said sales.

The Plaintiffs' case was that their vendors were the owners of the said lands which had always been freely transferred

without any opposition on the part of the Respondent and her predecessor in title who was the zemindar. The Respondent on the other hand contended that the vendors were merely tenants.

After their purchase the Plaintiffs had applied for mutation of names, and the Kanoongo of the circle duly submitted a report, dated the 11th June 1902, in favour of the Plaintiffs' claim. But the Respondent zemindar objected to the mutation of names on the grounds indicated above, and the Assistant Collector, by an order, dated the 4th January 1902, refused the Plaintiffs' claim.

The Plaintiffs thereupon instituted the present suit in the Court of the Munsif of Etah on the 9th January 1903. Rani Kishen Kunwar was the principal Defendant. The other Defendants were the vendors to the Plaintiffs and co-sharers in some of the lands in dispute. These Defendants did not appear. In their plaint the Plaintiffs after stating the facts mentioned above prayed for the following reliefs :—(1) for cancellation of the order, dated the 4th January 1902, passed by the Assistant Collector ; (2) for a declaration that they were absolute owners of the lands in question and that they were entitled to mutation of names in the revenue papers ; (3) for possession of the said lands with damages and costs of the suit.

Rani Kishen Kunwar alone defended the suit and filed a written statement. Her main plea was that the vendors to the Plaintiffs had no right of ownership in the said lands.

The Munsif framed the necessary issues, and after recording and examining evidence, both oral and documentary, delivered his judgment on the 22nd September 1903. He found that Rampur was not an agricultural village but a town. He was of opinion that the Settlement Officer having assessed rent on plots Nos. $\frac{782}{5}$ and 788, the holders of these and other plots must be taken to be tenants, at best occupancy tenants without power of sale. In the result the Munsif held that the suit was not cognizable by the Civil Court, and made a decree dismissing the suit with costs.

The Plaintiffs then appealed against the decree to the District Judge of Aligarh, and the said appeal was heard by the Subordinate Judge of Aligarh, who delivered his judgment on the 25th July 1904. The learned Subordinate Judge agreed with the Munsif in finding that Rampur was not an agricultural village, but on the remaining questions he came to contrary conclusions. He held that the Plaintiffs or their predecessors in title had never been tenants of the zemindar ; that they were the owners of the sites of the houses ; that what was sometimes called "rent" in the assessment of 1875 was really revenue, and that this was borne out by the assessment of the *dami* cess and by the entry of the Plaintiffs' names in the revenue papers as *seer* holders and not as tenants. He accordingly allowed the appeal, reversed the judgment and decree of the said Munsif, and passed a decree granting the Plaintiffs ownership and possession of the said plots.

The Defendant, Rani Kishen Kunwar, preferred a Second Appeal against the said decree to the High Court of Judicature for the North-Western Provinces at Allahabad, which Court delivered its judgment on the 7th November 1906. The learned Judges (Sir George Knox and Richards, JJ.) of the High Court rested their decision on the provisions of a *wajib-ul-arz* of Mouzah Rampur, which in their opinion

LALA FATEH CHAND *v.* RANI KISHEN KUNWAR.

were inconsistent with the Plaintiffs' claim. They accordingly reversed the decree of the Subordinate Judge, and restored the decree of the Munsif.

Hence this appeal.

Mr. Bhugwandin Dubé for the Appellants.—The High Court was in error in going behind the findings of fact of the Subordinate Judge in a Second Appeal. The findings were based on oral as well as documentary evidence.

[SIR JOHN EDGE.—Is not the *wajib-ul-arz* conclusive against you?]

Mr. Dubé.—I submit, not. A *wajib-ul-arz* is only one of the pieces of evidence to be taken into consideration with the other evidence. It is always relevant, but its weight depends upon the circumstances of each case. He cited *Rani Lekhraj Kuar* v. *Baboo Mahapal Singh* (1), *Anant Singh* v. *Durga Singh* (2). The High Court had no jurisdiction to enter into the merits in a Second Appeal. Under sec. 584 of the Code of Civil Procedure a finding of fact, however erroneous, is binding upon the Appellate Court. He relied upon *Durga Choudhrani* v. *Jawahir Singh* (3), *Anangamanjari* v. *Tripura Soondari* (4). It was not a case of no evidence.

[Their Lordships stopped Counsel for the Appellants, and called upon the Respondent's Counsel.]

Sir Erle Richards, K. C. (with him *Mr. Raikes*).—The whole question turns upon the construction to be put on the *wajib-ul-arz*. The Appellant has always been paying rent to us, *i.e.*, the zemindar. The land is admittedly zemindari land of the village. None of the Appellant's predecessors in title has ever been recorded as a proprietor in the *khewat*. It is not a pure question of fact. It is a mixed question which involves the construction of documents and inferences to be drawn from them. It is also a question of usage having the force of law. He cited Ameer Ali and Woodroffe's Code of Civil Procedure, page 391, *Kakarla Abbayya* v. *Venkata Papayya* (5).

[Their Lordships called upon Mr. Dubé to deal with the merits.]

Mr. Dubé.—The lands in dispute are situate in a *qasba*, and not in an agricultural village. Both the Munsif and the Subordinate Judge have found that Mouzah Rampur is a town and not an agricultural village. The *ratio decidendi* of *Sri Girdharji Maharaj* v. *Chote Lal* (6) does not apply to this case. The Appellants have shown a whole series of conveyances extending over a period of over 65 years to which no objection was ever raised by the zemindar. The names of the Appellants and their predecessors in title are not entered in the *jamabandi* along with the tenants properly so-called. They are entered next to the zemindar and the entry shows they had proprietary interests. Further they paid the *dami* cess which is paid by an owner and is never paid by tenants. The settlement proceedings also show that they were described as "muafidars" and although a sum of money was assessed on some of the lands it was "revenue" not "rent." There was also oral evidence to prove that the Appellants were owners and not tenants. The point that the High Court had no jurisdiction to go behind the findings was taken throughout the proceedings. The Respondents did not specify the question of law or usage in their memorandum of appeal which

(1) L. R. 7 I. A. 63, 70 (1879).
(2) L. R. 37 I. A. 191, 197 : s. c. 14 C. W. N. 770 (1910).
(3) L. R. 17 I. A. 122, 127 (1890).
(4) L. R. 14 I. A. 101, 109 (1887).

(5) I. L. R. 29 Mad. 24, 28 (1905)
(6) I. L. R. 20 All. 248 (1898).

they ought to have done in order to be able to enter into the merits. He relied on *Ram Gopal* v. *Shamskhaton* (7), *Nilmoni* v. *Kirti Chunder* (8), *Lukhi Narain* v. *Jodu Nath* (9). A question of the existence or non-existence of a custom is one of fact. *Joy Kishen* v. *Doorga Narain* (10), *Parbati Kunwar* v *Chandrapal Kunwar* (11). In any case the Appellants have heritable and transferable rights of ownership in the lands in dispute. Whether they are called 'owners' or 'tenants' and whether what the Appellants pay to the zemindar is termed "rent" or "revenue" their rights are not the ordinary rights laid down by the Tenancy Act (II of 1901, Local).

[LORD SHAW.—That was not your suit. In your plaint you claim a declaration that you are owners and as such entitled to be entered in the khewat.]

Mr. Dube.—That is true, but the real question of substance is what are the rights of the Appellants on the assumption that they were not absolute owners. There could be no question that the Appellants possessed heritable and transferable rights in the lands, and their rights were clearly recognized during the settlement proceedings.

Sir E. Richards, K. C., for the Respondent.—The lands belonged to the zemindar unless the contrary was proved. Whatever rights the Appellants might possess neither they nor their predecessors in title ever set up a claim to ownership. They have always paid rent. Throughout the *wajib-ul-arz* the right of ownership as existing in the zemindar is recognized—

(7) L. R. 19 I. A. 228, 233 (1892).
(8) L. R. 20 I. A. 95, 97 (1893).
(9) L. R. 21 I. A. 39, 43 (1893).
(10) 11 Suth. W. R. 348, 349 (1869).
(11) L. R. 36 I. A. 125, 134 : s. c. 13 C. W. N. 1073 (1909).

neither oral nor documentary evidence support the conclusion that the Appellants are owners. The construction of a document is always treated as a question of law.

Mr. Dubé replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an Appeal by special leave from a decree of the High Court of Judicature for the North Western Provinces of India, dated the 7th November 1906, which reversed the decree of the Subordinate Judge of Aligarh, dated the 25th July 1904, which had set aside the decree of the Munsif of Etah, dated the 22nd September 1903, dismissing the suit with costs.

The suit which related to the proprietary title to lands in Rampur was brought in the Court of the Munsif of Etah by Lala Fateh Chand, since deceased, and others against Rani Kishen Kunwar and others to obtain the cancellation of an order of the 4th January 1902 of a Court of Revenue; for a declaration that the Plaintiffs were the proprietors in possession of the lands in the plaint mentioned and as such were entitled to have their names entered in the revenue papers as proprietors; and for consequential reliefs. Some of the lands in question consisted of lands in the *abadi* of Mauza Rampur. Upon those lands in the *abadi* houses had formerly stood. It is not clear from the record whether or not all of those lands in the *abadi* had been cleared of houses and had been brought into cultivation, but apparently they had been brought into cultivation before suit. It is, however, not necessary to ascertain whether or not all of those lands in the *abadi* had been brought into cultivation

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as it is the proprietary title to the land, whether covered with houses or not, and not the title to the houses, if any, standing upon those lands which is in question in this suit. The remainder of the lands to which the suit relates were lands under groves. Rani Kishen Kunwar was the zamindar of the whole Mauza Rampur, and she alone defended the suit. By her written statement Rani Kishen Kunwar put in issue the alleged title of the Plaintiffs as proprietors.

Fateh Chand, the deceased Plaintiff, had applied to the Revenue Court to have his name entered as that of the proprietor of the lands in question in the revenue papers relating to Mauza Rampur. On the 4th January, 1902, the Assistant Collector rejected that application with costs, and on the 9th January 1903 the Plaintiffs brought this suit in the Civil Court. The Munsif of Etah having found as a fact that the Defendant, Rani Kishen Kunwar, was the zamindar of Mauza Rampur, and that the Plaintiffs were tenants and were not proprietors of the lands in the plaint mentioned by his decree of the 22nd September 1903, dismissed the suit.

From that decree of the Munsif the Plaintiffs appealed, and in their grounds of appeal alleged that they were the owners in possession of the plots in suit, and that in Khasra Rampur the zamindar is not the owner of the *abadi*, but the lower class of people, who are her ryots, are the owners. The plaint and the grounds of appeal to which their Lordships have referred put it beyond doubt that the title which the Plaintiffs claimed in the Munsif's Court and on appeal from the Munsif's decree was the proprietary title to all the lands mentioned in the plaint, and was not any inferior title. The Subordinate Judge of Aligarh in the appeal found on his construction of the *wajib-ul-arz* and other documentary evidence that the Plaintiffs were the owners of the lands in respect of which the suit was brought, and by his decree declared that the Plaintiffs were the owners in possession of the property, and decreed the Plaintiffs' claim. From that decree of the Subordinate Judge the Defendant, Rani Kishen Kunwar, appealed to the High Court of Judicature for the North-Western Provinces of India at Allahabad.

At the hearing of the Appeal in the High Court it was urged in argument on behalf of the Plaintiffs that the Appeal being a Second Appeal to which secs. 584 and 585 of the Code of Civil Procedure applied, the High Court was bound to accept as conclusive, and was precluded from questioning, the correctness of the finding of the Subordinate Judge that the Plaintiffs were the proprietors of the lands in respect of which the suit was brought. Sir George Knox and Richards, JJ., who heard the Appeal, overruled the objection, and on their construction of the *wajib-ul-arz* and other documents in the suit in their judgment stated and found :—

"From the judgment of the lower Appellate Court it appears that it is founded on inferences of law drawn by the learned Subordinate Judge from certain documents and the *wajib-ul-arz* which were given in evidence. The documents show that the owners of houses in Rampur had been in the habit of selling and transferring their houses. The *wajib-ul-arz* sets forth that the occupiers of houses had this power, but all through the entries the zamindar is recognised, and it is stated that if a new house is to be built the permission of the zamindar must be obtained. The entry in the *wajib-ul-arz* as to groves is to the effect that isolated trees and clumps of bamboos planted by the tenant can be cut by him, and as to rent-free groves, if the trees should

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die out and the land be brought into cultivation, rent must be paid, and that if a new grove was to be planted the leave of the zamindar must be obtained. The inference of law that the Subordinate Judge has drawn from this evidence (about which there is no dispute) is that the occupiers of the groves and of the land which had been the sites of the houses were the absolute property of the persons who occupied and used them. In our judgment this inference is a wrong and impossible inference and the decision of the learned Subordinate Judge based thereon is clearly wrong."

The High Court by its decree allowed the Appeal and restored the decree of the Court of the Munsif. From that decree of the High Court this Appeal to His Majesty has been brought. The principal ground of this Appeal is that the decree of the Subordinate Judge is right and that the Plaintiffs are the owners of the lands in dispute.

On the hearing of this Appeal the learned Counsel on behalf of the Appellants contended that the Judges of the High Court should have accepted the findings of the Subordinate Judge on the question of title as correct and as binding on them in Second Appeal and were not at liberty to find that the Plaintiffs were not the proprietors of the lands in question. He also contended that the Judges of the High Court had misconstrued the *wajib-ul-arz* and the other documentary evidence and had come to a wrong conclusion. He further contended that the *wajib-ul-arz* of Mauza Rampur, which was made in the settlement which commenced in 1872 and extracts from which are on the record of this suit, cannot be treated as applying to the *abadi* of Mauza Rampur, the contention being that Rampur, owing to the number of its inhabitants, many of whom are not agriculturists, and owing to the fact that the Government has applied the Chaukidari Act (Act No. 20 of 1858) to Rampur, must be regarded as a town and not as a purely agricultural village, to which, according to the learned counsel's contention, a *wajib-ul-arz* is alone applicable. The answer to that contention that the *wajib-ul-arz* does not apply to the *abadi* of Mauza Rampur appears to their Lordships to be that the *wajib-ul-arz* to which reference has been made was prepared by the Settlement Officer for the whole Mauza Rampur including the *abadi*, and that all those who were interested were at the time given the opportunity of objecting to the statements contained in it, and further that the Government by applying the Chaukidari Act to Rampur did not alter and could not have altered proprietary rights in Mauza Rampur or in any part of the Mauza. The *wajib ul-arz* is in their Lordships' opinion cogent evidence of the rights as they existed when it was made of those holding proprietary or other rights of property within the Mauza, and it has not been shown that the *wajib-ul-arz* to which reference has been made in this suit differs in any material respect from the *wajib-ul-arz* which their Lordships have been informed by counsel was made in the more recent settlement.

The Judges of the High Court rightly overruled the objection that they were bound to accept as correct the finding of the Subordinate Judge that the Plaintiffs were the proprietors of the lands to which this suit referred. That finding of the Subordinate Judge was the result of his having misconstrued the *wajib-ul-arz*. The right construction of documents is a question of law which Judges in Second Appeals are not, by secs. 584 and 585 of the Code of Civil Procedure, precluded from considering by any finding of a lower Appellate Court, based upon such docu-

ments. The Subordinate Judge arrived at his finding by inferences drawn upon an incorrect construction of the *wajib-ul-arz*, and the Judges in Second Appeal consequently were not bound by his finding that the Plaintiffs were the proprietors of the lands.

In the *wajib-ul-arz* it is stated that Mauza Rampur "is a mahal of Zamindari Khalis (held by a single person), and Raja Ram Chandar Singh is the only proprietor without any co-sharer." Raja Ram Chandar Singh was the husband of the Defendant, Rani Kishen Kunwar, the present zamindar. There is no documentary evidence to show that the Plaintiffs or their predecessors in title ever were proprietors of any of the lands to which this suit relates; on the other hand, the *jamabandi* shows that predecessors in title of the Plaintiffs paid rent as tenants for some of those lands, and in the *khasra* for 1297 Fasli the Defendant, Rani Kishen Kunwar, is entered as the proprietor of some of these lands, and predecessors in title of the Plaintiffs are entered as the tenants. The zamindar was not affected by any transfer of lands to which he was not a party, and in the *wajib-ul-arz* neither the Plaintiffs nor any predecessors of theirs are shown as tenants who had special rights which were heritable and transferable.

The following paragraphs of Chap. IV of the *wajib-ul-arz* relate to groves and houses, and are important :—

"Paragraph 3.—Relating to the rights of tenants in respect of groves and scattered trees.

"A tenant has power to cut down the grove or the scattered trees planted by him in his neighbourhood.

"If the land is rent-free and the trees have been removed therefrom and the land is brought under cultivation, the tenant shall have to pay the rent. If in future a grove is planted, it can be planted with the permission of the zamindar.

"Paragraph 4.—Relating to the rights of the tenants in respect of the houses in the village and of those which are built.

"A person residing in a house is owner thereof and he has power to transfer it; but in future a new house shall be built with the consent of the zamindar.

"The tenants of the lower class have no power to transfer their houses."

There is evidence on the record that when land in the *abadi* is brought under cultivation the tenant has to pay rent for it. In their Lordships' opinion the Judges of the High Court rightly construed the *wajib-ul-arz* and drew the legitimate inference from it, and the other documentary evidence in the suit.

On behalf of the Plaintiffs-Appellants in their Appeal the learned counsel who appeared for them pressed their Lordships to advise that the Plaintiffs-Appellants should be declared to have heritable and transferable rights in the lands in suit and for that purpose admitted that the Plaintiffs-Appellants were tenants of those lands. Apart from other considerations it is sufficient for their Lordships to say that that is not the claim in respect of which this suit was brought.

Their Lordships will humbly advise His Majesty that this Appeal should be dismissed and the decree of the High Court be affirmed. The Appellants must pay the costs of the Appeal.

Solicitors: *Messrs. Barrow, Rogers and Nevill* for the Appellants.

Solicitors: *Messrs. Summerhays & Son* for the Respondent.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1009 OF 1909.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
22, July.

RAM BARAI SINGH and ors., Plaintiffs, Appellants,
v.
SHEODENI SINGH and ors., Defendants, Respondents.

Transfer of Property Act (IV of 1882), sec. 55, sub-sec. (5), cl. (b)—*Vendor and purchaser—Mortgaged property sold subject to mortgage—Implied contract of indemnity—Seller damnified by reason of buyer not discharging mortgage debt—Suit for damages, if lies—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 83—Measure of damages.*

Where one buys from another an equity of redemption subject to a mortgage and merely pays for the value of that equity of redemption, he contracts to protect his vendor from the obligation of the mortgage, the buyer's contract with the mortgagor being that the debt should not fall upon the latter.

It is a contract of indemnity and the buyer would be bound without any specific contract to indemnify the seller.

TWEEDALE *v.* TWEEDALE (1) *relied on.*

Where a portion of the mortgaged property was sold subject to the mortgage, but the buyer having failed to pay off the mortgagee, the latter sued on his mortgage and the whole of the mortgaged property was sold and the seller was dispossessed of the lands which had been retained by him :

Held—*That a suit by the seller for damages against the buyer was governed by Art. 83 of Sch. II of the Limitation Act, time running from the date when the seller was actually damnified,* viz., *the date of dispossession.*

The word "contract" in Art. 83 does not mean an express contract.

Quære—*Whether, the deed of sale being registered, the period of limitation was that provided by Art. 116.*

Quære—*What under the circumstances would be the proper measure of damages.*

This was an Appeal preferred on the 20th of May 1909 against the decree of Mr. H. Foster, District Judge of Zillah Saran, dated the 16th of February 1909, reversing the decree of Babu Harihar Charan, Munsif at Chapra, dated the 30th of June 1908.

The facts of the case were as follows :—

Plaintiffs' father executed a *zuripeshgi* deed, dated the 21st May 1887, for Rs. 449 14 in favour of Mussamat Subhago Koer respecting 11 bighas, 4 cottahs of *kasht* land. Subsequently on the 29th January 1891, he executed a second *zuripeshgi* deed for Rs. 576-15 in favour of Ram Raj Singh respecting 5 bighas 14 cottahs out of the aforesaid 11 bighas 4 cottahs *kasht* as well as some other lands. Rs. 449 14 as. was left with Ram Raj Singh for payment of the prior mortgage of Subhago Koer.

Plaintiffs' father thereafter on 25th May 1895 executed a sale deed in respect of the 5 bighas 14 cottahs *kasht* and other lands mortgaged to Ram Raj Singh, for Rs. 861 in favour of Defendants Nos. 1 to 7. Out of this consideration money Rs. 576-16 as. was left with the Defendants Nos. 1 to 7 for payment of Ram Raj Singh's mortgage.

After this sale, Subhago Koer alleging dispossession instituted a suit to recover the amount of her mortgage, Rs. 449-15, with mesne profits and interest against the Plaintiff and the Defendants Nos. 1 to 7. It was established in that suit that Ram Raj Singh had never paid off Subhago Koer's mortgage and that Defendants Nos. 1 to 7 in their turn had not paid off Ram Raj Singh. In the result a decree

(1) 2 Brown's Rep. of Ch. Cas. 153 ; 23 Beav. 341 (1857).

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was passed in Subhago Koer's favour and, in execution thereof, the entire 11 bighas 4 cottahs *kasht* was sold and purchased by the predecessor-in-title of Defendants Nos. 8 to 10, who on the 29th December 1905 took delivery of possession through Court. Plaintiffs alleged that in consequence of this, they were dispossessed of 5 bighas 10 cottahs *kasht* land which they had retained when the remaining 5 bighas 14 cottahs were sold to Defendants Nos. 1 to 7.

Plaintiffs instituted the present suit on the 17th December 1907 for (amongst other reliefs) the recovery of a sum of Rs. 600 as damages from the Defendants on account of the loss of the said 4 bighas 5 cottahs of *kasht* land.

The Munsif decreed the suit to the extent of Rs. 425 only as he held on the evidence that that was the value of the lands of which the Plaintiffs had been dispossessed.

On appeal by the Defendants Nos. 1 to 7, the District Judge dismissed the suit holding *inter alia* that the suit was barred by limitation, the Plaintiffs having come to know of the breach of contract by the Defendants Nos. 1 to 7 in 1895 in the course of Subhago Koer's suit.

The Plaintiffs preferred this Second Appeal.

Babu Nares Chandra Sinha for the Appellants.

Babus Biraj Mohan Majumdar and *Chandra Sekhar Banerjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The facts of this case appear to me to point so clearly to the result that should follow on the Plaintiff's claim that I think it is convenient to commence with a brief narrative of those facts. On the 21st May 1887, the Plaintiffs' father executed in favour of Musstt. Subhago Koer a *zuripeshgi* mortgage for Rs. 449-14 as. The mortgaged property was 11 bighas 4 cottahs *kasht* land. On the 29th of January 1897, a second mortgage was executed of 5 bighas 14 cottahs, part of the same piece of land —this time in favour of one Ramraj Singh by way of *zuripeshgi*, and the mortgage amount was Rs. 576 15 as. Of this sum Rs. 449-14 as. was left with Ramraj Singh for payment on the mortgagor's behalf to the prior mortgagee. In fact this payment never was made. What was done with the sum representing the difference between Rs. 449 14 as. and Rs. 576-15 as. does not appear. On the 25th of May 1895, the Plaintiff executed an instrument of sale for Rs. 891 in favour of Defendants Nos. 1 to 7. The property was 5 bighas 14 cottahs, part of the property mortgaged. Of this amount, Rs. 576-15 as. was left with Defendants Nos. 1 to 7 for payment to Ramraj Singh on account of the *zuripeshgi* executed in his favour. This Rs. 576 15 as. was not paid. The result has been a suit by the first mortgagee against the Plaintiff resulting in an adverse decree and sale of the Plaintiff's property. The purchasers have thus paid Rs. 576-15 as. less than the full amount of the purchase price, and the protection which the Plaintiff expected to acquire by allowing them to retain that amount has not been afforded him. I am doubtful whether the position of the parties was correctly placed before the lower Courts. Where one buys from another an equity of redemption subject to a mortgage and merely pays for the value of that equity of redemption he contracts to protect his vendor from the obligation of the mort-

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gage. The buyer's contract with the mortgagor is that the debt shall not fall upon him. It is a contract of indemnity and the buyer would be bound without any specific contract to indemnify the seller [*Tweedale* v. *Tweedale* (1)]. This principle is founded on good sense and finds expression in sec. 55, sub-sec. (5), cl. (*b*) of the Transfer of Property Act. It is I think by these circumstances that we should be guided in this case. There may be some difficulty in determining the precise extent of the indemnity to which the vendor was entitled from the purchaser of the equity of redemption, having regard to the fact that only a part was purchased. But we have in the express agreement of the parties themselves a fair measure of the extent of this indemnity for which they contracted. That amount is manifestly in excess of the damages awarded to th Plaintiff by the Court of first instance where a decree for Rs. 425 was given as against Defendants Nos. 1 to 7. From that decree the Plaintiff did not prefer an appeal. Therefore, that amount cannot now be increased by us, and it is only for us in these circumstances to hold, as we do, that the indemnity extended at least to the amount of Rs. 425 and we must accordingly reverse the decree of the District Judge and restore that of the Munsif.

In coming to this conclusion I do not overlook the contention that the Statute of Limitation constitutes a bar to this suit. But as the contract is one of indemnity the article that applies is Art. 83, possibly extended by Art. 116. But even if it be taken that Art. 83 alone is the governing article and the benefit of the extension provided by Art. 116 cannot be claimed, still the suit is within time, as it is within three years of the time when the Plaintiff was actually damnified. All that was urged against this view is that a contract in Art. 83 means an express contract. I can see no warrant for placing that restricted meaning on the words of Art. 83. It is a meaning which the word do not themselves require, nor would it be in accordance with the view of contract expressed in the Indian Contract Act; and, so there is no obstacle on the score of limitation to the decree I have indicated.

Having regard to the mode in which the case has been conducted in the lower Appellate Court, I think each party should bear their costs of the lower Appellate Court or of this Court.

Appeal allowed.

(1) 2 Brown's Rep. of Ch. Cas. 153; 23 Beav. 341 (1857).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2062 OF 1909.

SHARFUDDIN, J. COXE, J. 1912, Heard, 12 and 15, July. Judgment, 14, August.	JHAPAJHANNESSA BIBI and others, Defendants, Appellants, *v.* BAMA SUNDARI CHOUDHURANI and others, Plaintiffs, Respondents.

Limitation Act (XV of 1877), Sch. II, Arts. 89, 115, 116—Accounts, suit for, against sons of gomastha—*Covenant to furnish annual accounts—Neglect to do so, if refusal—Suit by co-sharer for accounts of his share, if lies.*

A suit for money found due on an account and a suit for an account are really one and the same thing.

SHIB CHANDRA v. CHANDRA NARAIN (1) *followed.*

Such a suit lies on the death of an agent against his legal representatives.

(1) 1 C. L. J 232: s. c I. L. R 32 Cal. 719 (1905).

JHAPAJHANNESSA BIBI *v.* BAMA SUNDARI CHOUDHURANI.

LAWLESS *v.* THE CALCUTTA LANDING AND SHIPPING CO., LD. (9), JOGESH CHANDRA *v.* BENODE LAL RAY (10) *followed.*

Held (COXE, J., dubitante) *that a suit for accounts not against the agent personally but against his legal representatives is governed by Art. 115 or Art. 116 of the Limitation Act and not by Art. 89.*

The objection that a co-sharer cannot sue the gomastha *of all the co-sharers for the accounts of his share only does not apply where the remaining co-sharers have been made parties Defendants and a decree passed for an account of the whole agency.*

Quære—*Whether when there is a covenant by the agent to furnish accounts year by year, the neglect on the part of the agent to furnish the accounts in respect of any particular year amounts to "refusal to render accounts" within the meaning of Art. 89.*

Quære—*Whether, where there is such a covenant, a suit against an agent for accounts of particular years when the agent has neglected to furnish accounts, or for the sum found due thereon, can be regarded as a suit for compensation for the breach of a contract as contemplated by Arts. 115 and 116 of the Limitation Act.*

This was an Appeal against the decree of Mr. S. N. Huda, District Judge of Zillah Pabna and Bogra, dated the 21st of August 1909, confirming the decree of Babu Durga Kant Ray, Munsif of Pabna, dated the 21st of December 1908.

The facts of the case appear sufficiently from the judgment.

Babus Jogesh Chandra Ray and *Shyama Charan Ray* for the Appellants.

Babus Brojo Lal Chuckerbutty and *Biraj Mohan Mojumdar* for Deputy Registrar for the Respondents.

(9) I. L. R. 7 Cal. 627 (1881).
(10) 14 C. W. N. 128 (1909).

The JUDGMENT OF THE COURT was as follows:—

SHARFUDDIN, J.—This is a suit by the Plaintiffs against the Defendants, the heirs of one Laban Sarkar, who is alleged to have been an agent of the Plaintiffs and their co-sharers from 1287 or 1288 and to have continued as such up to his death which took place in Pous 1311 (January 1905.) In this suit the Plaintiffs have made their co-sharers *pro formâ* Defendants. Their allegation is that there was a contract between them and their co-sharers on the one side and Laban Sarkar, the agent, on the other that the latter should render accounts annually to each of his employers including the present Plaintiffs. It is further alleged by the Plaintiffs that the agent, although repeatedly asked, never rendered accounts for the period 1293 to Pous 1311, and that after his death his heirs also, although repeatedly asked, never did so. The present suit therefore is to obtain a decree against the heirs of Laban Sarkar for rendition of accounts for the above period, for the return of certain documents belonging to the Plaintiffs and their co-sharers, and for payment of the cash balance that may be found, on an adjustment, to have been in the hands of Laban Sarkar before his death in 1311.

The first Court passed a preliminary decree against the Defendants and on an appeal to the District Judge by the Defendants the judgment and the decree were confirmed and the appeal was dismissed. The Defendants have now appealed to this Court and the principal question to be decided in this appeal is as to whether the present suit is governed

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by Art. 89 or 115 of the Second Schedule of the Limitation Act (No. XV of 1877).

Art. 89 of the Limitation Act governs a suit by a principal against his agent for moveable properties received by the latter and not accounted for. The period of limitation for a suit of the above description is 3 years and the limitation begins to run when the account is, during the continuance of the agency, demanded and refused, or, where no such demand is made, when the agency terminates.

Art. 115 of the same Act is a provision for a suit for compensation for the breach of any contract, expressed or implied, not in writing registered, and not specially provided for in the Schedule. In this also the period of limitation is 3 years: and that period is to commence when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or, (where the breach is continuing) when it ceases.

The Defendants' allegations are that Laban Sarkar had rendered accounts to the Plaintiffs and their co-sharers in 1305, and that after his death the Defendants again rendered accounts in 1312.

The finding of the lower Appellate Court is this:—"In short taking into my consideration the oral and the documentary evidence adduced by the Defendants, I am strongly of opinion that the Defendants have failed to prove that Laban Sarkar rendered accounts in 1305, and that they (Defendants) again rendered account to the Plaintiff in Assarh 1312." This is a finding of fact and is therefore conclusive.

There can be no doubt that the present suit is not against the agent himself but against his heirs, and it is admitted by the Defendants that Laban Sarkar had to render accounts in the manner described in the plaint, that is, yearly. (*Vide* para. 7 of the written statements).

The question of limitation, it is alleged, was raised in the grounds of appeal to the lower Appellate Court, but that Court had not dealt with that question in its judgment. Under sec. 3 of the Limitation Act, if a suit is barred by limitation it shall be dismissed although limitation may not have been set up as a defence. We have therefore to determine as to whether this suit is governed by Art. 89 or by Art. 115.

The first point urged on behalf of the Appellants is that the agency having terminated on the death of Laban Sarkar the Plaintiffs have no cause of action against the heirs of Laban Sarkar. In this present suit the Plaintiffs not only sue for accounts but also for account papers and the cash balance that may be found, on adjustment, to have been in the hands of the deceased agent. In the case of *Shib Chandra* v. *Chandra Narain* (1), it was held that a suit for money found due from an agent on an account being taken, and a suit for rendering an account cannot be distinguished.

Other questions raised by the parties have been fully dealt with by my learned brother in his separate judgment. There is, however, the question of limitation and the application of the articles of the Act, which is of some difficulty owing to some conflicting rulings of this Court.

In the case of *Mati Lal Bose* v. *Amin Chand Chattopadhya* (2), it was held that a suit for accounts by a principal against his agent on the basis of a registered agreement is governed not by the 3 years'

(1) 1 C. L. J. 282: s. c. I. L. R. 32 Cal. 719 (1905).

(2) 1 C. L. J. 211 (1902).

rule laid down in Art. 89 but by the six years' rule laid down in Art. 116 of the Limitation Act, and the time begins to run from the date when the contract to render accounts is broken and if under the contract, the account has to be rendered at the end of every year, the Plaintiff is not entitled to account for more than six years' preceding the suit. The article applicable, if the contract had not been registered, would appear to be Art. 115. It appears that the judgment in *Mati Lal Bose* v. *Amin Chand Chattopadhya* (2), was questioned in the case of *Shib Chandra* v. *Chandra Narain* (1), because in the latter case it was held that in an action by a principal against his agent claiming an account and the money found due on such account, the period of limitation is 3 years as prescribed in Art. 89.

The difference between Arts. 89 and 115 is that a suit by a principal against his agent falls within the particular class provided for by Art. 89. If after the termination of agency by the death of the agent, an action for accounts is brought against the heirs of the deceased agent it cannot be treated as a suit against the agent for which there is a special provision in Art. 89. A suit for accounts against the heirs of the deceased agent would therefore be governed by Art. 115, if the contract is not in writing registered, and if there is a contract in writing registered the article applicable would be Art. 116.

It seems that the correctness of the finding in the case of *Mati Lal Bose* v. *Amin Chand Chattopadhya* (2) was also doubted in the case of *Hafizuddin Mondol* v. *Jadu Nath Saha* (3), where it was held that a suit by a principal against his agent for account is not "a suit for compensation for breach of a contract in writing registered" when the contract between the parties is embodied in a registered document, and Art. 89 and not Art. 116 should govern such a suit. In this reported case, Maclean, C. J., observed (and my learned brother agreed):—"There seems to be some difference of judicial opinion upon the question as to which article does apply. In the Privy Council case of *Ashgar Ali Khan* v. *Khursed Ali Khan* (4), the Judicial Committee held that in a case of this nature Art. 89 applied and that the expression 'moveable property' in that article included money. The same view was followed by this Court in the cases of *Shib Chandra* v. *Chandra Narain* (1) and *Debendra Nath Ghosh* v. *Sheikh Isha Huq Mistri* (5). In this case, however, it appears that the contract under which the *gomastha* was appointed is a registered document. The argument is that as it is a registered document the case falls within Art. 116 of the Second Schedule of the Limitation Act: and the Respondent relied upon a decision of a Division Bench of this Court also, *Mati Lal Bose* v. *Amin Chand Chattopadhya* (2), which laid down that where the contract between the parties is under a registered document, the case is governed by Art. 116 and not by Art. 89. Had the matter rested there, my own view would have been that Art. 89 applied and not Art. 116. Art. 89 applies to the case of a principal suing his agent for an

(1) 1 C. L. J. 232: s. c. I. L. R. 32 Cal. 719 (1905).
(2) 1 C. L. J. 211 (1902).

(1) 1 C. L. J. 232: s. c. I. L. R. 32 Cal. 719 (1905).
(2) 1 C. L. J. 211 (1902).
(3) 12 C. W. N. 620 (1908).
(4) I. L. R. 24 All. 27 (1901).
(5) 14 C. W. N. 121 (1908).

account whilst Art. 116 applies to a suit 'for compensation for the breach of a contract in writing registered.'"

I have no doubt as to the correctness of the view taken in the above case. That was a suit between the principal and an agent and it was immaterial whether the contract between the parties was in a writing registered or not as there is a special provision for suit by a principal against an agent for accounts. But the present suit as already observed is not between the principal and the agent. It is a suit by the Plaintiffs against the heirs of the deceased agent. We have therefore to see when the contract was broken or if there have been successive breaches, when the breach in respect of which the present suit was instituted occurred or if the breach was continuing when it ceased. There can be no doubt that there was a contract between the principal and the agent that the latter should render his accounts every year to the Plaintiffs and their co-sharers. After the agent's death the law presumes that there is always an implied contract by which the heirs of the deceased agent are bound to give an account of whatever they may have received from the agent at the time of his death. That being so and also because the contract was not in writing registered Art. 115 of the Limitation Act applies to such a case.

Another case referred to during the course of argument is the case of *Jogendra Nath Roy* v. *Deb Nath Chatterji* (6). This was a suit by a principal against his agent for an account and for money that might be found due upon such account being taken and it was held that Art. 89 was applicable. As already observed the D[illegible] before, when there is special provision under Art. 89 for limitation for a suit by a principal against his agent; this and no other article is applicable.

The case of *Easin Sarkar* v. *Barada Kishore Acharya Chowdhry* (7) was referred to. In this reported case the question that arose was what should be the period of limitation in a suit for accounts when there had been an agreement to furnish accounts year by year, which had been neglected year by year: and the contention of the Appellant in that suit was that it was immaterial whether Art. 89 or Art. 115 applied inasmuch as there was a successive breach of agreement. This case was decided not exactly on the application of the Art. 115 to the facts of the case but on quite a different ground. I find in the judgment of this reported case the following passage:— "That being so, we are of opinion that the Munsif is perfectly right in saying that it does not matter which article applies, whether Art. 89 applies or Art. 115 applies, there having been successive breaches year by year, the limitation dates from each breach. The Plaintiff brought the suit within 3 years of the last breach and he is therefore entitled to accounts for one year." There is no doubt that in the judgment of this reported case, cases of *Mati Lal Bose* v. *Amin Chand Chattopadhya* (2) and *Hori Narain Ghosh* v. *The Administrator-General, Bengal* (8) were followed. But a discussion as to which of the two articles applied was not necessary for the disposal of that appeal as is clear from what the Munsif said which was accepted by the Division Bench that decided that appeal.

(2) 1 C. L. J. 211 (1902).
(6) [illegible] W. N. 113 (1908).
(7) 11 C. L. J. 48 (1909).
(8) 3 C. L. R. 446 (1878).

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In that above circumstances I am also of opinion that the limitation against the present suit should be governed by Art. 115 and that the Plaintiffs can only obtain accounts for so much of the period in suit as falls within 3 years of the institution of this suit. This appeal will therefore be allowed in part and the Plaintiffs will get a preliminary decree for the accounts of the year 1311 only. The Appellant would be entitled to their costs.

COXE, J.—This appeal arises out of a suit for an account and for other reliefs against the legal representatives of one Laban Sakar. Laban Sarkar was the agent of the Plaintiffs and their co-sharers and died in 1311. The Plaintiffs seek accounts for the period 1293—1311. The suit has been decreed and the Defendants appeal.

The first point taken is that, as the agency terminated on the death of Laban, the Defendants are not liable to account at all. But clearly the Plaintiffs are entitled to some relief against them. To hold that when a *gomastha* dies, all his accounts and the money which he may have collected can be kept by his legal representatives is impossible. It is argued that the Plaintiffs ought to ascertain themselves what is due to them and sue for that amount. But that amount can only be ascertained with accuracy by an examination of the accounts kept by the deceased *gomastha*, and there is no reason why the legal representatives should be entitled to withhold those accounts. A suit for money, found due on an account and a suit for an account are really the same [*Shib Chandra* v. *Chandra Narain* (1)]. And in the present case the Plaintiffs do sue not only for an account, but also for the account papers, for the money found due on the account, and finally in the event of accounts not being furnished for a lump sum of Rs. 905. It was held in *Lawless* v. *The Calcutta Landing and Shipping Co., Ld.* (9) and in *Jogesh Chandra* v. *Benode Lal Roy* (10) that the legal representative of a deceased agent is bound to furnish accounts and this view seems to us correct. The first objection taken on behalf of the Appellants therfore fails.

Another point is that the Plaintiffs cannot sue for the accounts of their share. The co-sharers, however, have been made parties and a decree has been given for an account of the whole agency from which the Plaintiff's share can be ascertained. The Defendants are therefore relieved from any further liability to the co-sharers. In these circumstances I think that this objection also fails.

The only other point taken is that of limitation. This is one of some difficulty. It was held in *Mati Lal Bose* v. *Amin Chand Chattopadhya* (2), that a suit for accounts against an agent is not governed by Art. 89 at all. This decision was questioned in *Shib Chandra* v. *Chandra Narain* (1), and also in *Hafizuddin Mondol* v. *Jadu Nath Saha* (3), and perhaps must be regarded as to some extent overruled by the Privy Council decision in *Ashgar Ali Khan* v. *Khursed Ali Khan* (11). I may refer also to *Jogendra Nath Roy* v. *Deb Nath Chatterji* (6).

(1) 1 C. L. J. 232 : s. c. I. L. R. 32 Cal. 719 (1905).

(1) 1 C. L. J. 232 : s. c. I. L. R. 32 Cal. 719 (1905).
(2) 1 C. L. J. 211 (1902).
(3) 12 C. W. N. 820 (1908).
(4) I. L. R. 24 All. 27 (1901).
(6) 8 C. W. N. 113 (1903).
(9) I. L. R. 7 Cal. 627 (1881).
(10) 14 C. W. N. 123 (1909).

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But it has been held in *Jogesh Chandra* v. *Benode Lal Roy* (10) and in *Easin Sarkar* v. *Barada Kishore Acharya Chowdhry* (7), following *Mati Lal Bose* v. *Amin Chand Chattopadhya* (2) quoted above that such a suit is taken out of the operation of Art. 89 and comes within Art. 115 or Art. 116, if there is a covenant to render accounts at the end of every year. The learned Judges who decided the case of *Easin Sarkar* v. *Barada Kishore Acharya Chowdhry* (7), one of whom was my learned brother, also held, following *Hori Narain* v. *The Administrator-General, Bengal* (8), that in the case of a covenant to deliver accounts annually the omission to render such accounts must be regarded as a refusal within the meaning of Art. 89, and that, therefore, even if Art. 89 applied, the period of limitation would not be extended. I must confess, speaking with the greatest respect, that I feel some difficulty in holding that mere neglect to render accounts, which the Defendant has agreed to render, can be deemed to be a refusal within the meaning of Art. 89: and also, as pointed out in *Hafizuddin Mondol* v. *Jadu Nath Saha* (3), in regarding a suit for accounts or for the sum found due thereon as a suit for compensation for the breach of a contract. It seems to me that the Plaintiff sues for the money, because it is due, and not because it represents the loss caused him by the Defendant's neglect to render accounts. I am not prepared, however, to press my doubts on this subject to the point of differing from the decisions that I have quoted, and it must be held that that Art. 115 applies.

(2) 1 C. L. J. 211 (1902).
(3) 12 C. W. N. 820 (1908).
(7) 11 C. L. J. 43 (1909).
(8) 3 C. L. R. 446 (1878).
(10) 14 C. W. N. 123 (1909).

Furthermore, the balance of authority is to the effect that a suit is taken out of the operation of Art. 89, if it is a suit against the legal representatives, though here, too, there is a conflict of judicial opinion. It was held in *Harendra Kishore Singh* v. *The Administrator-General of Bengal* (11), that a suit against the representative of a deceased agent for specific sums misappropriated did not come under Art. 89, but under Art. 116. It was pointed out that such a suit could not be regarded as a suit for an account at all. But clearly a suit for the recovery of specific sums misappropriated would be in closer accordance with the wording of Art. 89, than a suit for an account, so that if Art. 89 does not apply to a suit against the representatives of an agent for the recovery of specific sums misappropriated, *a fortiori* it would not apply to a suit against them for an account. Again in *Omrita Nath Mitter* v. *Administrator-General of Bengal* (12), it was held that Art. 89 would not apply to a suit against the representatives of a deceased agent for recovery of a specific sum "because the suit was not against the agent, but against the legal representatives of the agent." On the other hand, it was held in *Lawless* v. *The Calcutta Landing and Shipping Co., Ld.*, (9), that a suit for an account against a representative was governed by Art. 89. That, however, was the decision of a single Judge and cannot outweigh the two other decisions.

It would seem therefore that this case is governed by Art. 115 and that the Plaintiff can only obtain accounts for so much of the period in suit as falls within three years of the institution of the suit.

(9) I. L. R. 7 Cal. 627 (1881).
(11) I. L. R. 12 Cal. 357 (1885).
(12) I. L. R. 25 Cal. 55 (1897).

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I agree therefore that the appeal be allowed in part and the Plaintiff be given a preliminary decree for the accounts of 1311 only.

Appeal allowed in part.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 568 TO 587 OF 1912.

HOLMWOOD, J. IMAM, J. 1912, Heard, 23 and 24, May. Judgment, 24, May.	FEROJA PESHAKAR, Petitioner, *v.* AMIRUDDIN and others, Opposite Party.

Act II of 1907 (E. B. & Assam), secs. 2, cl. (b), *7—House, use of, as brothel or for habitual prostitution—Sec. 7, object of—Order under cl.* (b) *of sec. 2, effect of—Proceedings under, how instituted—Criminal Procedure Code (Act V of 1908), sec. 190.*

Sec. 7 of Act II of 1907 (E. B. & Assam) is an enabling section and is not a necessary part of the procedure of the Act prior to the prosecution being instituted. It is not necessary to have recourse to that section if the Magistrate can be satisfied in other ways that the nuisance complained of is continuing.

Sec. 6 of the Act creates an offence under a local law and proceedings relating to such offence should be taken under sec. 190 of the Criminal Procedure Code.

Where a Magistrate authorised an Inspector of Police to enter and inspect the houses and the Inspector asked the Sub-Inspector to make the enquiry:

Held—*That the Magistrate had no jurisdiction to take cognisance of the case on the Sub-Inspector's report.*

The Magistrate could either treat the Sub-Inspector's report as a complaint under sec. 190 (a), in which case he would have to call upon the Sub-Inspector to appear and substantiate the report on oath: or under sec. 155 direct the Police to investigate the case and submit a charge-sheet if they thought proper.

Where the Sub-Inspector stated in his report that he was satisfied that a woman "was going on with her profession of prostitution" but did not say that she was using her house to the annoyance of the inhabitants of the vicinity:

Held—*That although the report might furnish a basis to the Magistrate to call upon the Sub-Inspector to depose on oath as complainant the report itself did not disclose a complete case under sec. 2 of the Act.*

This was a Rule granted on the 29th of April 1912 against an order of Moulvi Muhammad Chainuddin, Deputy Magistrate of Rungpur, passed on the 29th of November 1911, directing the Petitioner under sec. 3 of the E. B. & Assam Act II of 1907 to discontinue the use of her house as a brothel or for habitual prostitution within one month from the date of the order, as also against an order, dated the 19th of March 1912, summoning her under sec. 6 of the Act for not carrying out the above order.

The material facts of the case will appear from the judgment.

Mr. C. R. Das and *Babu Probodh Chandra Mukerjee* for the Petitioner.

Mr. Orr and *Babu Brojendra Nath Chatterjee* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This Rule was issued on the District Magistrate of Rungpur to show cause why these proceedings should not be stayed until proper procedure is taken, on the ground that the Magistrate has no jurisdiction either under secs. 190 (*a*), 190 (*b*)

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or 190 (*c*) to take cognizance of the offence alleged to have been commi ted on the report of a Town Sub-Inspector of Police.

It appears that certain inhabitants of Rungpur complained that the houses of certain prostitutes, twenty of whose cases are before us in connection with these analogous Rules, were used as brothels or for the purpose of prostitution or as disorderly houses to the annoyance of the inhabitants of the vicinity and the Magistrate expressly states that he issued an order summoning the tenants to appear and show cause why the use of those houses should not be discontinued for any of those purposes under cl. (*b*) of sec. 2 of the Act. The order was to take effect within one month. But the Magistrate appears to have lost sight of the matter and the proceedings were very much delayed. We may mention that the neighbours originally complained on the 18th August 1911, and then a very long and in our opinion unnecessary investigation was gone into by the Magistrate and an immense amount of evidence was taken and the prohibitory order was not issued till the 29th November 1911. There is quite a volume of evidence and a very lengthy order on the subject. Nearly three months after, on the 24th February 1912, the District Magistrate made an order to an Inspector whom he named authorizing him to make enquiry under sec. 7. It is said that this delay was due to the fact that there had been an appeal against the interlocutory order which was dismissed as incompetent on the 18th February 1912.

Now the first argument that was addressed to us appeared to contend that sec. 7 was a necessary part of the procedure of the Act prior to a prosecution being instituted. But this we think clearly is not the case, and it is now practically conceded that this is so. Sec. 7 is an enabling section. It provides that it shall be lawful for the District Magistrate by an order in writing to authorize any officer not below the rank of a Sub-Inspector of Police to enter and inspect the said house at any time after the expiration of the period specified in the order under sec. 3 for the purpose of satisfying himself that the order is being complied with. This does not seem to us to lay down that it is in any way necessary for anybody to enter the house if the Magistrate can be satisfied in other ways that the nuisance is still continuing. It is only a protection to the public authorities from a charge of trespass, for it is not lawful to enter a private house without the sanction of the owner, unless the Statute expressly gives such authority and the authority which is given by this section clearly cannot be delegated to any other person. If the District Magistrate thinks it necessary for any one to enter and inspect the house he must authorise some special person or persons not below the rank of a Sub-Inspector of Police to do so, and no other persons can be held absolved from trespass who purport to act upon that order. But in this case the Inspector asked the Sub-Inspector to make the necessary enquiry, and it does not appear that the Sub-Inspector entered the house, but he made a report which is on the face of it slightly ambiguous and this report fortifies us in our opinion that criminal proceedings should only be instituted in the way laid down by sec. 190, Criminal Procedure Code.

The real basis of the contention in this case is that sec. 6 of the Act creates an offence under a local law, and proceedings

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can only therefore be instituted under the Code of Criminal Procedure. Without desiring to lay down that sec. 190, Criminal Procedure Code, is mandatory or exhaustive and that there are no other ways in heaven or earth to institute criminal proceedings, it appears to us clear that the only way to avoid the difficulties of jurisdiction in working an act of this description, which does not appear to be self-contained as far as the procedure is concerned, is to make use of that very useful section of the Code of Criminal Procedure.

Now comes the question how that section should be made use of. It is open to the District Magistrate to treat the report of the Sub-Inspector as a complaint of facts which constitute such offence. But in that case it is obviously necessary for the Magistrate to call upon him to appear, if he so desires, and substantiate that complaint upon oath; and this brings us back to what we have just glanced at that as a matter of fact the present report of the Sub-Inspector does not disclose a complete case under the section; and although it might furnish basis to the Magistrate for directing the Sub-Inspector to come and depose on oath as complainant, it would not in itself fulfil the requirements of the section. For he says that he has personally enquired into the matter at various times during day and night and saw many persons frequent the woman's house and thus he is fully satisfied that she is going on with her profession of prostitution. Now this is not exactly what the woman was ordered not to do. She was ordered not to use her house to the annoyance of the inhabitants of the vicinity, and it will be necessary for the complainant to show that she was still using her house to the annoyance of the inhabitants in the vicinity.

Then there is another way in which the Magistrate could have taken cognizance, a way which we do not in any way recommend, that is, under sec. 155, Criminal Procedure Code, he could have directed the Police to investigate this non-cognizable offence. It would then have been open to the Police to make enquiry and send up a charge-sheet if the charge was established, or to report that the case could not go on if they thought the evidence to be insufficient. But this would be giving an amount of discretion to the Police which we think in a case of this nature would be extremely undesirable. It would be far better if the Magistrate is satisfied after examining the Sub-Inspector on oath that the annoyance still continues that he should take cognizance upon that complaint. He cannot act under sec. 190 (*c*) because the information which he received was received from a Police-officer.

We therefore think that it is not necessary to stay these proceedings, but the Magistrate should be directed if he thinks fit to continue this enquiry by calling before him the Sub-Inspector who made the report and examining him on oath to satisfy himself that there is sufficient ground for taking proceedings under sec. 6 of the Act. If he is so satisfied he can continue those proceedings; if he is not so satisfied he can dismiss the complaint under sec. 203, Criminal Procedure Code.

This judgment will govern the other 19 Rules Nos. 569 to 587 of 1912.

H. C. S. *Case remanded.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 560 OF 1912.

HOLMWOOD, J.
IMAM, J.
1912,
7, June.

SHEO BALAK RAI & ors., 1st Party, Petitioners,
v.
BHAGWAT PANDAY & ors., 2nd Party, Opposite Party.

Criminal Procedure Code (Act V of 1908), secs. 145 and 146—Attachment order under sec. 146, without jurisdiction—Evidence, omission to take, when amounts to want of jurisdiction—Jurisdiction.

Where in a proceeding under sec. 145, Cr. P. C., the Magistrate without taking any evidence or making any local enquiry, made an order attaching the land in dispute under sec. 146, Cr. P. C.

Held—*That the order of the Magistrate was incompetent and without jurisdiction, as the Magistrate did not make the slightest effort to satisfy himself as to the* factum *of possession.*

SHEIKH MANSAR ALI *v.* MATIULLAH (1) *relied upon.*

BEJOY MADHAB CHOWDHURY *v.* CHANDRA NATH CHUCKERBURTTY (2) *referred to.*

This was a Rule granted on the 29th of April 1912 against the order of Mr. U. Sen Gupta, Deputy Magistrate of Arrah, dated the 6th of March 1912, attaching the land in dispute and directing the Police to gather the crops standing thereon under sec. 146, Criminal Procedure Code.

The material facts of the case were briefly as follows :—

On the 4th January 1912, proceedings were drawn up by Mr. U. Sen Gupta, described in the proceedings as "in charge Magistrate," District Arrah, against the Petitioners and 2nd party in respect of land situate in District Ballia under sec. 145, Criminal Procedure Code.

(1) 12 C. W. N. 896 (1908).
(2) 14 C. W. N. 80 (1909)

16th January was fixed for hearing and pending final decision the land was attached under cl. (*a*), sec. 145, Criminal Procedure Code.

On that date neither the 2nd party nor the Petitioners filed written statements and the case was adjourned to 30th January when the 2nd Party filed written statement and on the objection of the 2nd party that the land did not lie within the jurisdiction of the Magistrate, the Magistrate directed the Police to hold an investigation and report.

On the 21st February 1912, the case was adjourned till 6th March 1912, as both parties applied for time to produce documents.

On the 6th March, the 2nd party prayed for time but the Magistrate did not accede to it and without taking any evidence attached the land under sec. 146 and directed Police to gather the crops standing on it.

Against this order the Petitioners moved this Court and obtained the present Rule.

Babu Chandra Sekhar Prosad Singh and *Babu Jyotish Chandra Bose* for the Petitioners.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This was a Rule calling on the District Magistrate of Shahabad to show cause why the order under sec. 146 should not be set aside as wholly without jurisdiction, inasmuch as the Magistrate had not taken any evidence as was necessary in order to enable him to determine if possible who was in possession.

Now as regards the duties of the Magistrate under sec. 146 it was laid down in the case of *Sheikh Mansar Ali* v. *Matiullah* (1), that the Magistrate in the

(1) 12 C. W. N. 896 (1908).

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absence of information might have himself held a local enquiry under sec. 148 or in various ways might have informed himself as to the facts of the case ; as he had not done so it was held that he declined jurisdiction and the order complained of was set aside. This ruling has been followed by this Court, in the experience of one of us who has been sitting upon this Bench for the greater part of two years, and has never as far as we know been differed from. There is a ruling in the case of *Bejoy Madhab Chowdhury* v. *Chandra Nath Chuckerburtty* (2), in which the learned Judges profess to distinguish the ruling in *Sheikh Mansar Ali* v. *Matiullah* (1) on the ground that the Judges set aside the order in that case because the Magistrate did not give sufficient time for regular proceedings to be followed. But as we have just pointed out, that was only one ground and a minor ground for setting aside the order. The main ground was the ground we have just now cited and that ground appears to us to be an obviously good ground, for the law says that it is only if the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was in such possession, he can attach the property, and it is perfectly clear that he cannot say he is unable to satisfy himself if he has never made the slightest effort to do so. He had only to send a kanango out to the spot and take his report, or send for the headman of the village and ask him what the facts were ; he would have then fully armed himself with jurisdiction ; but he did nothing of the kind, and it can be clearly distinguished from *Bejoy Madhab Chowdhury* v. *Chandra Nath Chuckerburtty* (2), where the Magistrate said he was unable to satisfy himself. He does not even say that he has had the slightest difficulty. His order is as follows,—"No evidence produced by either side, lands attached under sec. 146." Whatever view therefore be taken of the rulings that order is clearly incompetent and without jurisdiction.

(1) 12 C. W. N. 896 (1908).
(2) 14 C. W. N. 80 (1909).

The order must be set aside and the lands released from attachment.

B C. *Rule made absolute.*

[CRIMINAL APPELLATE JURISDICTION.]

APP. NO. 16 OF 1912.

HOLMWOOD, J.
SHARFUDDIN, J.
1912,
13, March.

KUNJA BHUNIYA and another, Appellants,
v.
KING-EMPEROR, Respondent.

Private defence, right of—Unlawful assembly—Unlawful common object, exceeding the right of private defence, if is.

Once an attack is made on persons in the lawful exercise of their rights over a property, they are entitled to the right of private defence ; and the only question which can arise after that is whether any member of the party individually exceeded that right.

People who were in the exercise of lawful rights cannot be held to have been members of an unlawful assembly, nor can that assembly become unlawful by reason of their repelling the attack made upon them by persons who had no right to obstruct them, or by reason of their exceeding the lawful use of the right they had.

The fact of exceeding the right of private defence which a man has, cannot make him a member of an unlawful assembly and he can only be convicted and punished for the

(2) 14 C. W. N. 80 (1909).

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individual act which he himself has done in excess of the right of private defence.

This is an Appeal filed on the 22nd of January 1912 from an order, dated the 18th of December 1911, of Mr. J. Cornes, Sessions Judge of Midnapore, who sentenced the Appellants each to two years' rigorous imprisonment under sec. 147, I. P. C.

The facts material to the report will appear from the judgment.

Mr. Monnier and *Babu Hirendra Nath Ganguly* for the Appellants.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This is an Appeal from the judgment and sentence of the learned Sessions Judge of Midnapore who agreeing with both the assessors found the Appellants, Kunja Bhuniya and Panchu Bhuniya, guilty of the offence of rioting under sec. 147 and sentenced them to two years' rigorous imprisonment each. There were charges under sec. 304 read with secs. 149 and 325, I. P. C., read with sec. 34 in respect of the injuries caused to one Bariar who met his death in consequence of the assault. The learned Judge finding that the fracture of the skull which caused the death was an isolated act committed by one Srinibash and finding also that the charge under sec. 304 read with sec. 149 was withdrawn, did not take the assessors' opinion on it, but he says in his judgment, and we think erroneously, considering the findings which we shall surely have to come to, that the same remarks really apply to the charge under sec. 325 read with sec. 34 as none of the contusions found on Bariar were severe.

Now what is really found in this case is that the accused party were justified in going to the land with the peon who had a warrant in execution of a Civil Court decree, and that they were interfered with and one of their member the drummer was pushed or struck with a lathi by the deceased Bariar who had come out from his house with a party of his adherents and opposed the lawful delivery of possession. This is what gave the Appellants' party the right of private defence, and the Judge seems to change his mind more than once as to whether they had this right of private defence or not, and he finally seems to come to the conclusion that the assembly became unlawful by reason of the accused retaliating when they were obstructed in the lawful exercise of their rights, and he then seems to think that they made an independent attack upon the deceased party and that the deceased's party then also had a right of private defence. We confess we are unable to follow the reasoning of the learned Judge. Once an attack was made on persons in the lawful exercise of their right over the property in question they were undoubtedly entitled to the right of private defence; and the only question which can arise after that is whether any members of the party individually exceeded that right. People who were in the exercise of lawful rights cannot be held to have been members of an unlawful assembly, nor can that assembly become unlawful by reason of their repelling the attack made upon them by persons who had no right to obstruct them, nor by reason of their exceeding the lawful use of the right they had. We have laid down before and we desire to lay down again that the fact of exceeding the right of private defence which a man has cannot make him a

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member of an unlawful assembly and he can only be convicted and punished for the individual act which he himself has done in excess of the right of private defence; and it is because we think that these two Appellants, Kunja and Panchu, did exceed that right in that they continued to beat Bariar with *lathis* after he had been struck down with a fructured skull and was lying in the water in a practically *moribund* condition, that we have to consider the question of law which we just now pointed out had been wrongly decided by the learned Judge with reference to the charge under sec. 325 read with sec. 34. That charge includes the charge under sec. 323, and notwithstanding the finding of acquittal under sec. 325, we can, on the whole case being open to us on the charges originally framed, convict and punish any of these Appellants on any fact which may be found against him under sec. 323. What they have been acquitted of is causing fracture to the skull of Bariar, but they have not been acquitted of causing simple hurt in a cruel and unnecessary manner after the deceased had fallen and was incapable of rising. For this we think they deserve a severe punishment; and while we are obliged to set aside the conviction and sentence under sec. 147 as being illegal, we think that it is within our power and also distinctly our duty to convict the Appellants under sec. 323.

We accordingly direct that the Appellants, Kunja Bhuniya and Panchu Bhuniya, be rigorously imprisoned for one year under sec. 323, I. P. C.

With this modification the appeals are dismissed.

B. C.

[CRIMINAL REFERENCE.]

No. 6 OF 1912.

AND APPEAL NO. 118 OF 1912.

HOLMWOOD, J. SHARFUDDIN, J. 1912, 13, March.	PIKA BEWA, Accused, *v.* THE EMPEROR.

Indian Penal Code (XLV of 1860), secs. 304A and 302—Rash and negligent act, what is—Accused's statement, how far Court would rely upon.

When the accused's own statement is to be relied upon, it must be taken as a whole; and nothing can be read into it which is not found within the four walls of the statement.

When a person commits an offence intentionally, but consequences beyond his immediate purposes result, the result is not to be attributed to mere rashness; if knowledge could not be imputed still the wilful offence does not take the character of rashness because its consequences have been unfortunate, but acts probably or possibly involving danger to others which in themselves are not offences may be offences within the meaning of sec. 304A, I. P. C., and kindred sections, if done without due care to guard against dangerous consequences.

IN RE NIDAMURTI NAGA BHUSHANAM (1) and EMPRESS *v.* KETABDI MUNDAL (2) *followed.*

Where the accused at the instigation of her paramour obtained some powder the quality of which she did not know and mixed it with some curry which she knew would be eaten by her husband and others with whom she was on unfriendly terms while she and her children did not eat that curry.

(1) 7 M. H. C. R. 119 (1872).
(2) I. L. R. 4 Cal. 764 (1879).

PIKA BEWA *v.* THE EMPEROR.

Held—*That she was guilty of a rash and negligent act within the meaning of sec. 304A, I. P. C., and if she had known that the substance she was administering was a poisonous substance that would have made a specific offence and in that case sec. 304A would not apply.*

This was a Reference under sec. 374, Cr. P. C., made by Mr. L. C. Adami, Sessions Judge of Cuttack, on the 15th of February 1912, for confirmation of the sentence of death passed upon the accused by him on the 12 h of February 1912.

The facts material to the report appear from the judgment.

Babus Jyotish Chandra Hazra and *Debendra Nath Kumar* for the Accused.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is an Appeal and Reference from the judgment and sentence of the learned Sessions Judge of Cuttack who agreeing with one assessor and differing from the other has found the accused Pika Bewa guilty of murdering her husband and mother-in-law by aconite poisoning and sentenced her to be hanged by the neck till she is dead.

In the first place with regard to the Reference on the capital sentence it is clear that such sentence cannot be carried out inasmuch as there is doubt whether the accused person is or is not pregnant. But in the view which we take of the case this will become immaterial. It is proved to our satisfaction that these two persons died of aconite poisoning and that another man Dasu the younger brother of the accused's husband very nearly met his death but was apparently saved by the decoction of various local simples which was given to him first of all by a beggar and subsequently by a sorcerer or charmer. We would observe that it would have been most important to examine these persons more carefully as to their knowledge of simple poisons like aconite and opium and the drugs that they are in the habit of using as antidotes to those poisons, when the antidote of irritant poisons would necessarily be something of a very opposite character to the antidote in the case of narcotic poisoning ; and it does not appear that when these persons were summoned they knew anything more than that the deceased was suffering from symptoms of poisoning, and they say they took the drugs with them. While we are on the subject of defective investigation in this case we may mention that Bhai Behari's wife was a most important witness who certainly ought to have been examined. There are many other points which ought to have been cleared up so as to leave it without doubt that this woman had knowledge that what the Sonthal and Maguni are alleged to have given her was an irritant poison. Now the only evidence as to this is Pika's own statement to two villagers whom the Judge and one of the assessors appears to us to have rightly believed, the witness Amroo, P. W. 9 and witness Hari Saha, P. W. 10 ; they are also corroborated by witness No. 11, Udoy Narain Singh, who says that the accused identified one Kuanaria Manjhi as the person who had given her medicine ; Kuanaria at first denied giving the accused anything, but afterwards admitted it.

Now it is in evidence that the accused returned to her home on the night of the 15th November and the murder took place in the evening of the 16th. On the morning of the 16th there is evidence

THE

Calcutta Weekly Notes.

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NOTES.

High Court Notice.

ORIGINAL SIDE.

The undermentioned principal officers will be on duty during the vacation.

Applications for special appointments for the hearing of urgent Chamber applications between the 21st and 30th September should be made in writing to the Master Mr. N. Chatterjee, No. 9, Middleton Street, and from the 1st to 13th October to the Registrar Mr. J. H. Hechle, No. 2, Little Russell Street.

The Hon'ble Mr. Justice Chitty will hear applications of a strictly urgent nature, other than Chamber applications on Tuesday the 10th September and on Tuesday the 17th September, and thereafter will only sit by appointment, applications for which should be made in writing to the undermentioned officers:—

From 6th to 20th September.
MR. S. N. ROY,
Lilooah.

From 21st to 30th September.
MR. G. RYPER,
105, Park Street.

From 1st to 10th October.
BABU G. C. DAS,
13, Duff Street.

From 11th to 19th October.
Babu S. M. ROY,
66, Pathuriaghata Street.

From 20th October to 9th November.
MR. M. REMFRY,
1, Ballygunge Park.

From 10th November to end of vacation.
MR. S. C. MITTER,
91, Karaya Road, Ballygunge.

By order,
J. C. HECHLE,
Registrar.

HIGH COURT, O. S.;
The 6th September 1912.

ON THURSDAY LAST MR. JUSTICE MOOKERJEE delivered judgment in the case of ***Rajendra Narain Singh*** which was referred to him owing to a difference of opinion between Mr. Justice Carnduff and Mr. Justice Imam. Mr. Justice Mookerjee has agreed with the latter in quashing the proceedings under sec. 110 Cr. P. Code instituted against the Petitioner. The judgment raises some very important issues which we shall discuss hereafter.

WE ARE GLAD THAT THE GOVERNMENT HAS AT last withdrawn the Delegation Bill. As we stated at the time when the Bill was introduced, it was unsound in principle and impossible in practice. That is exactly what the Hon'ble the Home Member said they have now found out at the discussion in the committee. We are glad that Sir Reginald Craddock has promised to bring in a complete bill with full schedules for carrying into effect the principle of decentralisation. The work will necessarily involve serious labour and strain on the Secretariat but the Hon'ble the Home Member thinks, quite rightly, that that trouble has to be taken if the thing is to be properly done. We also expressed the same view when the Bill was first introduced.

WE ENTIRELY ENDORSE THE VIEW EXPRESSED IN the public press that the Despatch of the Government of India on the ***Hoti Mardan Khan's*** case goes considerably beyond its legitimate sphere of defending the Chief Commissioner of the N. W. Frontier Province against some suggestions made by some members of Parliament regarding him in connection with the case. If the explanation offered by the Government of India on behalf of Sir George Roos-Keppel had been confined to the refutation of the charge that the refusal of the Khan to subscribe to the Islamia College had anything to do with his arrest and the criminal proceedings instituted against him and to showing that the uncomplimentary and defamatory illustrations concerning the Khan in the gallant officer's Pushtu grammar were after all mere accidents, we would not have taken any exception to the Despatch. But we are entirely at one with our non-legal contemporaries that the Despatch of the Government of India

in so far as it revises the judgment and findings of Mr. Justice Davar in the *Khan's* case, marks a most dangerous departure from the constitutional and wholesome practice followed by all responsible governments of accepting the judicial findings of the highest Court in the country as final.

WE ARE SINCERELY SORRY THAT THE GOVERNMENT of Lord Hardinge should have committed such an obvious and serious blunder. The demand for a more thorough separation of executive and judicial functions in the Indian administration has been for at least the last quarter of a century in the forefront of public questions in India. So far as we can judge from the trend of public opinion in India, this administrative reform would in the near future be pressed on the Government of India by the whole of the educated community in India as of the very first and most paramount importance. We are all the more sorry, therefore, that His Excellency the Governor-General in Council should have taken this occasion of sitting in judgment over the findings of a High Court Judge in respect of a case judicially determined before him.

THE GOVERNMENT OF INDIA HAS NO DOUBT done its duty in placing facts before the public which thoroughly discredit the suggestion that an officer of the position and responsibility of Sir George Roos-Keppel was at the root of the arrest and the criminal proceedings against the Khan because the Khan had refused to pay any subscription to the Islamia College. But we think the Government of India has been very ill-advised in entering upon a defence of the Punjab Police or the Punjab subordinate executive in connection with the Khan's case. When their acts and conduct were called into question before the Bombay High Court, it was for them to place before the Court every fact to establish the legality or regularity of their acts which had been called into question. The Court was thoroughly justified in drawing its own conclusions in these respects from the materials before it. After that it is neither decorous nor proper for the Government of India to step forward and enter upon a defence of the acts and conduct of the officers concerned which had been considered and adjudicated upon at a judicial trial. The Government of India have not only departed from its duty in not accepting such findings as final, but gone out of their way in reviewing the evidence and even interpreting the sections of the Code of Criminal Procedure and the Penal Code which they are not authorised to do.

THEY HAVE IN DOING ALL THIS ARROGATED TO themselves the functions of the Executive, the Legislator, the Judge, the Jury and the Appellate and Revisional Court all rolled into one. It is no wonder that this unprecedented attempt on their part to transgress the limits of their constitutional powers and to encroach upon judicial functions has met with almost universal public condemnation. The wonder is that it did not strike any member of the Government of India that it could not be otherwise. We only express public opinion when we say that quite apart from the impropriety of the course adopted by the Government of India, the case sought to be made out by them against the Khan, or in defence of his arrest, refusal of bail and his detention in prison, has not carried conviction with anybody and has singularly failed in its object. The Khan may or may not be a man of estimable character, but the question is whether without any substantial criminal charge against him, which even the Despatch with all its fantastic interpretation of the law fails to make out, he should have been treated by the executive and the police in the manner he was. The public would in this matter adhere to the opinion expressed by the judge in preference to that put forward by the Government of India.

WE ALSO REGRET TO NOTICE THAT THE GOVERNMENT of India is no more happy in their interpretation of the law than in their review of facts. We are greatly surprised to read the grounds advanced by the Governor-General in Council in justification of the refusal of bail to the Khan. It is solemnly maintained in the Despatch that the refusal was justified inasmuch as "it is a common Indian experience that enlargement on bail is used by wealthy and powerful persons to bribe and intimidate witnesses." We have heard of grounds like this being urged by Sub-Inspectors of Police before Mofussil Magistrates, but no lawyer or Judge of any position would urge or regard this as a valid ground for refusal of bail. If this were a sound principle, it would follow that whenever a criminal charge is brought against a person of position he ought to be forthwith shut up in prison and tha every opportunity should be given to the prosecution to collect evidence and none to the accus to make his defence. If a charge happens to be spurious, no better means can be devised fo securing the conviction of an accused person o evidence which the accused would, under the cir cumstances, have little opportunity of meeting.

BUT HAPPILY THIS INDIAN POLICE-MAN'S VIEW of bail, although it has been availed of by th Government of India as a prop to an unten able position, has seldom found favour with ou judges. It has been recognised in our law Court that the purposes of bail are the same under th Indian statutes as they are in the English law

Lord Chief Justice Russel said in *Reg* v. *Rose* that "the object of bail was never punitive." This was the view of the Court of Crown Cases Reserved (Russel, L. C. J., Hawkins, Mathew, Lawrence and Wright, JJ., see 2 C. W. N. cxxxii). Their Lordships observed that "it could not be too strongly represented to Magistrates that bail was meant simply for securing the attendance of the accused." The rich and the poor are equally entitled to its benefit. The Government of India is not at all justified in supposing that if the Khan had been a man in a humbler position in life the hardships of his case would not have attracted any public attention. A perusal of our pages would show that we have always fought for the more approved principle of bail being upheld in our Courts in the interest of the common people. It is that every accused person who has a home and a habitation should be ordinarily entitled to bail.

THAT THIS SINGULAR EXCUSE FOR REFUSING BAIL to under-trial prisoners should find place in the Government of India Despatch seems all the more extraordinary when it is remembered that the approved judicial view of bail has been repeatedly embodied in the circulars of successive Home Secretaries in England (see. 2 C. W. N. cxxx) and has also sometimes been emphasised in the Administration Reports of the Local Governments in this country. For instance, it is only recently that the Madras Government in its Resolution on the Administration of Jails has, in view of the detention in custody of under-trial prisoners and the large number of acquittals, directed that "a person under trial should never be detained in custody unless it is absolutely necessary, and then the period of detention should be as short as possible." It is regrettable therefore that the Government of India should promulgate a view which is in direct contravention of principles approved by the best opinions, both judicial and executive, in England as well as in this country. The Government of India no doubt also urge in justification of the refusal of bail that the Khan might have fled across the frontier. But it is hardly reasonable to suppose that the Khan would have left his estate, property, relations and friends all behind and for good without making any attempt to defend himself against a charge of which he was honourably acquitted by a Judge of the Bombay High Court. Naturally the inference is that bail had been refused to the Khan on the other plea we have already noticed which is surely more punitive in its object than otherwise.

THE VIEW OF THE GOVERNMENT OF INDIA WITH regard to sec. 81 of the Code of Criminal Procedure which provides that persons arrested should be produced before a Court without delay is no less extraordinary. The Despatch says that the fact that the Khan was not so produced was a mere technical irregularity. But it has long since been held in our Courts that the section is imperative. It has further been held that if a police-officer does not produce an arrested person before a Court within 24 hours he is punishable under sec. 25 of the Police Act (V of 1861), see 1 W. R. Cr. 5 and 19 W. R. Cr. 36. The Governor-General and his executive colleagues may, no doubt, make laws with the aid of the Legislative Council, but the Governor-General in Council has no authority to interpret such laws. Our law Courts have always censured any attempt on the part of any local executive to interpret the law in its executive capacity by circular or otherwise as it is calculated to mislead the subordinate judiciary. Surely what is reprehensible in the local or the subordinate executive officers cannot be commendable in the highest executive in the land. It is also no less objectionable for the Government of India to assume in this Despatch the functions of a Judge, Jury and an Appellate Court, and observe with regard to the findings of fact that "the Governor-General in Council could not but consider that the Hon'ble Judge had seriously misapprehended the significance of the act alleged" and then proceed to interpret the Indian Penal Code in their own way. They do not even hesitate to accuse the Khan of a criminal offence even after he has been honourably acquitted by a High Court Judge.

PROSPECTS OF MEMBERS OF EXECUTIVE AND JUDICIAL BRANCHES OF THE PROVINCIAL CIVIL SERVICE.

A member of the Provincial Judicial Service has submitted to us a table showing the comparative pay and prospects of the two branches of the Provincial Civil Service. From this table our correspondent draws certain conclusions which as also the table we publish below *in extenso.* We do not in any way commit ourselves to his conclusions but set out both his premises and conclusions as they are. The writer submits at the outset some explanatory notes to his tables and conclusions.

(*a*) It should be borne in mind that the Munsifs have had to officiate for 2 to 3 years before the date of confirmation from which the computation is made.

(*b*) In computing the age and period of service only the years have been taken into consideration and not months and dates.

(*c*) Only the cases of those who were appointed Deputy Magistrates at once have been taken up for comparison.

(*d*) The tables have been compiled from the Civil List corrected up to 1st April 1912, and the history of services of the Gazetted Officers.

The following conclusions are apparent from the annexed tables:—

1. In the most favourable circumstances a Deputy Magistrate may expect a lift to the Rs. 400 grade even at the age of 27, while a Munsif cannot expect it before his 39th year.

2. On the average a Deputy Magistrate is promoted to the Rs 400 grade in his 34th year, but a Munsif cannot expect it before he is 44 years old.

3. In the most favourable circumstances a Deputy Magistrate gets Rs. 300 at the age of 25 while a Munsif cannot expect it before 33

4. Generally a Deputy Magistrate attains the Rs. 300 grade at the age of 27, while the majority of the Munsifs reach the same grade at 36.

5. A Deputy Magistrate can reach the Rs. 400 grade even after 6 years' service, while a Munsif cannot think of it before 10 years' service.

6. The bulk of the Deputy Magistrates get Rs. 300 after 4 years' service, but the Munsifs cannot attain this grade before 6 years.

7. The period of service in the higher grades of the Judicial Branch constitutes but an inconsiderable part of the total length of service. The prospects have been made worse by the recent division of the cadre between the two Provinces. At present there are 43 Sub-Judges and 246 Munsifs in Bengal, the ratio being 1:5-8. A Munsif can, therefore, enjoy the higher grades for only 1/7th of the total length of his service The average length of his service being taken to be 24 years, the period of service as Sub-Judge can not exceed 4 years.

8. Taking the educational qualification of the members of the two branches into consideration, it appears that while there are so many as 57 under-graduates in the Executive Branch (that is, more than 1/6th of the total strength), the Judicial Branch consists entirely of B. L's. and Bars-at-Law (with only one exception).

In ventilating the grievances of the Judicial Service it is by no means intended to suggest that the Executive Service, as at present constituted, is in all respects an ideal one, or, that there is no room for improvement therein. Both the branches of the service are at present smarting under real grievances, but it will be readily conceded that the Judicial Branch is now placed at a greater disadvantage. All that is needed is that the two branches should be placed, at all events, on a footing of equality in the matter of total earnings.

Tables showing the comparative prospects of the two branches of the Provincial Civil Service. Compiled from the Civil List corrected up to 1st April 1912 and history of services of Gazetted Officers.

Executive Branch.		Judicial Branch.	
Number of officers.	Age of attaining grades.	Number of officers.	Age of attaining grades.
		Rs. 1,000	grade
		1	54
		1	55
		1	56
Rs. 800	grade	Rs. 800	grade
2	51	2	52
1	54	8	53
1	55	5	54
1	57	1	55
Rs. 700	grade		
2	47		
1	51		
Rs. 600	grade	Rs. 600	grade
1	40	1	44
8	44	4	48
1	45	5	49
1	46	12	50
4	47	9	51
4	48	4	52
1	49	1	54
Rs. 500	grade	Rs. 500	grade
1	35	5	48
2	37	4	49
6	38	1	50
7	39		
5	40		
3	41		
3	24		
2	43		
2	46		
1	47		
Rs. 400	grade	Rs. 400	grade
1	27	1	39
1	28	5	41
2	30	11	42
1	31	19	43
7	32	20	44
2	33	19	45
6	34	1	46
2	35	1	47
4	36		
1	38		
1	40		
Rs. 300	grade	Rs. 300	grade
2	25	2	33
1	26	10	34
5	27	20	35
2	28	28	36
2	30	18	37
1	31	2	38
1	38		

Table No. II.

Executive Branch.		Judicial Branch.	
Number of officers.	Period of service of attaining grades	Number of officers.	Period of service of attaining grades.
Rs. 400	grade	Rs. 400	grade
8	6 years	None	within 9 years
11	7 "	5	" 10 "
12	8 "	34	" 11 "
6	9 "	28	" 12 "
5	10 "	15	" 13 "
8	11 "		
7	12 "		
7	13 "		
Rs. 300	grade	Rs. 300	grade
43	4 "	None	within 4 years
21	5 "	4	" 5 "
4	6 "	61	" 6 "
		20	" 7 "
		3	" 8 "

Review.

THE LAW OF EVIDENCE, as administered in British India. *By Mahim Chandra Sarkar, Rai Bahadur, assisted by Subodh Chandra Sarkar, B. L., Pleader. M. C. Sarkar & Sons, Law Publishers and Book-sellers, 75, Harrison Road, Calcutta. 1912. Price Rs. 9.*

This book bears ample testimony to the fact that the commentator of the Civil Procedure Code has been turning the leisure afforded by retirement from judicial service into very good account. The book is not a mere collection of case-notes. The author has studied the cases as also the standard text-books of which mention need only be made of Taylor, Markby, Woodroffe, Norton, Cunningham and Best, and every sentence in his notes seems to have been duly weighed before being put into its present shape. The result is a well-ordered commentary on every point that may possibly arise upon the interpretation and application of each section of the Act. English cases are freely cited when they are calculated to elucidate the text of the Act. It need hardly be added that the book is thoroughly up-to-date. It does in the truest sense of the term furnish a *vade mecum* of the law of evidence to practitioners in this country, for not only does it put within easy reach the cases bearing on any point, and the observations of text-book writers of repute, but it gives, besides, in a series of appendices, valuable hints culled from standard writers, relating to the examination and cross-examination of witnesses and the appreciation of evidence, the speeches and reports of Sir James Stephen in connection with the passing of the Act and other miscellaneous informations to which detailed reference seems unnecessary. Considering the amount of labour spent on the work and the variety and quality of the matter presented, the price of the work seems quite moderate. Its printing, binding and the general get up also deserve praise.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL. *In re Hart—Green* v. *Hart and Lomas.* Before THE MASTER OF THE ROLLS AND LORDS JUSTICES BUCKLEY AND KENNEDY. 18th June 1912.

Voluntary gift of shares—Donor's subsequent bankruptcy—Shares sold by donee for value without knowledge—Is the trustee in bankruptcy entitled to the shares?

This was an Appeal from a decision of PHILLIMORE, J.

On October 14, 1909, Hart, the bankrupt, executed a voluntary transfer of certain shares to his daughter, who on April 13, 1910, sold the same for value to Miss Lomas. On March 31, 1910, Hart had committed an act of bankruptcy by non-compliance with a bankruptcy notice. On April 14 a petition was presented against him, on April 22 a receiving order was made, and on May 13 he was adjudicated bankrupt. It was admitted that at the date of the purchase Miss Lomas had no knowledge of any act of bankruptcy by Hart, but the trustee in bankruptcy claimed under sec. 47 (1) of the Bankruptcy Act, 1883, to have the transfer to her set aside.

The Court below held in favour of the trustee. Hence this Appeal which was allowed. The Master of the Rolls in the course of his judgment said:—It was held by Mr. Justice Vaughan Williams in the case of *Re Brall* 1893, 2 K. B, 381, that when the statute says that a voluntary settlement is "void against the trustee in bankruptcy" the word "void" must be construed as meaning "voidable" and not absolutely void. He points out that in all earlier bankruptcy statutes dealing with this subject-matter the settlement was made voidable by the Court though neither the word "void" nor "voidable" was used, and he concludes that the object of the Legislature had remained unchanged and that the purpose of the alteration was merely convenience of drafting. He added that the moment it is assumed that a settlement is not void *ab initio* those authorities apply which decide under 27 Elizabeth, c. 4, that a purchase for valuable consideration from a person making a title under a voluntary conveyance relates back so as to prevent the original conveyance being a voluntary conveyance within the meaning of the Act. So far as I am aware *Re Brall* has never been questioned, and it was expressly approved by the Court of Appeal in *Re Carter* and *Kenderdine's Contract*, 1897, 1 Ch., 776. It has also been held that sec. 47 does not vest the property comprised in the voluntary settlement in the trustee—*Sanginetti* v. *Stuchey's Banking Company* (1895, 1 Ch., 176).

In the present case the shares are vested in Flora Lomas, and Mr. Justice Phillimore has ordered her to transfer them to the trustee. In my opinion the true view is that a voluntary settlement is not void, but is only voidable by the trustee, who must apply to the Court for a declaration to that effect and for consequential relief. It seems to me to follow that the trustee is in the same position as any other litigant who seeks a declaration that a deed is voidable whether on the ground of fraud or undue influence or otherwise. It is settled law that, however good a claim might be as against the grantee, the Plaintiff cannot succeed if there has been any subsequent transaction for value and without notice. On April 13 who was the owner of the shares? Only one answer is possible. Flora

Lomas, who acquired them from the registered owner. The property was of such a nature that no investigation of the title of the transferor was possible, and it would be almost shocking to deprive her of the property she acquired in good faith.

I think I am entitled to do what Lord Justice Lindley did in *Re Carter*, viz., "to consider what the consequences would be if the other conclusion were arrived at." No purchaser of shares on the Stock Exchange would be safe if Flora Lomas is to be deprived of her shares. If I may adopt the words of Lord Justice Lindley, "to my mind good sense is shocked by such a startling conclusion as that." The Court of Bankruptcy has always been regarded as a Court of Equity. The Courts of Equity have for centuries refused to grant relief against a purchaser for value without notice in whom, or in a trustee for whom a legal title is vested. A good illustration of this is found in *Wilkes* v. *Bodington* (2 Vern., 599). In my opinion it is strictly in accordance with established principles to hold that the shares cannot be claimed by the trustee against Flora Lomas.

Mr. Hansell for the Appellant.

Messrs. Atkin and Mellor for the Trustee.

B. D. *Appeal allowed.*

COURT OF APPEAL.—*Irwin* v. *Waterloo Taxi-cab Coy., Ld.* Before LORDS JUSTICES VAUGHAN WILLIAMS, MOULTON AND BUCKLEY. 25th JULY 1912.

Master's liability for a servant's tort—The doctrine of holding out considered—Servant driving under manager's direction on manager's business —Master if liable.

This was an application by way of appeal in an action tried before PICKFORD, J. Black, the manager of a yard in which taxi-cabs were let out on hire, acting not in the interest or for the benefit of his masters, the proprietors of the yard who were the Defendants in the action, ordered one Bird, a driver whose duty it was to obey Black's orders in respect of driving the taxi-cabs, to drive him to some destination for his (Black's) personal pleasure or convenience, to effect some purpose of his own. Bird carried out this order and drove Black in a taxi-cab to the named destination. In the course of that drive the accident in respect of which the action was brought occurred.

Bird had no knowledge that the order which Black gave him was an order which Black had no right to give.

The Defendants pleaded that the driver was at the time not acting within the scope of his employment. The Court below passed judgment in favour of the Plaintiff for £350. Hence this appeal which was dismissed. In the course of his judgment LORD JUSTICE VAUGHAN WILLIAMS said:

There could be no doubt that Black was not in this transaction acting as his masters' servant. *Primâ facie*, therefore, apart from any duty of the driver to his masters to obey Black's orders, the Defendant company would not be liable to the Plaintiff for the accident occurring to the Plaintiff during the drive through the carelessness of the driver acting under the orders of Black. Did it make any difference that Bird as the servant of the company was bound to obey the orders of Black? Could the Plaintiff, a stranger, say "Bird obeyed Black's orders because it was as their, the company's, servant that he came under the obligation to obey Black?"

This was not a case in which the Plaintiff could say—You, the Defendants, had by previous practice held out Bird as your servant. It was not like the case of a master who had held out Bird as acting for him. Bird was never held out to the Plaintiff in any capacity. The case of the Plaintiff must be—Bird in driving was in fact acting as your, the Defendants', servant; you told him in respect of his duties as your servant in the taxi-yard to obey as his orders all the directions of Black.

His Lordship thought that any defence which was founded on Bird not being a servant of the Defendant company failed. As to the defence founded upon the car not being at the disposal of the Defendant company because it was at the time of the accident by agreement appropriated exclusively to the use of one Graham Harding, and specially fitted for him, his Lordship did not think this afforded a defence. The servant of the Defendant company by a direction conveyed to him by the manager whose directions it was his, Bird's, duty to the Defendants to carry out, did drive this car on the day the accident occurred. His Lordship did not think that prevented Bird, in driving, being a servant of the Defendant company, since Bird drove in pursuance of the direction of Black, whose direction he, Bird, was by his duty to the Defendants bound to carry out, unless there was something about the direction of Black which would make a reasonable man doubt the authority which was not the case here.

Messrs. Shortt, K. C., and Gibbons for the Appellant.

Messrs. Salter, K. C., and Davis for the Respondents.

B. D. *Appeal dismissed.*

KING'S BENCH DIVISION. *Exparte Stallmann.* Before the LORD CHIEF JUSTICE OF ENGLAND AND JUSTICES DARLING AND PHILLIMORE. 25th July 1912.

Habeas Corpus Act, 1697, sec. 5—Extradition

proceedings—Effect of decision of the Calcutta High Court—Release in previous habeas corpus *proceeding for an error of procedure, if bars fresh proceeding on same charge.*

This was a rule *nisi* for a writ of *habeas corpus* to obtain the release of Rudolph Stallmann who had been committed to prison for the purpose of being extradited to Germany. Similar proceedings were taken in India and the judgment of the Calcutta High Court is reported in 15 C. W. N. 1053.

The rule was obtained on five grounds:—

(1) on the ground that Stallmann was arrested on the same charge as that for which he had been discharged at Calcutta; (2) *autrefois acquit*; (3) Articles IV and XV of the Extradition Treaty with Germany of 1872; (4) no *primâ facie* case; (5) evidence had been admitted which was inadmissible.

The plea of *autrefois acquit* was not pressed. On the evidence the Court found that a *primâ facie* case had been established. On the remaining points the LORD CHIEF JUSTICE in the course of his judgment observed—

On October 25th, 1910, a request was made by the German Government in this country for the extradition of Stallmann. Between October 25th, 1910, and March, 1912, Stallmann was in India. An application was made for his extradition from India to Germany. His Lordship said he did not draw any distinction between proceedings for *habeas corpus* and the proceedings which actually took place in India. Under the Indian law the prisoner was entitled to call evidence on his behalf. The Magistrate, however, did not give him that opportunity. When the case was taken before the High Court at Calcutta the Court held that though in the charge against him with reference to Von Dippe a *primâ facie* case had been made out, yet the accused was entitled to be discharged, as he had not had the opportunity of calling evidence. When proceedings were taken against Stallmann in England it was suggested that as he had been discharged in India he could not be recommitted in England on the same charge. That argument was based upon sec. 5 of the Habeas Corpus Act, 1697, which provided:—"And for the prevention of unjust vexation by reiterated commitments for the same offence, be it enacted by the authority aforesaid or set at large that no person or persons which shall be delivered upon any *habeas corpus* shall at any time hereafter be again imprisoned or committed for the same offence by any person or persons whatsoever other than by the legal order and process of such Court wherein he or they shall be bound by recognizance to appear or other Court having jurisdiction of the cause."

It was quite impossible, as well as unnecessary, for him to deal with all the questions which might arise under that section. That section was intended to meet the case when a person had been released on bail and to prevent him from being re-arrested while on bail on the same charge. But it was impossible to suggest that where a person had been released owing to an error in the proceedings that that section prevented a competent Court from ordering that he should be again committed on the same charge. It was said that the contrary was laid down in the case of *Attorney-General of Hongkong* v. *Kwok-a-Sing* (L. R., 5 P. C., 179), but the judgment in that case showed that the Court was referring to a case where there had been a trial on the merits on the first occasion. Therefore, the fact that Stallmann had been released in India owing to an error in the proceedings was no answer to other proceedings in this country upon the same charge.

The Attorney-General (*Sir Rufus Isaacs, K. C.*), *The Solicitor-General* (*Sir John Simon, K. C.*), *Mr. Rowlatt* and *Mr. Bodkin* showed cause.

Messrs. Danckwerts, K. C., Elliot, K. C., Bennet and Hutchinson in support of the Rule.

B. D. *Rule discharged.*

PRIVY COUNCIL.

[ON APPEAL FROM ONTARIO.]

THE LORD CHANCELLOR LORD MACNAGHTEN. LORD ATKINSON. SIR CHARLES FITZPATRICK. 1912, 30th July.	THE BARNARD ARGUE ROTH STEARNS OIL & GAS COY., LD., and others, *v.* FARQUHARSON.

Meaning of "minerals"—Is natural gas a mineral?

This was an Appeal from a judgment of the Court of Appeal for Ontario. The Canada Company in 1867 granted to Mr. Farquharson the fee-simple of 100 acres at Tilbury, in the Province of Ontario. The deed contained an excepting clause in the following terms:—"Excepting and reserving to the company, their successors and assigns, all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress, egress, and regress to and for the said company, their successors, lessees, licensees, and assigns, in order to search for, work, win, and carry away the same, and for those purposes to make and use all needful roads and other works, doing no other unnecessary damage, and making reasonable compensation for all damage actually occasioned."

The sole question for decision was what was the true construction of this clause? Did it or did it not except from the grant the natural gas which impregnated certain underlying strata of these lands?

In the course of their Lordships' judgment which was delivered by LORD ATKINSON they said:

The case did not require that their Lordships should lay down a definition of minerals, nor even draw the line between what were and what were not minerals; the only question for decision was what, having regard to the time at which that instrument was executed, and the circumstances then existing, the parties intended to express by the language they had used, or, in other words, what was their intention touching the substances to be excepted as revealed by that language.

In one sense natural gas is, as rock oil also is, a mineral, in that it is neither an animal nor a vegetable product, and all substances to be found on, in, or under the earth must be included in one or other of the three categories of animal, vegetable, or mineral substance. It is obvious, however, for several reasons, that in this clause of the grant the word "minerals" is not used in this wide and general sense. *First*, because two substances are expressly mentioned in the clause which would be certainly covered by the word "minerals" used in its widest sense—namely, "metals," and "springs of oil in or under the lands;" *secondly*, because the words "all mines and quarries of metals and minerals," coupled with the words "search for, work, win, and carry away the same," do not seem to be applicable to a thing of the nature of this gas, obtainable in the way it is obtained; *thirdly*, because of the nature of the relation which exists between this gas and "rock oil, or the springs of oil in or under the ground," excepted in the grant of the function which the gas performs in winning, working, or obtaining the oil from these springs; and, *fourthly*, because of the state of knowledge at the date of this deed and the way in which gas of this kind was then regarded and treated.

As Lord Watson said in *The Lord Provost and Magistrates of Glasgow* v. *Farie* (13 A.C., 657, 675), "the words 'mines' and 'minerals' are not definite terms, they are susceptible of limitation or expansion according to the intention with which they are used." It is clearly established by the evidence that this gas is not volatilized rock oil, nor rock oil condensed natural gas. The gas is not an exhalation of the oil, nor is it held in solution by the oil to any considerable extent. The gas and the oil are in their chemical composition no doubt both hydro-carbons, but they are distinct and different products, and it therefore could not be contended successfully, their Lordships think, that the words "springs of oil" cover this natural gas, simply because both are found in some cases to impregnate the same subterranean porous stratum, and that when this stratum is tapped by a pipe or boring leading to the surface the gas in its escape to the upper air helps to bring up to the surface with it some of the oil. In some instances a stratum almost entirely impregnated with gas is found separated by a stratum impervious to both gas and oil from a stratum almost entirely impregnated with oil. Both the impregnated strata are then tapped by separate pipes so arranged that the gas performs the same function as in the other case, bringing, or helping to bring, oil to the surface; but in both cases, when the pressure under which the gas is pent up in the earth is relieved, a pump has to be used to pump up the oil.

Sir R. Finlay, K. C., and *Messrs. Hellmuth, K. C., and Rowlatt* for the Appellants.

Messrs. Danckwerts, K. C., and MacInnes, K. C., for the Respondent.

B. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CHITTY and IMAM, JJ. APPEALS FROM APPELLATE DECREES NOS. 169 AND 195 OF 1912. MOHUNT MADHUSUDAN DAS, Appellant *v.* MAHARAJA JAGADINDRA NATH ROY OF NATORE and another, Respondents. Heard, 28th August. Judgment, 2nd September 1912.

Administration of trust property—Sec. 37 of the Probate and Administration Act (V of 1881).

One Raghunath Das died having previously obtained a declaration that he was the Mohunt of a certain *akhra*. He died leaving, it is alleged, a Will whereby he appointed a certain minor as his chela and made the Appellant executor to the said alleged Will. Madhusudan applied for Probate and Letters of Administration in the alternative before the District Judge of Murshidabad. The application was refused on the ground that the property being *debutter* property, the document is not a Will under the Probate and Administration Act. He relied on *Mohunt Jib Lal Gir*, 2 C. W. N. cccxi, since reported in 16 C. W. N. 798.

Petitioner appealed to the High Court:

Held—That the document is not a Will under the Act and neither Probate nor Letters of Administration can be granted in respect thereof. 16 C. W. N. 798 followed.

Babus Umakali Mukherjee, Golap Chandra Sarkar and *Rishendra Nath Sarkar* for the Appellant.

Dr. Rash Behary Ghose, Babus Dwarka Nath Chuckerbutty, Mohendra Nath Roy, Jotindra Nath Lahiri, Rama Kant Bhattacharjee and *Krishna Kamal Maitra* for the Respondents.

R. K. B. *Appeal dismissed without costs.*

PIKA BEWA *v.* THE EMPEROR.

to show that she went to visit Maguni and in the afternoon of the 16th Maguni came to her husband's house, and from the evidence of Dasu, witness No. 3 for the prosecution, it would appear that notwithstanding the known intrigue between Maguni and Pika, Maguni was on visiting terms with the whole family. We can have no doubt that whatever poison was administered to the deceased was administered through the instrumentality of Maguni and some Sonthal whom he got hold of to supply the poison. The woman's own statement is that she did not know that it was poison; she thought it was some charm to procure the love of her husband and her mother-in-law who had been treating her badly. This statement may not seem to be very credible, but it is all the evidence we have; and when the accused's own statement is to be relied upon it must be taken as a whole, and nothing can be read into it which is not found within the four walls of the statement. We must therefore as far as this woman's guilt is concerned accept her statement that she at the instigation of Maguni obtained some powder, the character of which she was ignorant of and mixed it with pumpkin curry which she knew would be eaten by her husband, her mother-in-law and her husband's brother Dasu with whom she also appears to have been on unfriendly terms. The fact that she herself only ate plain rice and gave her child only plain rice is a very suspicious circumstance against her. She must therefore at any rate have been aware that she was committing something dangerous in administering some drug which had been given to her by a man whose relations with her made him an enemy of her husband; and this we think is undoubtedly a rash and negligent act within the meaning of sec. 304A. If she had known that the substance she was administering was an unlawful substance, that is to say, poisonous substance, that would have made a specific offence, and in that case sec. 304A would not apply. If a man intentionally commits any offence and consequences beyond his immediate purposes result, the result is not to be attributed to mere rashness; if knowledge could not be imputed still the wilful offence does not take the character of rashness because its consequences have been unfortunate; but acts probably or possibly involving danger to others which in themselves are not offences may be offences within the meaning of sec. 304A and kindred sections, if done without due care to guard against dangerous consequences; and this was the view which was taken by the Madras High Court in *In re Nidamurti Naga Bhushanam* (1), which was approved by this Court in the case of *Empress* v. *Ketabdi Mundal* (2)

Now the mere administering of a love-potion or drug which a person thinks might be beneficial is not in itself an offence; but when it is supposed to have effect upon persons with whom the paramour of the accused had enmity, and when she administers it without due care and caution or any enquiry as to what it really is, her act certainly falls within sec. 304A.

We think that the conviction under sec. 302 cannot be allowed to stand as the accused is entitled to the benefit of the doubt which we have already adverted to. But we think that she is certainly guilty under sec. 304A. We think that it was shown that she is a woman of abandoned character and richly deserves

(1) 7 M. H. C. R. 119 (1872).
(2) I. L. R. 4 Cal 764 (1879).

PIKA BEWA *v.* THE EMPEROR.

a more severe punishment than we are able to give her under that section. We therefore direct that she be rigorously imprisoned for two years under sec. 304A, which is the maximum sentence which the law allows under that section. The conviction and sentence under sec. 302 are set aside.

B. C.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1912,
Heard, 12, 13, 14 & 18, June.
Judgment, 18, July.

SHRIMANT RAJE BAHADUR RAGHOJIRAO SAHEB, Appellant,
v.
SHRIMANT RAJE LAKSHMANRAO SAHEB, Respondent.

Sanad, *informal and ambiguous—Construction*—Contemporanea expositio—*Evidence of construction placed by Government since the date of grant if admissible*—Jaghir, *impartibility of, ground of—Custom of primogeniture if may attach to grant of* jaghir—Inam *and* saranjam, *distinction in meaning.*

Contemporanea expositio *as a guide to the interpretation of documents is often accompanied with danger and great care must be taken in its application.*

Where the question was as to the extent of properties, granted as an appanage to the title of Raja conferred on the grantee by a Government sanad *and described therein as "lands attached to Deur," a village in the District of Satara in the Bombay Presidency, and the literal construction confining the grant to the single village mentioned was adopted by neither party, but whilst one party sought to confine it to the properties within the Satara District which would be worth about Rs. 3,000 per annum, the other contended that it covered all the properties within the Bombay Presidency, which yielded a total revenue of Rs. 12,000 a year,*

Held—*That the* sanad *being a document of a general and informal character and admittedly capable of a variety of constructions, the ambiguity covering the geographical as well as the pecuniary extent of the grant, it was legitimate to consider what was the footing upon which the grantors* viz., *the Government and its successors and officials, from the date of the grant and for a long period of time proceeded.*

Held—*That the grant included all the properties in the Bombay Presidency, and the whole of those properties were impartible as an appanage to the title of Raja.*

Grants of jaghir *are personal and not heritable. Being personal and temporary they are necessarily impartible. A custom of succession by primogeniture alleged in respect of a* jaghir *would not be a subject for proof because such a custom would be radically inconsistent with the personal and non transmissive character of a grant in* jaghir.

Held—*That the distinction between* saranjam *and* inam *drawn by the High Court confining the term* saranjam *to lands of Satara, was not well-founded.*

This was an Appeal from a Judgment and Decree of the High Court at Bombay, dated the 14th of November, 1907, which affirmed a Decree of the First Class Subordinate Judge of Poona, dated the 7th of December, 1904.

The main question for determination in the present Appeal was the partibility of certain property consisting of villages, lands, etc., in the districts of Poona, Ahmednagar and Sholapur in the Presidency of Bombay.

The circumstances out of which the Appeal arose may be stated as follows :—

The Respondent and the Appellant are half brothers, and the only surviving male representatives of the Nagpur Branch of the "Bhonsle" family.

It appears that in 1853, Raghoji III, the last ruling Prince of Nagpur died, leaving him surviving four widows. The title of Raja of Nagpur then became extinct. In 1858 proceedings were taken by the Inam Commissioner under the Inam Commissions Act of 1852, and the Government, acting upon his reports, declared the whole estate to have lapsed, except in so far as a portion of it, in the districts of Poona, Ahmednagar and Sholapur, which was continued as a matter of grace to the widows until the death of the last survivor of them.

In 1855 the surviving widows of Raja Raghoji III adopted Janoji Bhonsle, the father of the Appellant and the Respondent. Subsequently the Government of India, in consideration of the loyalty of the family and the services of a female member of it named Rani Bakabai, during the Indian Mutiny, recognised or admitted the succession of Janoji, the adopted son, to "certain Wattans, etc., held by the late ruler of Nagpur in the Collectorate of Poona, Ahmednagar and Sholapur and in the Satara Territory." This measure was confirmed by the Secretary of State for India in a despatch, dated the 7th of March, 1862.

In a letter, dated the 30th of March, 1860, the Government of India also agreed to the grant of the title of "Raja of Deur" to Janoji, and to the lands of Deur near Satara being attached to it, and directed that a *Sanad* to that effect should be prepared. It is dated the 10th of October, 1861, and is quoted in their Lordships' judgment.

On the 5th of March, 1864, the Under-Secretary to the Government of India wrote in reply to an enquiry from the Government of Bombay as follows :—

"I am directed, in reply to your letter No. 4408, dated 9th December last, to inform you that His Excellency the Governor in Council of Bombay is right in supposing that all the possessions specified in the list accompanying the memorandum from Revenue Commissioner S. D. No. 3726, dated 4th November last, are to be continued hereditarily to Janoji Bhonsale and his heirs without further enquiry."

It was not now disputed that the "list" mentioned in this letter was the list drawn up by the Inam Commissioner in 1858.

Raja Janoji died on the 5th of December, 1881, leaving him surviving three widows, three daughters and two sons, the present Appellant and the Respondent. The former, the elder son, was then only nine years old. In the year 1885, the management of the property was transferred to the Court of Wards. In 1893, when the Appellant attained his majority, the whole of the estate left by Raja Janoji was handed over to him. He managed it until the year 1895, when, in August, on his plea of inability to manage his affairs, it was again placed under the management of the Court of Wards.

The Respondent claimed a share in the property situate in the Bombay Presidency which led to the present suit for partition of the estate mentioned in the Schedules annexed to the Plaint.

Upon the pleadings of the parties, several issues were raised of which the following are material :—

"(3). Is the property or any part of it liable to the rule of primogeniture either by family usage or any other ground ?

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"(5). Is the property, or any part thereof, impartible? If so, is the Plaintiff entitled to share in the profits and management thereof by reason of his being a co-parcener?

"(6). Has the property in dispute, or any part thereof, been held and continued on political tenure, and is it impartible on that ground?

"(7). Is the property mentioned in Schedule "A" or any part thereof the private property of the parties, and as such liable to partition?

"(8). Is the Plaintiff entitled to get the moiety of the property or any part thereof, and to obtain a moiety of the proceeds thereof?

"(12). Does the Defendant enjoy the title of Raja of Deur, and does the property in the Bombay Presidency go with that title"?

Oral and documentary evidence was adduced on behalf of both parties. In addition to the documents filed by him, the Plaintiff endeavoured by a petition to the Bombay Government, to obtain copies of two important documents. He was informed, however, that his request could not be complied with. The Subordinate Judge then issued a summons calling for the documents, but was told by the Under-Secretary to Government that only an inspection of the records, on certain conditions, could be allowed. Upon this the Subordinate Judge recorded his opinion that he could make no use of the contents of the documents unless copies were put on the record.

In the High Court the Plaintiff presented a Petition, in which he explained the facts, and prayed that the High Court would send for the documents from the Government records, as they were absolutely necessary for a proper decision of the questions at issue in the Appeal before the High Court.

The Court considered that the reply of the Government to the Subordinate Judge did not indicate that they relied on sec. 123 of the Evidence Act as a reason for not producing the documents, and therefore directed that a letter should be written to the Government to ascertain whether they were willing to produce them. In reply, the Government considered it inadvisable to produce the documents.

On the 7th of December, 1904, the Subordinate Judge delivered his judgment. He recorded at the outset that the Plaintiff's Counsel did not press the claim in respect of the villages in the Satara District, as he admitted that it was not cognizable by the Civil Court without the Collector's Certificate under the Pensions Act 23 of 1871, and also because that estate was shown by the evidence in the case to have been treated for a long time as an appanage of the title of Raja of Deur, which was conferred on the Defendant alone.

The Subordinate Judge gave his findings separately on each of the issues, but of these findings it is now necessary to mention only the following. On the fifth and sixth issues he held that the property in the Satara District only was impartible, and that the Plaintiff had no right to a share in the profits and management of it. On the seventh issue he decided that the whole of the property in suit, save that in the Satara District and the moveables referred to in the Plaint, was private joint property, and was liable to partition. On the eighth issue he found that the Plaintiff was entitled to get a moiety of such property and to obtain a moiety of the proceeds thereof.

The Defendant appealed to the High Court at Bombay, and on the 14th of November, 1907, two learned Judges of the High Court (Sir Lawrence Jenkins, C. J., and Knight, J.), who heard the Appeal, delivered Judgment. In the course of their Judgment, they said :—

"We may now turn to the crucial point of the case: what is the meaning of the phrase *the Deur lands* or *the lands of* or, *attached to Deur?* It is agreed on both sides that it is these lands that form the special appanage of the Rajaship, and that they must therefore be impartible; and the suit has been brought practically to ascertain whether the phrase comprises the whole of the several estates situate in the Bombay Presidency, or only that portion which lies within the Satara District. The Defendant contends for the former interpretation, the Plaintiff for the latter.

The point is virtually decided by the evidence that we have already discussed; for the *Sanad* read with the list Exhibit 437 shows that it was the Satara lands alone that were regranted as *Saranjam*, and the "Deur lands" can therefore mean nothing but the lands within that district. This indeed is the natural construction to put upon the phrase; and that it is the correct one is a matter on which the evidence to which we will now refer can leave no reasonable doubt.

The *Saranjam* detailed in the lists consists of the village of Deur, certain cash payments deriving from the village of Dahigaon and some lands lying in the village of Palsi; all in the Satara District. The phrase therefore comprises more than the actual lands of Deur village itself; but the list affords no warrant for extending it to properties lying in other districts. Whatever difficulty might be felt in defining or explaining its meaning is set at rest by the evidence of the *Kamgar* or steward of the estate, called as witness Exhibit 225 for the Plaintiff. Premising that he manages the properties in all the four Bombay Districts on behalf of the Raja, he proceeds: "The whole of the property is divided into two *talukas* called Devinimbgaon and Deur. The properties in the Ahmednagar, Poona and Sholapur Districts form the *taluka* of Devinimbgaon, and the property in the Satara district forms the Deur *taluka*." From other passages in his evidence it appears that the estate accounts are separately kept for each *taluka*, and he mentions that he has two *naibs* or deputies, one living at Devinimbgaon and the other at Deur. He was himself *Naib Kamgar* at Devinimbgaon for some years. Now the credit and impartiality of this witness were not shaken—indeed, were not attacked—in cross-examination, and have not been impugned in argument before us: and we must regard his evidence as conclusive. We find no difficulty in accepting the explanation (though it does not appear explicitly on the evidence) that Deur was one of the old *talukas* of the district under Moglai or Maratha rule; and the steward's evidence shows that the name has persisted up to the present day as a general term for that portion of the Bhonsla estate lying within the Satara District. We are thus afforded an interpretation of the phrase no less adequate than natural, one which consists with the documentary evidence and which spares us the necessity of straining the expression *Deur lands* or *lands of Deur* so as to include properties lying in other districts, some at least of which could never have formed part of the ancient *taluka*. Although therefore the Plaintiff's own case involves the admission that the disputed phrase is not to be construed with rigidity, the *lands of Deur* admittedly meaning more than the lands of Deur itself, there is no real difficulty in ascertaining its exact signification; and that, we must conclude, is the signification for which Plaintiff has contended.

There is little left to add. We have been content to approach the case on its plain merits, and we have had no occasion to refer to the argument pressed upon us on behalf of the Plaintiff—an argument whose force cannot be gainsaid—that the onus of proving the impartibility of the estate rests heavily upon the Defendant, and that he has done little to discharge it. If the evidence were meagre or uncertain, it might have been necessary to have recourse to this proposition before a valid conclusion could be attained; but Plaintiff can afford to dispense with its assistance. For it is clearly established that the original grant was a personal grant in *jaghir*, that the regrant did not so much continue this grant as substitute for it a family hereditary grant partly in *saranjam* and partly in *inam* and *watan*; and that of the properties within the Bombay Presidency only those lying within the Satara District were regranted in *saranjam*.

We have not thought it necessary to allude to the official letters and other documents of recent

date that have been put in evidence. Their evidentiary value, if they have any at all, is so exiguous as to be negligible, and we may content ourselves with the broad assertion that with one exception they harmonize with our conclusions. No separate argument was addressed to us on the subject of the *watans*, regarding which there seems to be little evidence available. It was agreed that they should follow the decision on the main question. The other points raised in the lower Court, including that of estoppel, were not pressed; and the Plaintiff abandoned his cross-objection.

The decree is confirmed with costs "

Hence this appeal.

Mr. Kenworthy Brown, *Mr. Lowndes* and *Mr. Dick* for the Appellant submitted that the estates in question were impartible by custom and by the nature of their tenure. They were not heritable up to 1853, when Raghoji III died and on the re-grant by the British Government they continued impartible. There was no evidence to show that the intention of the re-grant was that the estates should be partible. The descent on a re-grant will be regulated according to its original nature and the family usage unless the contrary is proved. A re-grant is presumed to be given on the old conditions and remains subject to the same incidents of descent. *Baboo Beer Pertab* v. *Maharaja Rajender Pertab* (1).

Further the said estates formed the appanage of the Raja of Deur. "Lands attached to Deur" in the grants have been wrongly construed by the Courts below as meaning the taluka of Deur. But there was no such taluk then in existence. The division of the lands into talukas is only for purposes of management. All of them were *saranjam* lands. If they have been sometimes described as *inam* that would not change their nature. *Inam* has several meanings (*vide* Wilson's Glossary, p. 217). In a popular sense it means a perpetual hereditary grant of land free from revenue. It is a generic word and does not necessarily exclude *saranjam*. Reference was also made to *Shekh Sultan Sani* v. *Shekh Ajmodin* (2), Col. Ethridge's Report of Inam Commission. *Krishnarav* v. *Rangrav* (3). The Inam lands were entered as *saranjam* in register prepared under Act V of 1879, (Bombay). Its original entries were conclusive in favour of the Appellant.

Mr. L. DeGruyther, *K. C.*, *Mr. Ross* and *Mr. Gadgil* for the Respondent submitted that the Courts below were right in holding that the estates in dispute were partible. The words *inam*, *saranjam*, *jaghir* and *vatan* have definite meanings and are distinct tenures in Bombay. *Inam* is heritable grant of land. *Saranjam* is a grant of revenue and is neither heritable nor alienable. Mouzahs Devi and Jad-Devle were recognized as *inam*, and the *inam* village of Jalalpur was also recognised as forming a part of the general estate of the late Raja. *Saranjam* lands are resumable, but *inam* lands are not. In the Courts below the case was treated as a case involving the question of a family custom not as one involving a question of difference of tenures. Both Courts have rejected the plea of family usage raised by the Appellant. The *sanad* gives a title which is thereby made hereditary and as regards the lands it means that the land would not, according to the tenure as it existed before, have been hereditary. In 1874, the Government published a list of *saranjams* granted. In 1898, an order was issued that the Civil Courts had no

(1) 12 Moo. I. A. 1, 35 (1867).

(2) L. R. 20 I. A. 51, 52, 57, 69 (1892).
(3) 4 B. H. C. R. (A. C.) 2 (1867).

power to deal with questions relating to *saranjams*. The entries on which the Appellant relies have been corrected and as they now stand they are. The lands are *inam* and the onus of proving impartibility lies upon the Appellant. Reliance was placed on *Adrishappa* v. *Gurushidappa* (4), *Vinayak Waman* v. *Gopal Hari* (5). A grant to a man and his heirs will descend under the ordinary rules of succession. It is a grant of absolute estate and is alienable. *Mutta Vaduganadha* v. *Dorasinga Tevar* (6), *Gopal Hari* v. *Ramakant* (7). The "lands of Deur" or "lands attached to Deur" do not include the lands in dispute. They could not cover lands outside the Satara District. The lands in the other districts of Poona, Sholapur and Ahmednagar do not form part of the appanage of the title "Raja of Deur." (Aitchison's Collections of Treaties, &c., Vol. 5, p. 78 and Vol. 3, pp. 93-4). The mutation proceedings also show that in 1882, the lands in Satara District were entered in the name of Appellant alone, and the rest in the names of the Appellant and the Respondent. As to the construction of *sanads* granting *jaghir*, reference was made to *Gulabdas* v. *Collector of Surat* (8), *Ram Chandra* v. *Venkatrao* (9). Baden-Powell's Land Revenue Systems of India, Vol. 3, p. 299.

Mr. Brown replied.

[*Mr. L. DeGruyther*, *K. C.*, during the argument applied for leave to refer to certain Parliamentary papers published by order of the House of Commons in 1864. Their Lordships refused it, remarking that having been published in 1864, they were available to the parties if they contained anything bearing on the case.]

(4) L. R. 7 I. A. 163 (1880).
(5) L. R. 30 I. A. 77 (1903).
(6) L. R. 8 I. A. 99 (1881).
(7) I. L. R. 21 Bom. 458, 460 (1896).
(8) L. R. 6 I. A. 54 (1878).
(9) I. L. R. 6 Bom. 598 (1882).

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This Appeal is made against a Decree of the High Court of Justice at Bombay, dated the 14th November 1907, which affirmed a Decree of the Subordinate Court of Poona, dated the 7th December 1904. The Plaintiff (Respondent) and the Defendant (Appellant) are brothers. The main object of the suit is contained in the first prayer of the Plaint, and is to have it declared that the whole of the immoveable and moveable estate mentioned in the schedule annexed to the Plaint belongs to these two brothers as equal owners thereof. The elder brother, the Defendant-Appellant, is Rajah of Deur. And the claim is resisted by him upon the ground that the various properties referred to had been succeeded to by him, under the law of primogeniture, as an appanage to the title of Rajah conferred upon him by a *sanad* issued under the hand of the Governor-General, Earl Canning, in the year 1862.

The properties are situated in the Districts of Poona, Ahmednagar, Satara, and Sholapur, all in the Presidency of Bombay. They include five *mouzahs* or villages, together with various *vatans*, *hakks*, and cash allowances, set forth in the schedule. It was matter of agreement in the High Court that the main question in the case should be treated as one applicable to the villages or *mouzahs*, and that when the question of partibility or impartibility should be settled in regard to them, the remaining items in the schedule should follow that decision.

Of the *mouzahs* mentioned, that of Deur is situated in Satara. In the course

of the proceedings it has been admitted that the property in the Satara District is an appanage of the title of the Rajah of Deur, is impartible, and is succeeded to along with the title and position of Rajah accordingly, that is to say, by the rule of primogeniture. It is submitted by the Appellant that the same result should have followed with regard to the rest of the properties in dispute. The question in the case is whether that submission is correct.

The whole of the properties are, as stated, within the Bombay Presidency. This fact throws light upon the construction of many of the official minutes, despatches, entries and others, referred to in the case, and appears to be one of cogency. It can hardly be denied that the language used in all these official documents for a period of about fifty years is at least *ex facie* language applicable to the possessions of the Rajah in the Bombay Presidency as a whole.

Points of great historical interest are naturally suggested by a review of the pedigree put in by the parties. The records of the Bhonsle family—the Rajahs of Nagpur—are bound up during a long period of time with many stirring adventures and achievements in the course of the Maratha ascendancy and its decline. The position of the family was one of great note from the middle of the 17th, and during the whole course of the 18th, and the first half of the 19th, centuries. The possessions of these Rajahs were extensive, stretching throughout many portions of the Central Provinces, the North-West Provinces and Berar, as well as of the Bombay Presidency.

The last of the Rajahs of Nagpur, Raghoji III, held the title, estates, rights from the year 1817 till his death in 1853. The forfeiture of 1818 followed by the treaty and free gift of 1826 need not be referred to, the facts of ownership and possession being substantially as stated. He died without issue. He himself was an adoptive son of one Pursoji Bhonsle, and with his death in these circumstances the Bhonsle dynasty of Nagpur came to an end. It is an admission of parties that in that year title of Rajah of Nagpur lapsed and that the estates and rights of the deceased Raghoji III fell to the British Government.

The widows of Raghoji, however, adopted Janoji in the year 1855. He survived till 1881, leaving behind him the two sons who are contestants in the present case.

During the Mutiny of 1857 a female member of the family, the Rani Baka Bai, appears to have powerfully and loyally assisted the British cause and to have rendered services worthy of official recognition. She was the widow of a former Rajah of Nagpur, namely, Raghoji II, and she was anxious for the continuance in the family of the title of Rajah and the attachment to it of such property as would mark and maintain its dignity. The Government of the day declined to restore the Nagpur title, but was willing to create—by *sanad* issuing from the Governor-General—a fresh Rajahship. The title pitched upon was derived from Deur, a small village in the Satara District of the Bombay Provinces. It is manifest from the official documents issued that it was one of the objects of the Government to make such a provision—in land and revenues accompanying the title—as, though small and unimportant if viewed relatively to the ancient Nagpur possessions, would still be sufficient to gratify, so far, the desire of Baka Bai, and to support in becoming dignity the newly created title.

It is accordingly important to note what were the exact terms of the *sanad* under the hand of Earl Canning, Governor-General. It is dated the 10th October 1861. The Subordinate Judge of Poona has closely examined it and the translations. As stated by the learned Judge, it is written in Urdu, and its text is as follows, it being super-signed by Lord Canning and bearing the seal of the Government of India :—

" *Sanad* granted by His Excellency the Viceroy and the Governor General of India in Council to Raja Janoji Bhonsle Bahadur conferring upon him the title of Raja Bahadur of Deur.

Whereas it has been proved and verified that Maharani Baka Bai Saheb was loyal towards the noble British Government and the good behaviour and loyalty of that family during the Mutiny has been proved and verified; in recognition thereof the title of Raja Bahadur of Deur together with the lands attached to Deur has been conferred upon and given on this auspicious occasion, to that Meherban himself and his heirs in succession whether begotten or adopted in perpetuity and the *sanad* thereof has been executed. It must be deemed incumbent that in return of this gift and kindness you will always remain loyal to the noble British Government and you will look upon this *sanad* a perfect one."

The point of the case is : What meaning is to be given to the words "lands attached to Deur" ? Are these lands limited to the village of Deur itself? Or do they extend to the possessions in the Satara District ? Or do they cover the possessions as a whole which lay within the Presidency of Bombay ?

Neither party to the case maintains that the grant should be confined to the lands in the village of Deur alone; and it is conceded by the Respondent that other lands in the Satara District must be held to be included. This concession is perfectly reasonable, for otherwise the lands attached to Deur, if confined to the village of Deur itself, would reduce the maintenance of the dignity of the Rajah almost to a shadow.

But the mere inclusion of all the Satara lands also reaches a very inconsiderable total. These lands are worth over Rs. 3,000 per annum. The villages, lands, and others, in the whole of the Bombay Presidency, mentioned in the Plaint, yield a total revenue of over Rs. 12,000 and it would appear from this, that if all these lands were dealt with as lands which were attached to Deur by the *sanad*, they would form taken together a fund for the maintenance of the dignity of the Rajah which could not be said to be over ample. But if the lands attached to Deur are confined to those in the Satara District alone, then the result of such a construction of the *sanad* is to set up this Rajah with an appanage of about Rs. 3,000 per annum for the support of dignity and title. Their Lordships are not surprised to learn that during all the years since the *sanad*, in many of which the Court of Wards have had possession, and in all of which the Government have had cognizance of the facts, no one apparently until the institution of this suit ever thought of maintaining that the possessions attached to the position of Rajah were of the slender proportions described. Upon the contrary, they have throughout been dealt with as those within the Bombay Presidency at large.

As mentioned, the properties of the former Rajahs were situated not only in the Bombay Presidency, in which their extent was very limited, but in the Central Provinces and Berar. A large donation or stipend of Rs. 1,20,000 per annum was enjoyed by the late Rajah Janoji at the time of his death. After that event, in 1881, the Government of the day had to consider the question of the allowances

to be made to his successors, namely, his two sons. A pension amounting to Rs. 90,000 was fixed, and in the despatch of the 10th February 1882, by the Assistant Secretary to the Chief Commissioner, the grounds are explained of the distribution of this pension. "The two sons," it is said, "will succeed to the landed property of the late Rajah in the Central Provinces and Berar, and to the personalty in equal shares. This is in accordance with the Hindu law and Maratha custom. The elder son will succeed to the title of Rajah of Deur and to the estate in the Bombay Presidency, which goes with that title. The value of this estate is, however, comparatively small, the bulk of the landed property of the late Rajah being situated in the Central Provinces and Berar. There will not, therefore, be much difference in the private income of the two sons should they hereafter separate." This passage is quoted as an indication of the view which is repeatedly exhibited in the documents with regard to the attitude of the Government, from whom the grant by way of *sanad* proceeded. This interpretation was undoubtedly that the Rajah of Deur should take the estates in the Bombay Presidency, which were comparatively small, as an appanage of the title; that these should accordingly follow the rule of primogeniture; whereas the larger and more important estates in the Central Provinces and Berar should be partible equally between the two sons.

Contemporanea expositio as a guide to the interpretation of documents is often accompanied with danger, and great care must be taken in its application. But in the present case their Lordships do not feel themselves able to reject the assistance which it affords. The *sanad* upon which these important rights are founded is a document of a general and informal character. It admittedly is capable of a variety of constructions. The extreme literal construction—its confinement to the single village of Deur—is adopted by neither party. And when the ambiguity covers the geographical and pecuniary extent of an admittedly ambiguous grant, their Lordships think it legitimate to observe what was the footing upon which the grantors, namely, the Government and its successors and officials, from the date of the grant and for a long period of time, proceeded.

It may be pointed out that since 1881, namely, since the death of Janoji, the question of partibility was, of course, practically and sharply raised, and the fact is that the whole of income derived from the estates in the Bombay Presidency, amounting to about Rs. 12,000 per annum, has been uniformly treated as the exclusive income of the elder son, namely, the present Appellant. This was done both while he and his brother were wards in the Court of Wards and at other times. That Court managed the possessions of the Appellant until he came of age in 1893. Again in 1895 the Court of Wards re-entered, by request of the Rajah, into possession and management for a time. In 1899 the younger brother came of age, the property in the Central Provinces and Berar was divided equally, and the Bombay estate was treated as impartible and continued with the Rajah as an appanage of the title. In the opinion of their Lordships, this throughout was a correct course; and the present suit, the object of which is to diverge from that course, is not in accordance with the rights of parties.

In one view, what has been said might

appear to be sufficient for the disposal of this case. But in the judgments of the learned Judges of the Courts below, and in the arguments addressed to their Lordships, further considerations were urged as assisting towards a conclusion and falling to be dealt with. There can be little doubt that the whole of the lands in issue were originally *Jaghir* lands, and the legal position of such property *quoad* succession, and the competency or incompetency of assisting the construction of the *sanad* of 1862 by such considerations, were much discussed. There are three points with reference to the position of property such as that now in suit which stand logically clear of each other, and with regard to which there has been a certain element of confusion. These three points are, first, was the land impartible? Secondly, did the law of hereditary succession apply to it? And, thirdly, was it subject to the law of primogeniture?

The Subordinate Judge, after referring to the fact that some of the villages are referred to as *Jaghirs* in the old records, is of opinion that "that fact *per se* is not sufficient to make them impartible." If this be stated as a conclusion with regard to the *Jaghir* tenure in general, their Lordships cannot agree with it; but upon the contrary, they are of opinion that the following statement in the judgment of the High Court is correct, namely, "The grants were manifestly grants in *Jaghir* of the ordinary character, that is to say, they were personal and not hereditary, and were resumable at pleasure. Being personal and temporary, they were "necessarily impartible." This accurately distinguishes between partibility as such, and any consequence, whether in the direction of hereditary or primogenital succession, which may be supposed to flow from such a fact. The impartibility of *Jaghir* lands is in truth entirely separated from the idea of succession by the fact that the impartible lands were held together as a unit in the hands of one man who was rendering personal service to the Government of the day. It may be that upon his death a fresh grant, again to one man, and again in return for personal service, was made; and it may also be that the one man selected was in the ordinary case the eldest son; but these matters of practice were not consequences of law, and the impartibility and unity which attached to personal service was not related to, but, on the contrary, was distinct from, the idea of succession by force of law to the impartible lands.

It is at this point that the case appears to have been confused and encumbered by a plea put forward by the Appellant to the effect that the lands in question were not only impartible and hereditary, but were, by custom, subject to the law of primogeniture. Once grant that the lands were *Jaghir* and impartible as such, a custom of the kind alleged was not a subject for proof, because such a custom would have been radically inconsistent with the personal and non-transmissive character of a grant in *Jaghir*. Their Lordships agree in holding with the Courts below that this case accordingly cannot be decided on the custom alleged.

All that remains on this issue, consequently, is the fact that prior to the regrant by Earl Canning the lands had been formerly *Jaghir*. But this term implied no grant of the soil, but a personal grant only of the revenue to the grantee. The *Marathi* equivalent to the term *Jaghir*, namely, *saranjam*, came in course of time to be applied to the lands; and no doubt it was also a fact in the history of the

property that the senior living male of the family had in the ordinary case succeeded to it.

In those circumstances, it is interesting to observe what was the delivery order issued with reference to the lands which were the subject of the *sanad*. This forms a not unimportant item to that *contemporanea expositio* to which reference has been made. Much importance—and, in their Lordships' opinion, too much importance—has been attached in the judgments of the Courts below to the distinction between the term *inam* and *saranjam*. The importance has reached this point that the learned Judges treat the lands of Satara as referred to in one or two of the documents as *saranjam*, by way, as they apprehend, of distinction from the other lands which are treated as *inam*. In their Lordships' view, the terms are not mutually exclusive in the sense indicated. The latter term, namely, *inam*, is one of mere generic significance, applicable to a Government grant as a whole. But in the next place it is a very striking fact in this case that in the initial delivery order now being referred to (as indeed in many of the subsequent documents) the rights in the Bombay Presidency are dealt with comprehensively and as covered, not by one name, but by all, or at least many, of the names applicable to land and revenue rights. In the Mamlatdar's order, for instance, of the 19th March 1862, applicable to the village of Mouje Devi Nimbgay, one of the properties in Ahmednagar, the matter is treated of in this way. The village "is a jaghir to the Bhonsles and as a village was placed under japti (attachment); the revenue of the same was received for being credited in Government records." Then follows the definite statement:—"But the *vatan*, *inam*, *saranjam*, *hakks*, &c. . . . have been entered in the name of Janoji . . ." Therefore certain definite orders are given pursuant to the Government Resolution, "directing the said village, *vatan*, &c., to be delivered" into the charge of Janoji's managers. It would therefore accordingly appear that the term *saranjam* was not in point of fact confined to the lands of Satara. This ground of the judgments of the Courts below accordingly disappears.

A matter of much significance must now be dealt with. On the death of Janoji in 1881 the question of partibility or impartibility—there being two sons of that Rajah—became matter for definite consideration and regulation. What light is thrown upon the case by the conduct at and after this juncture of the Government, including the Court of Wards, which was charged with the correct distribution of these two sons' shares? Upon this head their Lordships do not conceal that they have viewed with some dissatisfaction the conduct of certain parts of the Plaintiff's case. On the 6th May 1882, an important letter was written by Mr. Lawrie, manager of the estates, to the Deputy Collector, "Satara, Sholapur, Ahmednagar, and Poona." That is to say, this letter was addressed to the persons acting as Collectors in reference to all the estates within the Bombay Presidency which were the subject of issue in this case. He forwards his appointment by the Deputy Commissioner of Nagpur as manager of the estate of the late Rajah's minor sons; and then there follows this passage, or what was supposed to have been this passage, as the document was produced in the suit: "I have the honour to request you to be so good as to cause mutation of names to be made for all villages held by the late Rajah in your collectorate in favour of his two sons,

Rajah Raghojeerao Bhonsle (only for Satara) and Laxmanrao in equal shares with my name as manager." So stated, this document would appear to suggest that all the properties except that of Satara were partible; and this would have been an important adminicle of evidence to that effect. The document, however, has a history. It is deponed to in the evidence of the Plaintiff's own witness Abaji Belaji. Interlineations and remarkable alterations occur in the document, and the witness confesses, "I cannot say why and by whose order the words 'only for Satara,' 'two,' the 's' added to the word 'son,' and the words 'and Laxmanrao in equal shares with my name as manager' were written." As the document stands it suits the Plaintiff's case; but it appears to be legitimate, and, indeed, proper and just, to read the document without the doubtful and unexplained interlineations and alterations. So read, the letter is as follows: "I have the honour to request you to be so good as to cause mutation of names to be made for all villages held by the late Rajah in your collectorate in favour of his son Rajah Raghojeerao Bhonsle." The letter is addressed to the Collector, not of Satara alone, but to the Collectors of Satara, Sholapur, Ahmednagar, and Poona, and it would, so read, accordingly appear to demonstrate that at the important time when the administration of the deceased Rajah Janoji's estate was taken up by Government, all the estates in the Bombay Presidency were treated, without exception, as an appanage to the title of Rajah.

It is right that a further reference should be made to a cognate topic. It would rather seem that the learned Judges of the Courts below have been induced to treat as authentic various entries in the Collector's books which were not the entries as originally made, but were entries subject to "correction"; a correction made upon an *ex parte* application on behalf of the Plaintiff. This application was preferred, and apparently granted, behind the back of the Defendant, and during the course of this present litigation. The date of the suit was the 22nd August 1900, and on the 5th August 1901 a memorial was presented to the Governor in Council at Bombay with the statement: "This is forwarded to the Chief Secretary by letter of the 13th August 1902." It is plain from a perusal of these documents that certain registers, including in particular the registers of the Collector of Ahmednagar, together with certain despatches, had been the subject of investigation on behalf of the Plaintiff, and that that investigation had revealed facts which were considered to be contrary to his interests. The application admits that in these documents the Collector of Ahmednagar had "been directed to treat the villages referred to in the petition as impartible *saranjam.*" Then the letter proceeds: "The villages of Devi Nomgaon, Jat Deola, and Jalalpur, in the Ahmednagar District, were up to 1864 regarded as *Inams* and *Saranjams*, and the *Deshmukhi* and other *Hacks* as *Wattans*, as contradistinguished from *Saranjams*. There was and is no room for asserting that they were ever treated as impartible *Saranjams* held on political tenure." This remarkable document winds up thus: "In view of the facts and arguments above set forth, you will be pleased to issue orders to correct the Land Revenue Register by expunging that portion of it in which" the villages "are specified as political *Saranjams.*" The facts and arguments here referred to

are simply those which have been urged in the present litigation. The one fact outstanding from the whole of these proceedings is that the argument now preferred, to the effect that the Satara property and that alone was treated as *Saranjam*, while the other properties were throughout treated as *Inam*, is contrary to what is admitted to have been the original entries in the books referred to. In these circumstances, it appears to their Lordships to be quite unsafe to place reliance upon a denomination of these lands dependent upon a "correction" which appears, or is alleged, to have been made while the case was *sub judice*, and upon an *ex parte* representation. Their Lordships think that the original state of the Records before the so-called corrections were made was that alone to which a Court of Law should have looked. This would at least be the safe and ordinary rule, and there do not appear to be any facts in the present case to ground an exception to it. It is not for their Lordships to pronounce upon the procedure by which such "corrections" of official documents and records can be possible in those districts in circumstances such as are here disclosed.

Various difficulties are presented by reason of expressions which appear in despatches from those in authority in the Central Provinces. In those despatches language is used which would appear to signify that the lands attached to Deur in the Bombay Presidency were the Satara lands alone. The language is not clear, and it had reference to a matter

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ment :—"

whereas in others there appears to be an application of both terms to the same lands and in various districts.

Their Lordships, upon the whole, have had little difficulty in coming to the conclusion that too restricted an application has been made by the Courts below of the term "the lands attached to Deur." They think the expression extends to the whole scheduled lands in the Presidency of Bombay. They will humbly advise His Majesty that the judgments of the Courts below should be reversed, that the lands referred to in this suit are impartible, that they are attached as an appanage to the title of the Rajah of Deur, and that the suit should be dismissed with costs here and below.

The Respondent will also pay the costs of a Petition for further documents which was before the Board on the 24th February 1911.

Solicitors: *Messrs. Speechly, Mumford and Craig* for the Appellant.

Solicitors: *Messrs. Lalteys and Hart* for the Respondent.

B. D. *Appeal decreed with Costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 2591 OF 1909.

CARNDUFF, J. CHAPMAN, J. 1912, Heard, 12, June. Judgment, 18, June.	MAHOMED SADAT ALI MILKI, Defendant, Appellant, *v.* HARA SUNDARI DEBYA, Plaintiff, Respondent.

Hindu Law—Rent-decree against Hindu widow and her co-sharers, paid off by latter—Decree for contribution by latter against widow—Sale in execution of decree if affects reversionary interest—Personal liability, notwithstanding charge.

Where a suit for arrears of rent of a

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taluk which accrued due after the death of one of the co-sharers therein was brought against his widow and other co-sharers and the decree obtained in the suit was discharged by the other co-sharers :

Held—*That a sale of the share of the taluk held by the widow in execution of a decree obtained by her co-sharers in a contribution suit against her did not not affect the title of the reversionary heir.*

The liability of the widow for the rent in question should be regarded as a personal liability which ought not to be held to attach to the reversion unless and until the landlord proceeded to bring the tenure to sale under the special provisions of the rent law.

BROJO LAL SEN *v.* JIBAN KRISHNA ROY (1) and BAIJUN DOOBEY *v.* BRIJ BHOOKUN LALL (3) *relied on.*

This was an Appeal preferred on the 19th of November 1909 against a decree of Mr. H. Walmsley, District Judge of Zillah Mymensingh, dated the 13th of August 1909, affirming a decree of Babu Ram Chandra Mullik, Subordinate Judge of that place, dated the 30th of November 1908.

The material facts of the case will appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Tarak Chandra Chuckerbutty* for the Appellant.

Babus Mohendra Nath Roy and *Monmotha Nath Roy* for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

The Respondent in this Second Appeal sued, as being the reversionary heir of her father after the death in 1898 of her widowed mother Jagadishwari Debya, for a declaration of her title to, and the recovery of possession of, a share in a *shikimi* taluk. It appears that in 1873 a decree for rent of the taluk was obtained against Jagadishwari and her co-sharers. The latter satisfied the claim, brought a suit for contribution against Jagadishwari, and were given a decree, in execution of which a share of the taluk was sold and purchased on the 20th May 1876, by the Appellant, a Mahomedan. Both the Courts below have decreed the Plaintiff-Respondent's suit, and this appeal is preferred by the Defendant.

The first of the only two points raised on the Appellant's behalf is as to the refusal of the Court of first instance to grant the Appellant an adjournment and direct the issue of a commission for the examination of two ladies to prove that the Respondent's father had adopted a son and that she had consequently been excluded from inheritance.

As to this the facts are these. The issues were first framed on the 17th August 1907, but on the 10th June 1908, an additional issue expressly raising the question of the alleged adoption was added. Witnesses were from time to time summoned, and the case was heard from the 20th to the 26th November. Among the Appellant's witnesses were two members of the family, called to testify to the adoption, but one of these (Aredhan) would not do more than swear that there had been some talk of an adoption, while the other (Shyam Sundar) failed to appear and no steps were taken to enforce his attendance. But on the 26th November one Kali Kumar Chuckerbutty, a pleader connected with the family, who had already been examined by the Respondent as a witness in the case, was once more and

(1) I. L. R. 26 Cal. 285 (1898).
(3) I. L. R. 1 Cal. 133 : s. c. 24 W. R. 306 ; L. R. 2 I. A. 275 (1875).

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at the last moment put into the witness-box by the Appellant to declare that he had heard his motner and the Respondent's sister Rashmoni say that a boy had been adopted; and no sooner was this hearsay statement extracted from him than the Appellant applied for an adjournment and the issue of a commission for the examination of the two ladies. In these circumstances the refusal to accede to the prayer might, we think, be supported on the merits, if this were a regular appeal, it is certainly not arbitrary and incapable of justification, and we are of opinion that it is not open to us, on second appeal, to interfere with the discretion exercised in the matter by the lower Court.

The second point relates to the finding that, in the suit for contribution brought against her, Jagadishwari did not represent her late husband's estate, and consequently the reversioners were not bound by the sale in execution of the decree in that suit. The argument with which we are pressed, is that, as the original liability was one for arrears of rent, to liquidate which the entire tenure might have been sold, the decree for contribution arising directly therefrom should be held to have had the same effect, the sale under it passing not the widow's interest merely, but the taluk. The point is not free from difficulty, but on the whole, we are disposed to think that the view taken by the Courts below is correct and should be affirmed. The authorities on the subject were discussed by this Court in *Brojo Lal Sen* v. *Jiban Krishna Roy* (1) and, on appeal to the Privy Council, their Lordships of the Judicial Committee [see *Jiban Krishna Roy* v. *Brojo Lal Sen* (2)] expressed concurrence with the view that, where a suit for rent against a Hindu daughter was brought in respect of arrears which had accrued due after her father's death and while she was in enjoyment of the property, the liability for rent should be regarded as her personal liability, and ought not to be held to attach to the reversion unless and until the landlord proceeded to bring the tenure itself to sale under the special provisions of the rent law. It comes to this, indeed, that it does not follow that, because a liability could be made a charge on the estate, it *ipso facto* ceases to be a personal liability; and thus in *Baijun Doobey* v. *Brij Bhookun Lall* (3), it was held by the Privy Council, that the liability of a Hindu widow to pay maintenance to her mother-in-law, though charged on the estate, was personal to her, so that a sale in execution of a decree therefor against her passed only her interest. Here, moreover, there are further difficulties in the Appellant's way: for neither the decree in the rent suit nor the decree in the action for contribution is in, and we are, therefore, in the dark, both as to whether the whole tenure could have been sold in satisfaction of the former, and as to the capacity in which the latter was obtained against Jagadishwari. All that we have to guide us in the matter is the Respondent's sale-certificate, and that refers to "the property of the judgment-debtor, Jagadishwari Debya, widow of Brojo Mohan Mohalnabis," a description which indicates the lady's interest as widow rather than the estate itself. And we cannot help observing in conclusion that the point now taken is really a new one, the nearest approach to it in the Court below being apparently the

(1) I. L. R. 26 Cal. 285 (1898).
(2) I. L. R. 30 Cal. 550, 555 (1903).
(3) I. L. R. 1 Cal. 133: s. c. 24 W. R. 306; L. R. 2 I. A. 275 (1875).

argument that the circumstances of Jagadishwari Debya were such that the sale in execution of the decree for contribution against her must be regarded as caused by legal necessity and, therefore, binding on the reversioners.

For all these reasons we hold that the contentions raised fail, and the Appeal must be dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1155 OF 1908.

BRETT, J. CHAPMAN, J. 1912, 21, August.

NISARALLI SHEIKH, Defendant, Appellant, *v.* ADEBUDDI SHANA, Plaintiff, Respondent.

Limitation—Attachment under sec. 146 of the Criminal Procedure (Act V of 1898)—Limitation Act (XV of 1877), Sch. II, Art. 142 or 144—Arts. 47 and 120, applicability of.

Where a property was attached under sec. 146 of the Criminal Procedure Code on the 7th March 1899, and it remained under attachment till the 26th February 1903 when, on the application of the purchaser of the holding of the opponent of the Plaintiff in the proceedings under sec. 145, who had been put in symbolical possession by the Civil Court, the Magistrate put him in possession of the same, and the Plaintiff on the 28th February 1906 instituted a suit to recover possession,

Held—***That the limitation applicable would be that provided by Art. 142 or Art. 144 of Sch. II of the Limitation Act and the suit was not time-barred.***

GOSWAMI RANCHOR *v.* SRI GRIDHARIJI (2) *followed.*

RAJAH OF VENKATAGIRI *v.* ISAKAPALLI SUBBIAH (1) *dissented from.*

This was an Appeal preferred on the 5th of June 1908 against the decree of Babu Satya Chandra Ganguli, Subordinate Judge of Khulna, dated the 25th of February 1908, affirming the decree of Babu Ashutosh Gupta, Munsif of that place, dated the 2nd of March 1907.

The facts of the case will fully appear from the judgment.

Babus Surendra Chandra Sen and *Lalit Mohan Banerjee* for the Appellant.

Babus Upendra Nath Chatterji and *Biraj Mohan Majumdar* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

In support of this Appeal, the only point which has been urged on behalf of the Appellant is that the lower Appellate Court erred in law in the view which it took that the suit of the Plaintiff was not barred by limitation. It appears that the property, the subject of the suit, was attached under sec. 146, C. Cr. P., on the 7th March 1899, in consequence of proceedings under sec. 145, Cr. P. C. The property remained under attachment and in charge of the Magistrate till the 26th February 1903. Then the present Appellant, the Defendant No. 18, applied to the Magistrate to be put in possession of the property on the ground that he had purchased the holding of the Defendant No. 1, who was the opponent of the Plaintiff in the proceedings under sec. 145, Cr. P. C., and had been put in symbolical possession by the Civil Court. The Magistrate passed an order in the following terms :—" The paddy having been

(2) I. L. R. 20 All. 120 (1898).

(1) I. L. R. 26 Mad. 410 (1902)

NISARALLI SHEIKH *v.* ADEBUDDI SHANA.

grown before the Petitioner obtained symbolical possession through Civil Court, he cannnot get the paddy this year. As regards the prayer for withdrawing the order under sec. 146, Cr. P. C., this is allowed in view of the report of Babu P. K. Karformia, Deputy Magistrate." The result of the order seems to have been that the Defendant No. 18 was afterwards in possession of the disputed land. The present suit was instituted on the 28th February 1906, and was contested by the Defendant No. 18 alone, who is the Appellant before this Court. He then set up the plea that the suit was barred by limitation under the provisions of Art. 47 of Sch. II of the Limitation Act, inasmuch as it had not been brought within three years from the 26th February 1903, when the order had been passed by the Magistrate. The Court of first instance held that the plea was not maintainable having regard to the decisions of the Madras High Court in the case of *Rajah of Venkatagiri* v. *Isakupalli Subbiah* (1), and of the Allahabad High Court in the case of *Goswami Ranchor* v. *Sri Gridhariji* (2). There was an appeal to the lower Appellate Court and, before that Court, another point of limitation was raised, namely, that the suit was barred under the provisions of Art. 3 of Sch. III, Part I, of the Bengal Tenancy Act. The lower Appellate Court held that this plea could not be sustained and confirmed the judgment and decree of the Court of first instance.

The Defendant No. 18 has appealed to this Court and, on his behalf, the only point raised is that the lower Courts should have held that the suit was barred by limitation, it not having been brought within six years from the 7th March 1899, the date when the property was attached by the Magistrate. The learned pleader for the Appellant argues that the provisions of Art. 120 of Sch. II of the Limitation Act would apply as held by the Madras High Court and that the limitation would not be governed by Art. 142 or 144 of the same Act. In our opinion, the contention advanced on behalf of the Appellant is not sound. The meaning of the decision of the learned Judges of the Madras High Court is not very clear to us and we are unable to agree in the view taken by them that Art. 120 had any application. In the present case, the Plaintiff brought the suit to recover possession not from his original adversary in the proceedings under sec. 145, Cr. P. C., but from a person who had been placed in possession by the Magistrate by an order passed apparently not in accordance with the provisions of sec. 146, C. Cr. P. At all events, the effect of that order was to deprive the Plaintiff of possession, and, from the date of that order, the Plaintiff had a cause of action to recover possession from the Defendant. The limitation applicable in such a case would be that provided by Art. 142 or Art. 144 of Sch. II of the Limitation Act; and this is the view which was taken by the Allahabad High Court in the case on which the learned Munsif relied. We must, therefore, hold that the lower Courts were right in the view which they took on the question of limitation. The result therefore is that the Appeal is dismissed with costs. We assess the hearing-fee at one gold mohur.

H. C. S. *Appeal dismissed.*

(1) I. L. R. 26 Mad 410 (1902).
(2) I. L. R. 20 All. 120 (1898).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1693 OF 1909.

BRETT, J.
SHARFUDDIN, J.
1912,
Heard, 27 and 28, June.
Judgment, 28, June.

DEBENDRA CHANDRA ROY, Defendant No. 1, Appellant,
v.
BEHARI LAL MUKERJEE and others, Plaintiffs, Respondents.

Attestation—Mortgage—Transfer of Property Act (IV of 1882), secs. 59, 100—Executant if may attest so as to bind co-executants—Improperly attested mortgage bond, if operates as a charge.

A party to a document cannot under any circumstances be allowed to sign a document as an attesting witness and a person who has once signed as an executant of a mortgage bond and as one of the persons who were borrowing the money on the bond cannot be allowed to have his position altered from an executant of the bond to that of a witness for the purpose of rendering the document valid as a mortgage against the other executants.

A document which is inoperative as a mortgage by reason of its not being properly attested cannot take effect as creating a charge under sec. 100, Transfer of Property Act.

This was an Appeal preferred on the 12th of August 1909 against the decree of Babu Ram Charan Mallik, Subordinate Judge of Zillah Nadia, dated the 4th of May 1909, modifying the decree of Babu Atul Chandra Ghosh, Munsif, 1st Court at Krishnaghur, dated the 23rd of April 1908.

The facts of the case material to this report will appear from the judgment.

Babu Jatindra Mohan Sen for *Babu Siva Prasanna Bhattacharjee* for the Appellant.

Babu Girija Prosanna Roy Chowdhuri for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The present Appeal arises out of a suit brought by the Plaintiffs-Respondents to recover a sum of Rs. 522-8 on a registered mortgage bond. The bond in question purported to have been executed by the Defendants Nos. 1 and 2. In the Court of first instance, an objection was taken to the bond on the ground that it did not create a valid mortgage as there was only one attesting witness to the document. It appears that the Defendant No. 2 wrote the bond and that, after writing it, he signed his name as an executant of the bond and afterwards as the writer and as one of the attesting witnesses. The Court of first instance held that this objection was valid and that the document could not have effect as a mortgage. The Munsif, however, was of opinion that, under the provisions of sec. 100 of the Transfer of Property Act, the bond could take effect as creating a charge on the property covered by it for the realization of the debt and he, therefore, gave a decree to the Plaintiffs for the recovery of the amount claimed by sale of the property on which he held a charge had been created.

The Defendants appealed to the lower Appellate Court but the Plaintiffs did not file a cross-appeal nor did they put in any cross-objection. On the hearing of the appeal before the lower Appellate Court, however, that Court, after first arriving at a conclusion that the Munsif was wrong in holding that any charge could be held to be created under the provisions of sec. 100 of the Transfer of Property Act and after setting aside the finding of the Munsif on that ground, took up the question which had in fact, been decided against the Plaintiffs and in respect of which there was no appeal

to that Court and decided that, though the mortgage bond could not be taken to be valid and operative as against both the executants, still it could be taken as a mortgage bond binding, so far as one-half of the amount of the mortgage debt was concerned, against the Defendant No. 1 because it was possible to treat the Defendant No. 2 not as one of the executants of the bond but as the writer and one of the attesting witnesses to it. On that finding, the lower Appellate Court gave the Plaintiffs a decree in modification of the decree of the Court of first instance for the recovery of one-half of the mortgage-money by sale of one-half of the mortgaged property.

The Defendant No. 1 has appealed to this Court and, in support of the appeal, it has been argued, *first*, that the lower Appellate Court was not justified in re-opening, in appeal, the question as to the validity of the document as a mortgage, the Court of first instance having decided against its validity and there having been no appeal against that finding of the first Court; and, *secondly*, that the lower Appellate Court was entirely wrong in the view which it took with regard to that document and in holding that it could be treated as a valid mortgage against the Defendant No. 1 by regarding the Defendant No. 2, one of the executants, not as an executant but as the writer and one of the attesting witnesses to the document. In our opinion, both these grounds are sound. The Subordinate Judge certainly ought not to have re-opened the question which had been decided by the Court of first instance and in respect of which there was no appeal. We also hold that the view which the learned Judge has taken with regard to the document is incorrect. The authorities are clear that a party to a document cannot, under any circumstances, be allowed to sign a document as an attesting witness and a person who has once signed as an executant and—as in the present case—as one of the persons who were borrowing the money on the bond cannot be allowed to have his position altered from an executant of the bond to that of a witness for the purpose of rendering the document valid as a mortgage against the other executant. The authorities in support of this view are to be found in the cases of *Seal* v. *Claridge* (1), *Pran Nath Sarkar* v. *Jadu Nath Shaha* (2) and *Rozguddi Shiekh* v. *Kali Nath Mukerjee* (3). Disagreeing, therefore, with the finding of the lower Appellate Court, we hold that the document on which the suit was brought cannot be held to be valid as against the Defendant No. 1 as a mortgage. The lower Appellate Court held—and we think rightly—that the Court of first instance was wrong in holding that any charge on the property described in the document could be held to be created by the document. Sec. 100 of the Transfer of Property Act expressly states that where immoveable property of one person is by act of parties or by operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and, in this case, there can be no doubt that the document, if valid, amounted to a mortgage. In these circumstances, it is impossible to hold that any charge by it was created on the property. This is indeed the view which was taken by this Court in the case of *Rozguddi Sheikh* v. *Kali Nath Mukerjee* (3). The only benefit which the Plaintiffs

(1) 7 Q. B. D. 516 at page 519 (1881).
(2) I. L. R. 32 Cal. 729 (1905).
(3) I. L. R. 33 Cal. 985 (1906).

could derive from the document would be to bring a suit against the persons who had executed it on the basis of the personal covenant contained in the bond. This is in accordance with the view taken by this Court in the case of *Tofaluddi Peada* v. *Mahar Ali Saha* (4). Such a suit, however, ought to have been brought within three years from the date when the money was borrowed and, as in the present case it appears that the present suit was not brought till more than five years after the execution of the documents and the date when the loan was taken, the Plaintiffs' claim to recover on the personal covenant is clearly barred. The result, therefore, is that we decree the appeal, set aside the judgment and decree of the lower Appellate Court and direct that the Plaintiffs' suit be dismissed with costs in all Courts.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 715 OF 1912.

HOLMWOOD, J.	REAZUDDI and others,
IMAM, J.	Accused, Petitioners,
1912,	*v.*
21, June.	THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), secs. 221, 222, 238—Indian Penal Code (Act XLV of 1860), secs. 34, 147, 149, 325—Charge under sec. 325, I. P. C., read with sec. 149, I. P. C.—Conviction under sec. 325, I. P. C., if legal—Sec. 34, I. P. C., when applicable.

Where the accused were charged and convicted by the Magistrate under sec. 147, I. P. C., and sec. 325 read with sec. 149, I. P. C., and the Sessions Judge in appeal set aside the conviction under sec. 147, I. P. C., and altered the conviction under sec. 325 read with sec. 149, I. P. C., to one under sec. 325, I. P. C.,

(4) I. L. R. 26 Cal. 78 (1898).

Held—*When a person is charged by implication under sec. 149, I. P. C., he cannot be convicted of the substantive offence.*

When a Court draws up a charge under sec. 325 read with sec. 149, I. P. C., it clearly intimates to the accused persons that they did not cause grievous hurt to anybody themselves but that they are guilty by implication of such offence inasmuch as somebody else in prosecution of the common object of the riot in which they were engaged did cause such grievous hurt. When these accused persons are acquitted of rioting obviously all the offences which they are said to have committed by implication disappear and the defence cannot be called upon to answer to the specific act of causing grievous hurt simply because it may have appeared in the evidence.

Sec. 34, I. P. C., can only come into operation when there is a substantive charge.

The considerations which govern sec. 34, I. P. C., are entirely different from and in many respects the opposite of those which govern sec. 149, I. P. C.

This was a Rule issued on the 27th of May 1912 against the order of Syed M. Chainuddin, Esq., Deputy Magistrate of Rungpur, dated the 12th of April 1912, which order was, on appeal, modified by Babu Raj Krishna Banerjee, Sessions Judge of that district, dated the 13th of May 1912.

The facts of the case will appear from the following portion of the judgment of the Sessions Judge—"The five Appellants who were in ambush attacked the complainant on a public road. The Appellant Reaz caught hold of the complainant's neck and threw him down on the ground. Reaz, Khoaz and the Appel-

lant Tamiz beat him and Khoaz broke his 8th right rib with a kick. The other two Appellants were standing close by with lathis in their hands."

The accused were charged under secs. 147 and 325 read with 149, I. P. C., and the Deputy Magistrate convicted them under those sections and sentenced them each to undergo rigorous imprisonment for three months. On Appeal the Sessions Judge set aside the conviction under sec. 147, I. P. C., and altered the conviction under sec. 325 read with sec. 149, I. P. C., to one under sec. 325, I. P. C. The accused moved the High Court and obtained a Rule.

Babu Monmatha Nath Mukherjee for the Petitioners.

Babu Brojendra Nath Chatterjee for the Crown.

The JUDGMENT OF THE COURT was as follows :—

We are clearly of opinion that this Rule must be made absolute and a retrial ordered upon the ground on which it was issued. When a Court draws up a charge under sec. 325 read with sec. 149 it clearly intimates to the accused persons that they did not cause grievous hurt to anybody themselves, but that they are guilty by implication of such offence, inasmuch as somebody else in prosecution of the common object of the riot in which they were engaged did cause such grievous hurt. Now when these persons are acquitted of rioting obviously all the offences which they are said to have committed by implication disappear, and the defence cannot be called upon to answer to the specific act of causing grievous hurt merely because it may have appeared in the evidence; for the Court having already declared by its charge that they did not commit a specific act and not having given effect to the evidence for the prosecution by framing a fresh charge the defence would not be justified in wasting the time of the Court in defending themselves on a charge which had never been brought against them. This will be perfectly clear if the offence disclosed by the evidence was the heinous one of murder and the Court framed no charge of murder, but went on with the charge of rioting; obviously in that case the accused could not be called upon to defend themselves on the charge of murder; for it is only in the Sessions Court that the said charge can be tried. The Magistrate appeals to the provisions of sec. 34; but sec. 34 can only come into operation when there is a substantive charge of causing grievous hurt. The considerations which govern sec. 34 are entirely different and in many respects the opposite of those which govern sec. 149, and it is now settled law that when a person is charged by implication under sec. 149, he cannot be convicted of the substantive offence.

The present conviction therefore is bad and must be set aside and the accused must be retried on the substantive charge under sec. 325. They will remain on the same bail pending their retrial.

S. C. M. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 1488 OF 1911.

HOLMWOOD, J. SHARFUDDIN, J. 1912, 17, January.	PRANKHANG and others, Petitioners, *v.* KING-EMPEROR, Opposite Party.

Code of Criminal Procedure (Act V of 1898), secs. 435, 437, 165 and 94—District Magistrate,

PRANKHANG *v.* KING-EMPEROR.

power of, to order further enquiry after discharge —House search by Police officer—General search —Search for specific article—Criminal trespass—Right of private defence—Indian Penal Code (Act XLV of 1860), secs. 97, 99.

Every person has a right subject to the restrictions contained in sec. 99 of the Indian Penal Code to defend property, whether moveable or immoveable, of himself or of any other person against any act which is an offence falling within the definition of criminal trespass.

The law does not empower a police-officer to search an accused person's house for anything but the specific articles which have been or can be made the subject of summons or warrant to produce. A general search for stolen property is not authorised and the law cannot be got over by using such an expression as "stolen property relevant to the case" as the law requires the mention of specific things.

Where one of the accused in resisting such a search pushed the Sub-Inspector and the latter ordered two constables to climb on his roof and break into the house whereupon the villagers assumed a threatening attitude and threatened to cut them to pieces if they entered the house and this empty threat was sufficient to prevent the Police from committing the trespass:

Held—*That the accused had not exceeded the right of private defence and were rightly discharged and there was no ground for further enquiry.*

This was a Rule granted on the 18th of September 1911 against an order of further enquiry into the case passed by Mr. A. H. Bentinck, Deputy Commissioner of Dibrugarh, on the 30th of August 1911.

The facts of the case as stated below are taken from the judgment of the trying Magistrate. On 25th May last Sub-Inspector Abdul Hamid of Sudder Thana with another Sub-Inspector and a force of nine constables went to the Dehing Khamti village to search the house of certain Khamti in connection with a burglary case instituted by one Benuhunsahuan. On arrival at the village the Sub-Inspector called the Gaonbura and proceeded to search the house of accused Prankhang first. Prankhang was told through the Gaonbura that it was suspected that there were stolen property and an unlicensed gun in his house and so it would be searched. Prankhang refused to allow the search alleging that a child had been born in the house two days previously and he would not allow anybody in (as that would disturb his wife.) The Sub-Inspector insisted and expressed his determination to make the search but Prankhang did not yield. Some thirty-two Khamties assembled at the place by and by, of whom two of them were said to have had daos in their hands and they were all said to have threatened the Police officers that they would cut them to pieces if they entered their houses. Some 18 or 19 displayed a fighting attitude. The Sub-Inspector ordered two constables to get up to the *chang* house, they were pushed by Prankhang and the others, showed an attitude to attack and assault the constables and uttered threats also. So the Police retired and returning to the Thana the Sub-Inspector reported the matter to his superiors who taking action on it sent up the eight accused under secs. 143 and 353, I. P. C. The seven accused besides Prankhang were said to be those who took an active part in the obstruction to the search. The Sub-Inspector was not

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provided with any search warrant and evidently thought himself empowered to conduct the search under sec. 165, Cr. P. C. The trying Magistrate relying on *Baijrangi Gope* v. *The King-Emperor* (1) discharged the accused. The Deputy Commissioner therefore relying on the opinion of the Legal Remembrancer E. B. and Assam ordered a further enquiry.

Mr. Bardalai for the Petitioners.
Mr. K. N. Chaudhuri for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This was a Rule calling upon the Deputy Commissioner of Dibrugarh to shew cause why the order directing further enquiry into this case should not be set aside on the ground that the order of discharge was correct in law and could not be impugned in view of the ruling in *Baijrangi Gope* v. *The King-Emperor* (1).

The learned Counsel who appears to show cause does not attempt to support the order on the ground taken by the learned Magistrate, that the point of law laid down in that Ruling should be reconsidered. He takes a new point that whatever right of private defence the Petitioner Prankhang may have had, his neighbours could have had no right to assemble and attack the Police, and he bases his contention on some remarks in this very judgment in the case of *Baijrangi Gope* v. *The King-Emperor* (1). There we said:—"The search was therefore not a legal search and two at any rate of the Petitioners who were the part-owners and occupiers of the house had the right of private defence. The common object of the riot therefore failed and the conviction under sec. 147 was also bad. But we see no reason to disturb the conviction under sec. 323. There was no justification for calling on the neighbours to beat the Police after they had gone out of the hut, and we uphold that part of the conviction." These remarks are no warrant whatever for holding that the neighbours in this case had not a right of private defence as laid down in sec. 97. Every person has a right subject to the restrictions contained in sec. 99 to defend property, whether moveable or immoveable of himself or of any other person, against any act which is an offence falling within the definition of criminal trespass. Now what was found in the evidence here is that Prankhang in the exercise of his right of private defence pushed the Sub-Inspector, thereupon the Sub-Inspector ordered two constables to climb on his roof and break into the house; whereupon the villagers assumed a threatening attitude and threatened to cut them to pieces if they entered the house. They were therefore engaged in defending the property of another from an act which amounted to criminal trespass. Of course if they had executed their threat and had cut the constables to pieces they would not have been able to plead that they were not exceeding that right. But as a matter of fact the empty threat appears to have been quite sufficient and no further damage was done. We therefore think on the ground urged by the learned Counsel, which is of course a ground on the merits, that there is no case for further enquiry.

As regards the ground of law upon which further enquiry appears to have been ordered, we find that the learned Magistrate acted upon an erroneous opinion tendered to him by the Legal Remembrancer of the Eastern Province.

(1) 15 C. W. N. 343: I. L. R. 38 Cal. 304: 13 C. L. J. 659 (1910).

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Contents.

NOTES.

REPORTS (See Index.)

THE JUDGMENT OF MR. JUSTICE MOOKERJEE in the case of *Rajendra Narain Singh* is a very sound and well-balanced pronouncement which shows clearly how the requirements of the law had been overlooked by the District and the Sub-Divisional Magistrates in this case. We do not at all find fault with either the Sub-Divisional or the District Magistrate for their attempt to protect the tenantry against alleged acts of oppression of a zemindar. In fact it is part of their duty to protect the poor and weak against the rich and powerful. What we object to, however, is that even for such purposes the Police and the Magistrates in this country should not abuse the powers conferred on them by law or misuse the legal processes for even laudable purposes.

WE GATHER FROM THE FACTS SET OUT IN MR. Justice Mookerjee's judgment, that proceedings under sec. 110 of the Code of Criminal Procedure were contemplated against Rajendra Narain Singh early in 1908, and with that view over 200 witnesses were examined. Since these proceedings were dropped in consequence of Rajendra Narain's appointing a European Manager, we are convinced that Mr. Justice Mookerjee is absolutely right in regarding the evidence then collected as irrelevant to the present proceedings which were started towards the end of 1911. His Lordship with great justice observes that when Rajendra Singh has been treated as a respectable gentleman for over three years since 1908, no proceedings under sec. 110 would be good unless they were based upon fresh and sufficient materials. It is settled law that even if Rajendra Narain had been bound down under sec. 110 in 1908 for three years, the maximum period provided under law, no fresh proceedings could be started against him or fresh order made on the old materials.

WHERE THE MAGISTRATES ERRED WAS IN HOLDING proceedings under sec. 110 *in terrorem* over Rajendra Singh for getting him to place his estate under approved European management. This points to a clear abuse of their executive and judicial powers as conferred on them by the Code of Criminal Procedure. That Rajendra Singh interfered with the management of a European manager who had been appointed with the approval of the District Magistrate or appointed another Manager whose appointment was not approved by the Magistrate, were surely not sufficient grounds for reviving proceedings against him under sec. 110. The fact that only three cases of no particular gravity, all of which had been compromised, were made the basis of fresh proceedings, goes also to strengthen the conclusion that the criminal law had been improperly set in motion against a proprietor for compelling him to accept official control over the management of his estate.

THE FACTS OF THIS CASE AS ALSO OF OTHERS noticed by us recently go to show that even Magistrates of considerable experience are prone to misuse their executive and judicial powers under the present system and strengthen our belief that the separation of the judicial and executive functions is urgently called for. We do not in this particular case question at all the good intentions of the Magistrates concerned. On the contrary we are disposed to

think that they acted with consideration towards Rajendra Singh in dropping the proceedings under sec. 110 against him in 1908. What we object to is not their motives but their methods. If they were convinced that Rajendra Singh was a desperate and dangerous character, they should have proceeded with the sec. 110 proceedings initiated against him in 1908. If Rajendra Singh had been guilty of any grave offences, he ought to have been prosecuted for them. But to keep criminal proceedings hanging over a man for years surely amounts to harassment which has no sanction either in law or morality. In fact, in attempting to protect the tenants against alleged acts of oppression by zemindars, the acts of the officers concerned against the latter amounted to no better.

A VERY UGLY FEATURE OF THIS CASE IS THAT the officials concerned displayed a singular want of discretion and common wisdom in embodying or causing to be published in the Official Gazetteer and the Administration Reports remarks concerning individuals which are damaging alike to themselves and the persons concerned. For instance, it is stated in one of these Official Reports concerning Babu Rash Behari Mondal that "he was forced through the knowledge that he could not escape conviction for forgery to apply to be declared a disqualified proprietor." It passes our legal conception how admissions like these can be made by responsible officials without realizing their gravity and statements like these can find place in publications intended to be read by the public. There can be no more damaging confession of official coercion having being practised on individuals to force them to come to terms or act according to official wishes. In utter disregard of law or propriety it is equally foolishly stated that "Babu Rajendra Narain Singh of Koriaputti through fear of future similar cases against him voluntarily appointed a very able European Manager and cut himself off from all the management." We hope the Government will take steps not merely to put down such official methods but also to prevent such scandalous matters finding place in official reports and conveying the impression to the world at large that such practices have the sanction of Government.

THE APPARENTLY SMALL CHANGE WHICH HAS been introduced by the Indian Divorce Act Amendment Bill which has just been passed into law involves an important question of principle for which we cannot but regret that the matter was allowed to pass with a most inadequate discussion. The amendment extends the application of the Indian Divorce Act to all Christians provided they were Christians at the date of the occurrence on which the application is based. So that, no matter by what law the marriage might have been originally celebrated, it would now be capable of being dissolved provided the parties are Christians at the date of, say, the alleged adultery. The Statement of Objects and Reasons leaves one in no doubt as to the aim and object of this amendment. It seeks to remove all barriers to the dissolution of marriage of Christian converts who had been married according to Hindu rites.

WE HAVE EVERY DESIRE TO SYMPATHISE WITH Christian converts who desire to free themselves from the restrictions of a system of laws based on ideas and feelings which have ceased to influence them. But the question is whether it would be right on principle and workable in practice to permit them to introduce into their marriage relation incidents and obligations which were foreign to that relation when first contracted. On this point we have grave doubts, not from the point of view of Hindu law or Hindu society which has no manner of interest in the change, but from the point of view of the legal position of Christian converts of both sexes with reference to their marital relation.

A HINDU MARRIAGE IS INDISSOLUBLE AND THE Madras High Court has held that the marriage could not be dissolved even when the parties subsequently became Christians. [I. L. R. 17 Mad 235]. The Calcutta High Court has held the contrary view in *Gobardhan* v. *Jasodamoni*, I. L. R. 18 Cal. 232. According to principles which ought to regulate the marital rights and which may now be taken to have been settled by the decision in *De Nicols* v. *Curlier* [(1900) A. C. 21], the matrimonial personal law of the parties ought to regulate all incidents of marriage. And where a husband or wife gets rights by marriage they cannot be altered by a subsequent change of the personal law either by change of domicil or change of religion. If this is a sound principle, the decision of the Calcutta High Court as well as the proposed amendment would seem to be against it.

IT MAY NO DOUBT BE SAID THAT *De Nicols* v. *Curlier* was not a case on divorce, but it is hardly possible that the House of Lords would have come to any different conclusion if the question had been about granting divorce to parties who by the law of matrimonial domicil were bound in an indissoluble marriage. [See per Eldon L. C. in *Tovey* v. *Lindsay*, 1 Dow 117, 131, 140]. The decisions in *Niboyet* v. *Niboyet*, 4 P. D. (C. A.) 1, 9 and *Le Mesurier* v. *Le Mesurier* do not really touch this question and the effect of these decisions

taken along with *De Nicols* v. *Curlier* would seem to be that while the *forum domicilii* would undoubtedly have jurisdiction to grant divorce, the grant would be subject to limitations imposed by the law of the matrimonial domicil.

THE PRINCIPLE IN *De Nicols* v. *Curlier* IS certainly applicable to the present question. For, by marriage a Hindu wife becomes, on a proper interpretation of Hindu law texts, a co-owner with the husband of all his properties although she may have no rights of disposal. Although this right of community has not been clearly recognised by British Indian Courts this much at least is clear that by marriage she gets an indefeasible right to maintenance from the husband which is not liable to be defeated according to recent Bombay decisions even by unchastity. The conversion of the parties to Christianity, which in India would have the same effect as a change of domicil, by changing the personal law, should not be allowed to affect the vested right of the wife. The husband too has got certain indefeasible rights arising out of Hindu marriage which are not identical with those of an Indian Christian husband. The extension of the provisions of the Indian Divorce Act to marriages contracted according to Hindu rites would make such rights terminable though they were indefeasible at the time of the marriage.

THEN AGAIN ONE CANNOT TAKE THE LAW OF divorce entirely by itself. It is a part of a whole body of rules relating to matrimonial relations which are based on the assumption that the marriage is "the voluntary union for life of one man with one woman to the exclusion of others." As Lord Penzance observed in *Hyde* v. *Hyde*, L. R. 1 P. & D. 130, the law of marriage and divorce in England—(and of Indian Christians too)—is adapted to the Christian marriage and is wholly inapplicable to polygamy." [See also *Warrender* v. *Warrender*, 2 Cl. & F. 531, per Lord Brougham]. It was on this ground that their Lordships refused to dissolve a Mormon marriage although in fact in that case there was no polygamy. Lord Penzance in his judgment points out the obvious inconveniences that would arise if the Matrimonial Court assumed jurisdiction over polygamous marriages.

THUS FOR INSTANCE A CONVERT MAY HAVE more than one wife married according to Hindu rites. What would be the position of the second wife if the matrimonial law of the Hindus is to be regarded as abrogated? Under the Indian Divorce Act under which the principles of the English law are to be applied there would be nothing to prevent the first wife from seeking a divorce from the husband on the ground that the husband was guilty of adultery coupled with bigamy. The idea of two legitimate wives is entirely obnoxious to the idea of Christian marriage and to the English Divorce law and Lord Penzance in *Hyde* v. *Hyde* had to cut the Gordian knot by refusing to regard the polygamous marriage as a marriage at all. The difficulties are aggravated when we come to consider the effects of the reconversion of, say, a divorced Christian woman into Hinduism. She would certainly not be able to marry as a Hindu while her husband is alive. Yet she would be deprived of the right of maintenance from her former husband and, it may be, other property rights. And again what would be the legal position of the parties if both the husband and the wife happened to be reconverted.

WE ARE AFRAID THEREFORE THAT THE AMENDMENT made by the Indian Divorce Bill not only runs counter to recent English precedents but is erroneous in principle and likely to prove on occasions unworkable in practice. It is very much to be regretted that the matter was not more thoroughly gone into before the Bill was passed. A further discussion would at any rate have had the effect of providing adequate safeguards against the difficulties of the situation created by the Bill. In any case we feel that the position of the second wife of a non-monogamous marriage should not have been left a matter for discussion in law Courts.

THERE ARE ONE OR TWO OTHER MATTERS WHICH we should have liked to have seen placed beyond doubt in the Indian Divorce Act. Thus for instance the question of jurisdiction of Indian Courts to grant divorce under the Act is far from clear. Professor Dicey thinks and very properly that under the Act the Indian Courts would have jurisdiction if the parties resided in India. *Le Mesurier* v. *Le Mesurier* and *Niboyet* v. *Niboyet*, however shows that domicil and not residence alone would furnish the basis for jurisdiction under English law. This conflict may lead to obvious difficulties in the case of a divorce in India of persons domiciled in England though residing in India. The Indian Courts would possibly grant a divorce but, upon the authorities, that divorce cannot be recognised in England and the husband, if he marries again, may be prosecuted in England for bigamy. There is no reason why such contingencies should not be made impossible by a simple change bringing the Indian law on this matter on a line with the present English law. We hope the legislature will yet see their way to provide against these contingencies.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Genn* v. *Winkil.* Before LORDS JUSTICES VAUGHAN WILLIAMS, MOULTON AND BUCKLEY. 17th June 1912.

Sale of goods—Delivery on approval or return—Not returned within reasonable time—Passing of property.

This was an appeal from a decision of Scrutton, J. The Plaintiff's case was that the Defendant came to him and told him that he had a customer for some diamonds which the Plaintiff had for sale. So the Plaintiff gave the diamonds on sale or return. The Defendant subsequently reported that he had sold the diamonds—the Plaintiff made an entry in his books charging the Defendant with the price which he failed to pay. The Plaintiff pressed for payment when the Defendant said that he had entrusted the diamond to a man who lost them. The Plaintiff was insured against loss and so he sued the underwriters who paid him a little money and compromised the action. The Plaintiff now claimed the balance of the cost price from the Defendant who pleaded that the diamonds were given to him for sale on commission and that they were lost without any negligence on his part. The Court below held that the Defendant had adopted the transaction and property in the goods passed to him. Hence this appeal by the Defendant which was dismissed. LORD JUSTICE VAUGHAN WILLIAMS in the course of his Judgment said :—

In *Kirkham* v. *Attenborough*, ([1897] 1 Q. B, 201), Lord Esher had said :—"It is necessary to consider the principles adopted by the Courts and now, unhappily, as I think, codified in the Act, the language of which is unfortunately chosen." He had here to apply the Code and construe it. The particular passage was section 18, rule 4, of the Sale of Goods Act, 1893, which ran thus :—"When goods are delivered to the buyer on approval or "on sale or return' or other similar terms the property therein passes to the buyer : (*a*) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction ; (*b*) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods on the expiration of such ment, and, if no time has been fixed, on the involves on of a reasonable time. What is a reasonwhich wee is a question of fact." In his judgment was allowedant had done an act adopting the discussion. The tion of the India of a person receiving goods on provided they were thought, was this, that if there . d for the return of the goods or if not, so long as a reasonable time for the return of such goods had not expired, his liability was only that of a bailee so that no action lay against him except for negligence, but where there was a fixed time and it had expired it was otherwise. Here there was no fixed time. What happened was this that the Defendant who had received the goods on sale or return transferred them on the same terms to Gutwirth, who had transferred them to a third person. Under those circumstances the Defendant was responsible for the conduct of those who subsequently had possession of the goods through his act.

In those circumstances the Plaintiff called upon the Defendant to return the goods. The Defendant then took up the position that he could not return them because he could not obtain them from the third person. The question therefore was this : Had this state of things resulted from any act of the Defendant ? He thought it had, and that it was entirely the Defendant's act that he could not return the goods. That being so, the Defendant placed himself most clearly within the judgments of Lord Esher and Lord Justice Lopes in *Kirkham* v. *Attenborough* (*supra*). He did not read those judgments as limiting the liability of persons who took goods on sale or delivery to cases where there was an intention on their part in their action to adopt the transfer of the goods. It was quite sufficient here that the Defendant had knowingly done an act under which he transferred the goods to Gutwirth, who had then transferred them to a third person, and when called upon to return the goods the Defendant became liable because he did not in fact return them. A reasonable time had elapsed ; the Defendant said he could not return them, and he explained it by saying simply that he was not in a position to return them.

Primâ facie he was liable because he could not so return them. He had given no explanation and no reasonable excuse for his inability to return the goods.

Messrs. Pollock, K. C., and Morle for the Appellant.

Messrs. Rawlinson, K. C., and White for the Respondent.

B. D. *Appeal dismissed.*

COURT OF APPEAL.—*Dare* v. *The Bognor Urban District Council.* Before LORDS JUSTICES VAUGHAN WILLIAMS, MOULTON AND BUCKLEY. 19th June 1912.

Claim for breach of contract—Implied warranty.

This was an application by way of appeal in an action tried before Avory, J., and a Jury.

The Plaintiff's case was that he entered into a contract with the Defendant which provided that the Plaintiff would provide a band to play on the

parade, and that the Defendant would let him 500 chairs for hire in the enclosure.

The Plaintiff complained among other things that the Defendant caused him loss by breaking an implied warranty, namely, that the Plaintiff had the sole right of placing chairs on hire inasmuch as the Defendant put a number of free seats on the parade. The Court below decreed the claim. Hence this Appeal which was allowed. In the course of his judgment LORD JUSTICE VAUGHAN WILLIAMS said:—

It was suggested that the case of *Inchbald* v. *Western Neilgherry Company*, 33 L. J., C. P., 15, was an authority for the proposition that, whenever something was done by a grantor which had the effect of preventing or reducing the profits which the grantee reasonably expected to get out of the grant, there was a good cause of action. In his opinion no such proposition could be rightly laid down universally applying to every contract. Each contract must be looked at and considered in itself. By this contract the Plaintiff was entitled to make collections from the public, but not to solicit contributions from any person who had paid for the use of a chair. That went some way to negative the suggested inference. Then they were told that there were a certain number of public seats at the time when the contract was entered into. He did not think that it was a proper inference to draw from the agreement that the parties contemplated that the total number of such seats should remain exactly what it was on that day.

It was true that the jury found that the presence of benches amounted to a substantial interference with the Plaintiff's receipts from the letting of the chairs, but it was consistent with that finding that the takings of the collections were quite as big as any loss arising from a number of the Plaintiff's chairs not being occupied because the public were supplied with seats on benches. He could not draw the inference that the intention of the parties was that not a single additional bench should be supplied for the use of the public free of charge. In his judgment therefore the Court could not imply the negative covenant which had been suggested.

Messrs. Hohler, K. C., and Pitman for the Appellant.

Messrs. Waugh, K. C., and Giveen for the Respondents.

B. D. *Appeal allowed.*

KING'S BENCH DIVISION.—*Houghton and anr.* v. *Pilkington.* Before JUSTICES BRAY AND BANKES. 21st June 1912.

Master's liability for servant's act—Extent of a servant's duty to care for a fellow servant in an emergency.

This was an appeal from the decision of a County Court Judge.

The Defendant was the owner of a milk-round and he employed a man named Heaps to drive a milk-float, and also a boy to help to deliver the milk. During the course of the round, the boy fell out of the float on to the ground and was rendered unconscious. The Plaintiff seeing the accident, went to the boy's assistance. She said to Heaps, "Shall I help you to take him home?" He replied, "You can if you will. Get in." The Plaintiff got into the float and was bending down to put the boy's head to rest on her arm when the float set off and she fell out backwards and sustained injuries.

The County Court Judge held that in the circumstances there was an obligation on the Defendant's servant to secure assistance on behalf of his master; that the Plaintiff was entitled to care on the part of Heaps, and that, there having been a breach of the duty owed, the Defendant was liable. He gave judgment for the Plaintiff for £30.

Hence this Defendant's appeal which was allowed. In the course of his judgment, MR. JUSTICE BRAY said—

In order that the Plaintiff could establish that the Defendant had been negligent she must prove—(1) that he owed a duty to her; and (2) that there had been a breach of such duty. The main argument had been as to whether there was any duty which the Defendant owed to the Plaintiff that his servant should take care. The County Court Judge held that there was an obligation on the Defendant's servant in what constituted an emergency to secure assistance on behalf of his master. The question was whether that was right in law, and whether that duty arose from the circumstances of the present case.

In order to see whether such a duty existed it was necessary to see whether Heaps had authority to invite the Plaintiff to do what she did. Where was that authority, and how was it obtained? It clearly was not in the ordinary course of the servant's employment to ask anybody to ride in the float unless it could be that the law inferred an authority to do so from the emergency which arose. That question was considered in the case of *Cox* v. *Midland Railway Company* (3 Ex. 268) and was there decided in favour of the Defendants. In that case there had been an accident and several people were injured, and a servant of the company called in a surgeon and the surgeon brought an action to recover his fees. Whether he had a right of action for them depended on whether the Defendants were bound by the act of their servant in calling in the surgeon. It was said that they were so bound because an emergency had arisen, but the Court held that that was not the case.

The only distinction which could be drawn be-

tween that case and the present was that there the servant was apparently binding or seeking to bind his masters by a contract to pay for services, whilst in the present case he gave an invitation which involved the obligation to take care. In either case it was imposing upon the master an obligation, and if, in the case referred to, the Court held that there was no authority in the servant to create the obligation to pay, then he (Mr. Justice Bray) was of opinion that the servant could not create an obligation to take care.

Mr. Eastham for the Apellant.

Mr. C. Smith for the Respondent.

B. D. *Appeal allowed.*

KING'S BENCH DIVISION.—*Lloyds Bank, Ld.* v. *Swiss Bankverein and others.* Before MR. JUSTICE HAMILTON. 27th June 1912.

Bill broker's mercantile custom—Who is a bona fide *holder for value?*

These were two actions in which the Plaintiffs claimed from the Defendants delivery of bearer securities or their value.

On September 15, 1911, there fell due for payment by Edward Hellings & Co., to the Plaintiff banks two large sums of short money lent against securities; and on the morning of that day Hellings gave to the two banks cheques for the amounts due—cheques which were subsequently dishonoured—and received back from the banks the securities which had been deposited to secure the loans when they were first made. Later in the same day the Defendant bank received from Hellings on two separate occasions, certain of these securities which that firm had received in the morning from the Plaintiffs—namely, at 2 o'clock, securities of the nominal value of £22,000 or thereabouts, and at 3 p.m. securities of the nominal value of about £15,000. The whole of the documents in question in the action were negotiable instruments. The question was, were the Plaintiffs or the Defendants entitled to those securities?

The Plaintiffs claimed that they were *bonâ fide* holders for value whose effective retention of the securities had never been determined. The Defendants, on the other hand, contended that from the time the securities passed into Hellings' custody the Plaintiffs had no legal title to them; the Defendants further said that in any case they were themselves *bonâ fide* holders for value without notice.

The learned Judge gave judgment for the Defendants which was to the following effect:—

The Plaintiffs said there was a practice of bankers which either had the effect of a custom, or to which the law attached the significance of a trust, under which Hellings, being still in possession of the securities, and his cheques not having been met, held the securities as custodians for the Plaintiffs, no doubt with an authority to negotiate them for value, which authority, however, had not been exercised. As against a *bonâ fide* holder for value the Plaintiffs conceded that their rights must go, but they said the practice they set up was universal and its meaning notorious to the Defendants, who had themselves acted upon it that day and must, therefore, have had knowledge of the infirmity of Hellings's title to the securities.

For the Plaintiffs to succeed they must say that the banks were secured up to the very end. That was sought to be made out by saying that the instruments in the hands of the broker were impressed with a trust—that he held them in a fiduciary capacity, and that there was a right to follow the fruits of the trust property. That was a view not taken up by any of the witnesses. They said that what they expected was that the broker should apply the securities in the proper way to meet his cheque, and that if he could not do that he should return the securities, or that he ought to return equivalent securities. That was a very intelligible and natural view. The other view presented by the Defendants' witnesses was that the securities when given up were really given up. . . . To suggest that the broker was invested with the unfamiliar character of a trustee in respect of negotiable instruments seemed a great deal to extract from the handing over of a bundle of documents from one clerk to another. His Lordship was loath to hold that negotiable instrument was impressed with a trust of such a kind unless it was absolutely necessary so to hold, and he could see no necessity for so holding.

There was another point which had not been got over to his satisfaction. A cheque for the full amount of the securities was given in such transactions. What was the cheque for? According to the Plaintiffs' contention, the security was still there, it was still the bank's security, the only change being that it became itinerant instead of stationary. As a matter of fact, the cheque never was negotiated, but still it was in form another negotiable security. It was conditional payment; no one supposed that the loan was paid off finally by handing over the cheque; but still it was a further negotiable instrument. What was it for? The Plaintiffs' theory made it entirely otiose. It was suggested that it was a reciept, but he could not so regard it. It did not in any way identify the instruments handed over.

His Lordship therefore came to the conclusion that it was not the natural or the necessary construction to put upon the transaction that these bonds were impressed with a trust in favour of the Plaintiffs with a right to follow their proceeds. That being so, it followed that as soon as the Plaintiffs parted with their securities they ceased to be able to make any claim to them in this action. The claim of the Plaintiffs therefore failed

Mr. Astbury at the end of his argument suggested that such a decision would revolutionize the course of business and constrain the banks to borrow one another's money and eliminate the bill-brokers. His Lordship did not share those apprehensions, nor did he think there was any danger of a sudden flight of bill-brokers carrying negotiable securities impressed with a trust to a region where Hallet's Case (1 Ch. D., 696) was unknown. Personally he had no doubt that his judgment, even if affirmed, would produce no convulsions, and would soon be forgotten and forgiven.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CARNDUFF and IMAM, JJ. SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS *v.* MOTI LAL GHOSH, EDITOR and MANAGER, AND T. K. BISWAS, PRINTER and PUBLISHER OF THE *Amrita Bazar Patrika*. 3rd and 5th September 1912.

Contempt of Court—Newspaper comment on a sub judice *case—Comment published after decision of Court on the particular point was intimated to counsel but before passing of formal orders—Apology.*

In this case a rule was issued on the application of the Local Government calling on the Respondents "to show cause why they should not be committed to prison or otherwise dealt with for contempt in respect of an article published in the *A. B. Patrika* in its issue of the 10th August regarding a petition of one Rajendra Narayan Sing."

The facts are these. Criminal revision case No. 865 of 1912: *Rajendra Narayan Sing*, Petitioner v. *The Emperor* was heard by Carnduff and Imam, JJ., on the 18th and 19th July 1912 when their Lordships reserved judgment. On the 6th August before judgment was delivered the Advocate-General made an application to the Court for leave to file two affidavits sworn to by Messrs. Lyall and Hammond who had previously been District Magistrates of Bhagalpur and against whom, it was stated, certain allegations had been made in the course of the argument in the aforesaid case. The object of the affidavits was to refute these allegations. The affidavits were filed and their Lordships fixed the 12th August to consider the matter. It was prayed on behalf of the said Rajendra Narayan Sing that the deponents to the said affidavits should be present in Court on that day for cross-examination. On the 9th August their Lordships intimated to counsel on both sides that the affidavits would not be received in evidence. On the 10th August the article in question appeared in the *Patrika* in which certain observations were made regarding the affidavits of Messrs. Lyall and Hammond and their cross-examination thereon.

On the 12th August the Court passed formal orders regarding the affidavits which were returned. In regard to the case of *Rajendra Narayan Sing* v. *The Emperor*, their Lordships differed in opinion and the case was referred to a third Judge.

On the rule coming on for hearing the Respondents through their counsel unreservedly apologised to the Court. The Court accepted the apology and made the Rule absolute, but passed no further orders.

Held by CARNDUFF, J.—The publication of the article constitutes contempt. The article seems to suggest the course that ought to be taken by this Court in dealing with a pending case and to that extent it tends to interfere with the free course of justice.

Held by IMAM, J.—The Respondents committed no contempt of Court inasmuch as a day before the article appeared in the *A. B. Patrika* in its issue of the 10th August the decision of the Court that the affidavits would not be received in evidence had been intimated to counsel on both sides.

The Rule was made absolute as the parties called upon to show cause did not contest the matter.

The Advocate-General with *Mr. Orr* for the Petitioner.

Mr. B. Chakravarti with *Babu Narendro Kumar Basu* for Babu Moti Lall Ghosh.

Mr. K. N. Chaudhuri with *Babus Noresh Chandra Sen-Gupta* and *Probodh Chandra Chatterji* for Babu Tarit Kanti Biswas.

S. C. M.

CRIMINAL REVISIONAL JURISDICTION. Before RICHARDSON, J. REV. NO. 197 OF 1912. SABARALI MUNSHI, Complainant, Petitioner *v.* KALI PROSHONYO BOSE, Accused, Opposite Party. 17th September 1912.

Criminal Procedure Code, sec. 250—Order directing complainant to pay compensation passed subsequent to the order of acquittal of the accused, if legal.

The complainant brought a case under sec. 441, I. P. C., against the Opposite Party in the Court of the Deputy Magistrate of Munshigunj who by his order, dated the 28th June 1912, acquitted the Opposite Party finding that "it is a false and vexatious case instituted with a view to avoid civil litigation and gain the ends of such litigation

by setting the criminal law in motion." In this order, dated the 28th June 1912 there was the following direction—"The complainant Sabarali to show cause why he should not pay compensation (under sec. 250, Cr. P. C.) Rs 50 to accused." Subsequently on the 1st July 1912, the Deputy Magistrate, after hearing the complainant, made an order directing him to pay Rs. 50 as compensation to the Opposite Party.

On the application of the complainant the Additional Sessions Judge of Dacca made a reference under sec. 438, Cr. P. C., to the High Court recommending that the order dated the 1st July should be set aside.

The objection taken by the complainant was that the order awarding compensation was not contained in the order of acquittal, as required by law.

Held—On the authority of *Haru Tanti* v. *Satish Chandra Roy*, I. L. R. 38 Cal. 302, that the order under sec. 250, Cr. P. C, was bad in law and it must be set aside.

Babu Norendra Kumar Basu for *Babu Surendra Nath Guha* with *Babu Abani Bhusan Mukherjee* for the Opposite Party.

No one appeared in support of the reference.

Order awarding compensation set aside.

S. C. M.

CIVIL APPELLATE JURISDICTION. Before STEPHEN and RICHARDSON, JJ. APPEALS FROM APPELLATE DECREES NOS. 2312 AND 3152 OF 1909. GOPI MOHAN SEN AND OTHERS, Defendants, Appellants *v.* JAMINI KANTA SEN AND OTHERS, Plaintiffs, Respondents. Heard, 10th and 18th April. Judgment, 18th April 1912.

Rent suit—Co-sharer landlord if may bring suit with other co-sharers as Defendants—Refusal of Defendant co-sharers to join if must be positively proved.

This was an Appeal preferred on the 15th of November 1909 against the decree of Babu Nikunja Behari Roy, Additional Subordinate Judge of Zillah Chittagong, dated the 12th of July 1909, modifying the decree of Babu Kumud Bandhu Gupta, Munsif of North Raojan, dated the 14th of December 1908.

These Appeals arose out of two rent suits brought by the same Plaintiff against different Defendants.

The Plaintiff originally based his claim on a title derived from one Munsur Ali. The Defendants contended that the land in dispute was not included within the dur-taluk of Munsur Ali but in that of one Duli Mian. It was found by the lower Appellate Court that these two men held the dur-taluk jointly and that the Plaintiff is accordingly entitled to recover rent on the basis of being an eight annas co-sharer.

Held—That the fact that the Plaintiff had claimed a 16-annas title was no bar to his recovery on the title to the extent to which it was proved without any amendment of the plaint.

On the contention that the Plaintiff ought to have shown by some definite proof that the *pro formâ* Defendants being the co-sharers of the Plaintiff had refused to join him in the plaint and that he could not, without such proof, recover by merely joining the co-sharers as *pro formâ* Defendants (*Dwarka Nath Mitter* v *Tara Prosanna Roy*, I. L R. 17 Cal. 160), their Lordships observed: "In this case, however, although it does not appear on the findings that there is any specific refusal of the *pro formâ* Defendants to join the Plaintiff, it is pretty plain that they have throughout acted prejudicially to the Plaintiff, having denied the Plaintiff's title. The authority cited does not cover the arguments which is attempted to derive from it."

Babu Monmotha Nath Roy for the Appellants.

Babu D. L. Khastgir for the Respondents.

Appeal dismissed.

CIVIL REVISIONAL JURISDICTION. Before BRETT and CARNDUFF, JJ. RULE NO. 6411 OF 1911. KHANTA RANI DASI, Plaintiff, Petitioner *v.* JNAN CHANDRA CHATTERJEE, Defendant, Opposite Party. 15th March 1912.

Purdanashin woman—Right to be examined on commission, if forfeited by previous appearance in Court.

In this case the lower Court refused the application of the Petitioner to be examined on commission on the ground that the Plaintiff who claimed to be a *purdanashin* woman had, on one or two other occasions, appeared in Court. Their Lordships observed: "This point came before the Court for consideration in the cases of *Chamatkar Mohini* v. *Mohesh Chandra*, C. W. N, 750, *Mohesh Chandra* v. *Mani Lal*, 3 C. W. N. 751, and *Probhat Kumari* v. *Apurba Krishna*, 3 C. W. N. 753. In all those cases, it was held that a *purdanashin* woman did not lose the right given to her under sec. 132 of the Code of Civil Procedure to be examined on commission by reason of the fact that on one or two occasions she had of her own will or from necessity, broken the rule of the *purdah*."

Their Lordships therefore directed the examination of the Petitioner on commission.

Rule made absolute.

PRANKHANG *v.* KING-EMPEROR.

That was the sole ground for ordering further proceedings except that he also claims absolute right to order further proceedings in any case under sec. 437, Cr. P. C. The learned Legal Remembrancer apparently was of opinion that the ruling in *Bajrangi Gope* v. *The King-Emperor* (1), if it intended to lay down that a Police officer is not empowered to search an accused's house for stolen property relevant to the case, is not a correct statement of the law and the learned Magistrate in his explanation refers to the ruling in the well-known case of *The Nizam of Hyderabad* v. *Jacob* (2), as supporting this contention. We need hardly point out, as the learned Counsel for the Crown has frankly admitted, that that case has nothing whatever to do with the question now before us, and we desire again to point out that the law does not empower a Police officer to search an accused's house for anything but the specific article which has been or can be made the subject of summons or warrant to produce. A general search for stolen property is not authorized and the law cannot be got over by using such an expression as "stolen property relevant to the case." Such expressions are vague and misleading and the terms of the law are extremely specific. As long as that law is not amended the Police cannot be said to be empowered to make any search not authorized by that law.

We further wish to point out with reference to the Magistrate's opinion that it is open to him to order further proceedings in any case under sec. 437, that that section is limited by the words "on examining any record under sec. 435" and that sec. 435 lays down that a Court may call for and examine any record for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court. It cannot therefore be said that if a Magistrate finds no illegality, or impropriety or irregularity and nothing incorrect in the proceeding that he is empowered to set aside an order of discharge upon other grounds, or upon no ground at all.

(1) 15 C. W. N. 843: I. L. R. 38 Cal. 904: 13 C. L. J. 659 (1910).
(2) I. L. R. 19 Cal. 52 (1891).

The Rule is made absolute. The order of the lower Court must be discharged and further proceedings against the Petitioners dropped.

Rule made absolute.

[PRIVY COUNCIL.]

[APPEAL FROM MADRAS.]

LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
1912,
Heard, 20, June.
Judgment, 20, June.

IN THE MATTER OF G. KRISHNASAMI AIYAR, Appellant.

Professional misconduct—Pleader and client—Vakil's duty in relation to orderly and pure administration of justice—Personal fraud, absence of, if sufficient to acquit Vakil of responsibility—Printing charges paid by client not put in owing to fraud of Vakil's clerk—Dismissal of case for non-payment of printing charges—Vakil's duty to explain circumstances in Court as soon as he had knowledge of them—Permitting dishonest clerk to continue correspondence with client—Professional impropriety—Suspension from practice.

Vakils have the general function, applicable not only to the Bar in general but to solicitors at large, that they must in the conduct of all suits entrusted to them cooperate with the Court in the orderly and pure administration of justice.

IN THE MATTER OF G. KRISHNASAMI AIYAR.

Where certain printing charges which an Appellant in a second appeal was called upon to pay, was paid by him to a clerk of his Vakil, but the amount was not paid in Court, and on the other hand the clerk falsely informed the Appellant that his case was being proceeded with, and when later on the case was listed for dismissal for non-payment of the printing charges, it was dismissed in the Vakil's absence, and the Vakil in an affidavit sworn by him in support of an application made 18 days later for restoration of the appeal admitted that on the day the case was disposed of he had become aware of the fact that the money required to be paid had been paid by the client but had not been applied to the purpose for which it had been paid ;

Held—*That in honour and in duty to his client, to himself and to the Court, the Vakil who had already become aware of the circumstances in which the money had not been paid in Court should have attended when the case was called and publicly explained those circumstances and apologised to the Court and expressed his regret.*

That the excuse offered by him, viz., *that he was engaged elsewhere and could not therefore attend in order to discharge this duty of honour, was insufficient.*

That it was his duty, even after this, to have waited until an interval in any procedure of the Court or till the Court was about to adjourn, and to have instantly made his honourable explanation.

That in any case he was honourably bound to inform his client of what had occurred on that day and he was guilty of regrettable conduct in permitting his clerk who was plainly guilty of fraudulent and improper conduct to continue in correspondence with the client in the course of which the latter was falsely informed that the appeal had come on for hearing and been dismissed.

That although the Vakil was not found guilty of direct and personal fraud he could not be acquitted of conduct in the management of the appeal and of his client's affairs which caused the procedure of the Court to be the very opposite of what all such procedure should be, viz., *responsible, orderly, and pure.*

That this violation of the proprieties which attach to legal procedure constituted a reasonable cause for his suspension from practice, and an interim suspension for six months as ordered by the High Court was in extent appropriate.

This was an Appeal against an order of the High Court of Judicature at Madras, dated 28th February, 1912, whereby the Appellant was suspended from practice for six months.

The Appellant was a Vakil of the High Court, and had a considerable practice in Madras. The Manager of his office was Luchmiah, whose duties included those of book-keeper and cash keeper. He had also a clerk, Bhashyam, who ordinarily wrote the Tamil letters.

In 1907, the present Appellant was engaged to file a Second Appeal in the High Court against a decree of the District Court of South Arcot. He appears to have accepted the engagement to file and conduct the Second Appeal without a fee for his services in order to oblige certain friends of his family, who were interested in the case. The case was admitted and numbered Second Appeal No. 1045 of 1907, and applications were made in due course for the printing of the pleadings and judgments and certain other papers wanted for the purposes of the Second Appeal.

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On the 13th November, 1907, Lutchmiah received a demand from the Court for payment of Rs. 48, the probable cost of printing the pleadings, &c., in the case, and on the 5th May, 1908, a further demand for Rs. 60 for the other printing charges. Letters were thereupon written to Visvanatha Chetti asking him to remit the monies within the time limited by the Court's demands. Ultimately on or about the 6th January, 1909, he sent by post Rs. 40 on account. The Appellant handed over the Rs. 40 to Lutchmiah, and on the 8th January Bhashyam duly wrote to Visvanatha Chetti acknowledging its receipt. It was alleged that by a mistake on the part of the gomasta the said Rs. 40 was credited in the accounts to another Second Appeal from the same district, *viz.*, South Arcot.

Subsequently Visvanatha Chetti, having been told that the amount was insufficient was sent for and came to Madras, and a Petition supported by an affidavit was put in asking for an extension of the time for payment.

On the 5th March, the case was posted for dismissal for non-payment of the printing charges; the said Petition was then brought before the Court and an order was made whereby the amount demanded for the printing was reduced to Rs. 68, and a fortnight's time was given within which the money was to be paid. On the next day, Visvanatha Chetti at Madras paid Rs. 28 direct to Lutchmiah, who credited him with this payment in the account. Lutchmiah had accordingly in fact received the full amount required to meet the charges in question, but he omitted to pay the amount into Court. And in consequence of the default in payment of the charges the prints were not prepared for the Second Appeal.

On the 26th January, 1910, the Second Appeal was placed in the cause list under Rule 100 of the Rules of the High Court, Appellate Side, for disposal without the printing of the papers in respect of which default had been made in paying the charges. The case was reached a few minutes after the Court sat, and the Appellant not being present it was dismissed for default. On the 28th January Bhashyam wrote to the client a letter stating that the case had been dismissed.

On the 14th February the present Appellant together with another pleader who had been engaged by Visvanatha Chetti to appear with him put in the necessary Petition (Civil Mis. Pet. No. 498 of 1910) for the restoration of the Second Appeal under Order XLI, Rule 19 of the Civil Procedure Code. The Petition was supported by two affidavits explanatory of the circumstances, one made by the Appellant and the other by Visvanatha Chetti.

The petition came on for hearing in November and December, 1911, and at the hearing some fresh affidavits (including one by the Appellant) and certain other documentary evidence were put in; and on the 3rd January, 1912, judgment was delivered directing that the present Appellant pay all costs of the hearing and the costs of the 26th January, 1910, and that the Second Appeal be thereupon restored to the file.

In the course of the said judgment the learned Judges animadverted on the Appellant's omission to take the earliest opportunity the same day to state to the Bench before whom the case was posted the circumstances which prevented his being present when it came on. They expressed suspicions as to Lutchmiah's accounts, and said that the conduct of

both the clerks in writing the letters of July, 1909, and 28th January, 1910, abovementioned, must be regarded as fraudulent; and referring to the extent to which the Appellant admittedly left the correspondence in the hands of his clerks, they added: "In the eye of the law at least, he is responsible for the fraud perpetrated on his client. No pleader can be permitted to completely abandon to clerks the discharge of his duties to his clients, and, in any event, he must bear the full responsibility for the acts and defaults of his clerks." And later on they observed: "The negligence in the present case is so gross as to amount to fraud, the evidence showing a design on the part of either the Vakil or his clerks to do nothing for the client and to appropriate his money."

After the said judgment had been pronounced the High Court ordered by certain proceedings, dated 3rd January, 1912, that a notice returnable in fourteen days be issued under Letters Patent, sec. 10, to the present Appellant "to show cause why he should not be removed or suspended from practice as a Vakil of the High Court or be otherwise dealt with for his unprofessional conduct in the said Second Appeal," and that a copy of the said judgment should be sent with the notice. This was done. The Advocate-General was requested by the High Court to appear in support of the notice. The case was heard by Sir C. White, C. J., and S. Nair and Ayling, JJ., who delivered their judgment on the 28th February, 1912. In the course of their judgment, they said:—

"According to the Vakil's own case, by a mistake of his clerk moneys paid by the Appellant in S. A. No. 1045 of 1907 were credited to another client and as a result of this mistake the appeal was dismissed for default. The case was posted not on account of any default of the client but on account of a mistake, or something worse than mistake, in the office of the Vakil. In this state of things, the onus was heavy on the Vakil to explain the true state of affairs to the Court and to his client. So far as the Court is concerned he does nothing. His failure to be in Court when the case was called on may have been accidental. But one would have thought in a case where a grave injustice had been done to his client by a mistake in his office of which the Vakil was personally aware, he would have been specially careful to attend and explain how things stood. It was a duty which he owed to the Court. It was a duty which he owed to his client, who had suffered a serious injustice. It was a duty which he owed to himself since the mistake might well give rise to questions involving the personal honesty of the Vakil or his clerks. There may be an explanation of the Vakil's failure to appear. It seems to us there can be no satisfactory explanation of his conduct in not bringing the matter before the Court at the very earliest opportunity. In our opinion, the *gravamen* of the charge is not that the Vakil failed to appear when the case was called on (this, as we have said, may have been an accident) but that having failed to appear, and the appeal having been dismissed, he did not give a full explanation to the Court at the earliest opportunity. His excuse that he was under the impression that he could not mention the facts till the same Bench sat again seems to us to be idle.

"As regards the client, whatever may have been the practice of the Vakil's office as to allowing his clerks to write letters which did not come before him, the Vakil

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seems to have entirely misconceived the nature of his duty and responsibilities in not taking steps to see that the real circumstances in which the appeal had been dismissed were brought to the knowledge of his client. He did nothing until the client appeared upon the scene. To make matters worse, the letter of January 28th to which we have referred was written by the clerk Bhashyam. This letter is a deliberate lie. The object with which it was written was obviously to deceive the client and make him think there was nothing more to be done. We cannot shut our eyes to the fact that if this letter had accomplished the object with which it was written, the clerk or the Vakil might have got the benefit of the client's money and nothing more would have been heard of the case. The suggestion that the object of the clerk in writing the letter was to 'gain time' is not worth serious consideration. . . . .

"The letters of March 15th, 1909 and January 28th, 1910, were written by Lutchmiah and Bhashyam respectively on paper headed with the Vakil's name and address. The Vakil tells us, in effect, that these letters were written without his knowledge or approval. It was suggested that there was nothing unusual in this. If a practice of Vakils' clerks being allowed to write letters on behalf of their masters without their masters' knowledge really exists, it seems to us that the practice is altogether unbusiness-like. The letter of January 28th, 1910, contains a false statement, a false statement—as it seems to us—made deliberately with a definite object in view. The Vakil cannot protect himself from responsibility by saying he knew nothing about this letter. We must hold him responsible for it. If this letter was in fact written with the Vakil's knowledge and approval the case would be an extremely bad one. We assume, in his favour, that the letter was written without his knowledge. We also assume, in his favour, that what appear to be the obvious alterations in the books made, as it seems to us, with the object of supporting the very doubtful story as to the Rs. 40 having been credited to the wrong Second Appeal by mistake, were made without the knowledge of the Vakil. Then remains the fact that when the appeal was dismissed for default in circumstances which made it the duty of the Vakil to offer a prompt and full explanation to the Court and to his client he did nothing till his client appeared on the scene. He did not write to the client himself. He gave no instructions to his clerk to write. The matter was one of special delicacy and importance and in our opinion it was the duty of the Vakil either to give express instructions to his clerk in the matter or to satisfy himself that any communication which his clerk sent to the client was a true statement. As we have said, the clerk's statement was untrue and we must hold the Vakil responsible for it."

The High Court accordingly made the order of suspension.

Hence this Appeal.

Mr. L. DeGruyther, K. C., and *Mr. Brown* for the Appellant submitted that the Appellant was not guilty of any professional or other misconduct. It was not proved that the Appellant's clerks desired to deceive or to cheat the client. At the most there was negligence on the part of the clerks which did not come to the Appellant's knowledge till very late, and the Appellant could not do more under the circumstances to put matters right. It was unfortunate that the Appellant was a little late on the 26th January 1910,

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to explain the matter to the Court, but the Appellant's affidavits truly explained everything. There was no culpable negligence on the part of the Appellant. The charge was made under sec. 19 of the Letters Patent. No "reasonable cause" for suspension within the meaning of the said section has been made out. The Letters Patent did not provide the procedure which should be adopted in such cases. It was provided by Act XVIII of 1879, (Legal Practitioners Act). Sec. 13 enumerates a number of "reasonable causes" for which a pleader may be suspended. In the absence of fraud or grossly improper conduct there could be no "reasonable cause." Reference was made to *In re Southekal Krishna Rao* (1). The Appellant had been amply punished by loss of practice and the circumstances of the case were deserving of a lenient consideration.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an Appeal against an order of the High Court of Judicature at Madras. The order is dated the 28th February 1912. Under that order the Appellant who was a Vakil of the Court was suspended from practice for six months on the ground of professional misconduct.

The circumstances of the case have been resumed in a very careful judgment by the learned Judges of the Court below. Their Lordships only review them further for the purpose of illustrating the one point which appears to them to be conclusive of the present Appeal.

In the year 1907 the present Appellant, the Vakil, was employed to file a Second Appeal in the High Court against a decree of the District Court of South Arcot. The condition of matters with regard to a Vakil, and his relation to the procedure of the Court which bears upon this case, are set out in sec. 95 of the Appellate Side Rules of Madras. By that section pleaders "are responsible to the Registrar for all translation and printing charges incurred by him on their behalf" under those Rules. To that extent the Vakil must co-operate in the conduct of the suit with the Registrar and with the Court, under these regulations. And they have the other general function, applicable not only to the Bar in general, but to solicitors at large, that they must, in the conduct of all suits entrusted to them, co-operate with the Court in the orderly and pure administration of justice.

In the present case a certain advance was made, or required to be made, in order to enable printing to be done as Court printing. A correspondence accordingly ensued between this Vakil, and his client; and it is a well-founded observation made in the anxious argument presented to their Lordships from the Bar that that correspondence was mainly conducted by a manager and a clerk of the Vakil and not by the Vakil personally. That, however, is not completely true because one of these letters, an important one, of the 8th September 1908, was written by the Vakil himself. Further, the Vakil in the present case, the present Appellant, was, of course, charged with the knowledge that it was necessary, not only that the moneys should be received from his client, but that in common honesty that money should be paid to the Registrar for the discharge of the printing dues. This was not done. Statement after statement is made by the manager and clerk in the course of this correspondence containing a false narra-

(1) I. L. R. 15 Cal. 152 (P. C.)

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tive of what had been proceeding, and constituting a fraudulent deception of the client.

Matters, however, culminated in a visit paid by the client on the 5th March 1909, when a payment of Rs. 28—making up the full amount to which the printing charges had accumulated at that date—was made by the client to one of the clerks in the Vakil's office. The full sum amounted to Rs. 68, that is to say, a payment of Rs. 28 on the spot, added to a previous payment of Rs. 40.

That being done, what followed? The client naturally expected that his case would be proceeded with. He was falsely informed on the 15th July, by a letter written by the clerk, that certain progress was being made. Nothing, however, had been done, on account of the initial withholding from the Registrar of the Court of the whole of the money received from the client.

On the 25th of January matters were in this position: that the case was listed for the following day, the 26th, and, as is admitted in a most fatal document for the Appellant in this case, namely his own affidavit, the Appellant then personally knew of the transactions in the interim. His knowledge must have included the knowledge that the moneys received for a specific purpose from the client had not been so applied. When the Vakil arrived at the Court on the morning of the 26th January 1910 he was aware that he was accordingly bound, as a responsible Vakil, in honour and in duty to his client, to himself, and to the Court, to explain that the cause, which would in the natural course be dismissed for want of payment of the printing dues, was exposed to this peril by reason of a circumstance for which he apologised publicly to the Court, and expressed his regret. His affidavit, however, is to this effect: "When I reached the doors of this Court it was about a few minutes after this case had been called on and dismissed for default." In short, he makes to the Court below, and at this Bar, an excuse that, being engaged elsewhere, he did not appear to discharge that duty of honour, which on all sides plainly rested upon him. Having made that mistake a further course was open to him, and that was to wait until an interval in any procedure of that Court, or till the Court was about to adjourn, and instantly to make his honourable explanation. He did not do so. He allowed matters to drift for about 18 days, as after mentioned; and the Court below, having considered the excuses put forward for not sooner making application to notify what had occurred, think these excuses to be idle.

He apparently returned to his office, and what did he then do with his staff? His staff by that time had been convicted of most fraudulent and improper conduct in keeping of the client's money, in sending lying letters to a client, and in giving, in the interval, an untrue account of the proceedings in the appeal. This Vakil, who has been acquitted of personal fraud by the Court below, an acquittance with which their Lordships do not in any degree interfere, was guilty of the regrettable conduct of permitting a staff, who had previously been guilty of such deception, to continue in correspondence with his client. It was for him to say whether he should retain such persons in his service, but at all events he was honourably bound to disclose to his client the mishap that had occurred on the morning of the 26th January. Instead of that the staff was continued as before, and on

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the 28th January the client was written to by Bhashyam in these terms: "Your Second Appeal aforesaid came on for hearing on the 26th instant, and was decided against us, that is the Appeal was dismissed." That implies two falsehoods. The case did not come on for hearing. It was never heard. It was not decided against them in the sense of a decision having been pronounced *in foro contentioso.* It was dismissed simply in consequence of the improper non-payment of moneys due. Accordingly, so far as the client was concerned, nothing was done to wipe out the mistake which had been made by the Vakil. So far as the Court was concerned nothing was done for a period of about 18 days.

In the interval the client had appeared in Madras, and, no doubt, made his determination plain to have the matter brought before the Court as one at least of mischance. Accordingly an application had to be made, and it was not made until the 14th of the following month of February—an application for restoration of the case to the Roll. Then, the Court apprehending the gravity of the situation, instituted this enquiry. Every conceivable point has been taken against the regularity of that enquiry in the Court below; but at the Bar, where the case was anxiously and ably argued, these points have not been insisted upon. For they were without substance.

The main issue in this case is, what was the conduct, relative to the Court, relative to the client, and relative to his own professional position, which this Vakil perpetrated on or about the 26th January? Their Lordships while not interfering, as stated, with his acquittance of direct and personal fraud, do not see their way to acquit him of conduct in the management of the appeal and of his client's affairs which caused the procedure of the Court to be the very opposite of what all such procedure should be, namely, *first* responsible, *secondly* orderly, and *thirdly* pure. In all these respects there has been a violation of the proprieties which attach to legal procedure.

That being so, the Court made this enquiry. Its powers seem to be those contained in sec. 10 of the Letters Patent creating the Court and containing, *in gremio* thereof, the rules with regard to Advocates, Vakils, and Attorneys-at-law. Amongst the Rules is r. 10, which empowers the Court in these terms: "to remove or to suspend from practice on reasonable cause the said Advocates, Vakils or Attorneys-at-law."

The sole question which their Lordships have to consider in the present case is: the Court being apprised of the procedure which has been briefly described, can it be said to have acted without reasonable cause in making an interim suspension of the Appellant from practice as a Vakil for a period of six months? Their Lordships think that there was reasonable cause in the present case, and they further think the Court below was justified both in the pronouncement and the extent of the suspension.

With regard to the appeal very properly made by Mr Kenworthy Brown as to his client, their Lordships can only express the hope that in the management by those under him of affairs committed to his charge, he will, in future, see to it, that such improprieties as those referred to do not recur; and, if that is done, there seems no reason to doubt that, after this discipline, he will be able to resume an honourable professional career.

Their Lordships will humbly advise His

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Majesty that this Appeal should be dismissed.

Solicitor: *Mr. Douglas Grant* for the Appellant.

B. D. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPLICATION FOR LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL, No. 22 OF 1911.

JENKINS, C. J.
N. R. CHATTERJEA, J.
1912,
16, April.

NAND KISHORE SINGH and others, Plaintiffs, Appellants,
v.
RAM GOLAM SAHU and others, Opposite Party, Respondents.

Civil Procedure Code (Act V of 1908), sec. 114, Ors. XLV, XLVII—Review, if competent, of an order refusing leave to appeal—Privy Council Appeal—Value of suit and value of subject-matter of appeal—Interest subsequent to the decree if may be added.

An order refusing leave to appeal to the Privy Council is open to review by the Court which made it.

Where it was found that the subject-matter of the mortgage suit as stated in the plaint even when the interest of six months allowed for redemption was added did not come up to Rs. 10,000 though the amount was above Rs. 10,000 when interest subsequent to that date accrued due at the date of application was added:

Held—***That in refusing leave no error apparent on the face of the record was committed, nor was there any sufficient reason for granting a review.***

This was an application for reconsideration of an order refusing leave to appeal to the Privy Council in a Privy Council Appeal preferred against the judgment and decree of the Judges Mr. Woodroffe and Mr. Carnduff of this Court, dated the 10th of December 1911, allowing the appeal in Appeal from Original Decree No. 531 of 1908, which had been preferred against a decree of Babu Rajendra Nath Dutt, Sub Judge of Bhagalpur, dated the 31st of August 1908.

The facts of the case material to the report will appear from the judgment.

Mr. Caspersz and *Babu Upendra Nath Chatterjee* for the Petitioners.

Dr. Rash Behary Ghose and Babu Kshetra Mohun Sen for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

This is an application to review an order made by us under Or. XLV of the Code of Civil Procedure. By that order we rejected an application for leave to appeal to His Majesty in Council and we did so upon this ground. The learned Vakil for the applicant, one of the most experienced and eminent Vakils of this Court immediately told us that though the value of the subject-matter on appeal to His Majesty in Council was upwards of Rs. 10,000, still the value of the subject-matter of the suit was not Rs. 10,000 and consequently he could not support the application. The result was, it was rejected.

It is now sought to obtain a review of this order under sec. 114 of the Code and Or. XLVII. It is objected on the part of the Respondent that no such application can be made and for the purposes of supporting that contention our attention has been drawn to a number of decisions in which it has been held that no appeal lies under the Letters Patent from the orders of a single Judge, reject-

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ing an application for leave to appeal to the Privy Council. Mr. Justice Wilson in a case of *Lutf Ali Khan* v. *Asgur Reza* (1) bases this conclusion on the view that the order was not a judgment within the meaning of the Letters Patent. If that be the reason why an appeal does not lie from an order of a single Judge it affords no answer to an application for review.

Sec. 114 of the Code provides, "that a party who is aggrieved by an order from which no appeal has been preferred or from which no appeal is allowed by the Code, may apply for a review of the judgment to the Court which made the order, and the Court may make such order thereon as it thinks fit. The order of rejection comes within this description and the application for review is therefore within the terms of sec. 114. I fail to see how it can be said the order of rejection was not an order of a Civil Court; it was under Or. XLV of the Code which is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature.

Moreover I would point out in support of this view, that when an application for review is rejected by a Court, other than a High Court, then under Or. XLIII, Rule 1, an appeal lies from such order. I therefore can see in the Code itself nothing to support the view that the order of the High Court under Or. XLV is not subject to review.

The next question is whether the applicant has made out a case for review.

It is now contended that the value of the subject-matter of the suit in fact was Rs. 10,000 or upwards, and that there is an error apparent on the face of the record. But when the facts come to be investigated, it is conceded that even if interest be calculated not only up to the decree, but even up to the end of the six months allowed for redemption the sum of Rs. 10,000 is not reached. In this connection I would refer to the case in *Gooroo Persad* v. *Juggut Chunder* (2), where it was stated that "their Lordships must not, of course, be understood to intimate that the Sudder Courts are to give leave to appeal in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree. Such cases must, in their Lordships' opinion, rest in their discretion:" that is, in the discretion of the Judicial Committee. There were therefore grounds for the conclusion at which the learned Vakil arrived as to the insufficiency of the value of the subject-matter of the suit and it is not made out that there is an error apparent on the face of the record or any sufficient reason for granting the review. If leave to appeal is to be obtained, it must, in the circumstances, be obtained from their Lordships of the Privy Council and not from us.

The application must, therefore, be dismissed with costs, three gold mohurs.

Application dismissed.

(1) I. L. R. 17 Cal. 455 (1890).

(2) 8 Moo. I. A. 1, 166, 169 (1860).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO 258 OF 1910.

MOOKERJEE, J.
CARNDUFF, J.
1912,
16, April.

SINNAMAN SINGH and another, Appellants,
v.
SHAM CHARAN OHDAR and others, Respondents.

Chota [Nagp]ur Tenancy Act (VI of 1908, B. C.), sec. 178, cls. (2) and (3)—Non-occupancy raiyat, conditional decree for ejectment for non-

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payment of rent—Statutory time, extension of, if may be granted after expiry thereof and after execution applied for—Executing Court, if may extend time.

The period of thirty days allowed for payment of arrears to a non-occupancy raiyat by a decree passed against him under sec. 178, cl. (2) of the Chota Nagpur Tenancy Act of 1908, in a landlord's suit for ejectment for non-payment of arrears, may be extended by the Court under cl. (3) of the section even after the expiry of that period and even after the decree-holder has applied for execution.

BODH NARAIN *v.* MAHOMED MOSSA (9) *relied on.*

The order for extension can be made only by the Court which tried the suit and not by the executing Court.

Where however the Court executing the decree was the Court which tried the suit, no objection could be taken to the Court extending the time merely because the order of the Court was recorded in the order-sheet of the execution proceedings and not in that of the original suit.

PATLOJI *v.* GANU (2), MAHAPROSAD SINGH *v.* SURENDRA MOHAN SINGH (4), SUNKUR SINGH *v.* HUREE MOHAN (5), PURESH NATH *v.* KRISHTO LAL (8) *referred to.*

This was an Appeal preferred on the 31st of May 1910 against the order of D. H. Kingsford, Esq., Judicial Commissioner of Zillah Chota Nagpur, dated the 23rd of February 1910, affirming the order of Babu Asutosh Chatterjee, Munsif of Hazaribagh, dated the 3rd of August 1909.

The material facts of the case will appear from the judgment.

(2) I. L. R. 15 Bom. 370 (1890).
(4) 9 C. L. J. 288 (1907).
(5) 22 W. R. 460 (1874).
(8) 23 W. R. 50 (1874).
(9) I. L. R. 26 Cal. 639 (1899).

Babu Lalit Mohun Mukerjee for the Appellants.

No one for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The question of law raised in this appeal depends for its solution upon the true construction of sub-secs. (2) and (3) of sec. 178 of the Chota Nagpur Tenancy Act, 1908. Sub-sec. (2) provides that "in all cases of suits for the ejectment of a non-occupancy raiyat for non-payment of arrears of rent or for the cancelment of a lease for non-payment of arrears of rent, the decree shall specify the amount of the arrear and if such amount together with interest and costs of the suit be paid into Court within thirty days from the date of the final decree, the decree shall not be executed. Sub-sec. (3) provides that the Deputy Commissioner may for special reasons to be recorded in writing, extend the period of thirty days mentioned in sub-sec. (2). The Appellants, who were the Plaintiffs landlords in the Court below, obtained a decree against the Respondents on the 14th May 1909, which was drawn up in accordance with the provisions of sub-sec. (2) of sec. 178. The tenants made default in the payment of the decretal amount and the result was that on the 29th June 1909, the decree-holders applied for execution by way of ejectment. On the 3rd August following, the judgment-debtors applied for extension of time under sub-sec. (3). That application was granted and the decretal amount as directed by the Court was deposited. The amount was subsequently received by the decree-holders under protest. On behalf of the Appellants the validity of the order has been challenged on three grounds, namely, *first*,

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that the application for extension of time could not be entertained by the Court executing the decree; *secondly*, that it could not be entertained after the expiry of the time prescribed by the decree for payment of the arrears; in any event it could not be entertained after the application for execution had been made by the decree-holder; and, *thirdly*, that time was extended by the Court for reasons not sufficient in law.

With reference to the first ground, it has been urged that a Court executing a decree is bound to execute it as it stands and can in no way alter or interfere with its terms. In support of this proposition, reliance has been placed upon the cases of *Mohant Ishwargar* v. *Chudasama* (1), *Patloji* v. *Ganu* (2), *Bhugwandas* v. *Haji Abu Ahmed* (3) and *Mahapresad Singh* v. *Surendra Mohan Singh* (4). This contention is clearly well-founded, and the proposition admits of no dispute that a Court of execution cannot alter the terms of the decree. In fact, this view was adopted by this Court in the case of *Sunkur Singh* v. *Huree Mohan* (5), which turned upon the construction of sec. 52 of Act VIII of 1869 (B. C.), corresponding to sec. 178 of the Chota Nagpur Tenancy Act, 1908. But although the argument is well-founded, it is, in our opinion, wholly unsubstantial. The Court executing the decree was the Court which had tried the suit and made the decree. It has not been disputed, and in view of the provisions of sub-sec. (3) of sec. 178 of the Chota Nagpur Tenancy Act, 1908, it cannot be disputed that the application could have been entertained by this very judicial officer if it had been described as an application in the suit. It would therefore serve no useful purpose to hold that the application was improperly entertained and it would be an idle formality to send back the case for considerations by the same officer in the course of the suit he had tried. The decision in *Thakur Madan Mohan* v. *Bhikai Sahu* (6) is distinguishable, as there the decree was altered in execution by a Court of Appeal by consent of some of the parties and in the absence of other parties prejudiced by the variation. No doubt, as pointed out by this Court in the cases of *Rao Baneeram* v. *Prannath Shaha* (7) and *Puresh Nath* v. *Krishto Lal* (8), a matter of this description ought to be considered by the Court which has tried the suit, because whether or not the order for extension of time should be made in favour of the tenant, depends upon the circumstances of the litigation, that is, upon the circumstances disclosed at the original trial and the events subsequent. It is thus fairly obvious that the order can be made only by the trial Court. But as a matter of fact, in the case before us, the order has been made by that Court; only, it has been recorded in the order-sheet not of the original suit but of the execution case. We are therefore of opinion that effect ought not to be given to the first contention of the Appellants.

With reference to the second ground it has been argued that an application for extension of time under sub sec. (3) of sec. 178 must be made before the time has expired, and in any event, before an application for execution has been presented. The learned Vakil for the Appellants, who

(1) I. L. R. 13 Bom. 106 (1888).
(2) I. L. R. 15 Bom 370 (1890).
(3) I. L. R. 16 Bom. 263 (1891).
(4) 9 C. L. J. 288 (1907).
(5) 22 W. R. 460 (1874).
(6) Mis. 415 of 1910.
(7) 18 W. R. 412 (1872).
(8) 23 W. R. 50 (1874).

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has addressed to the Court a very able and forcible argument on this part of the case, has contended that upon the expiry of the time prescribed by the decree, the tenancy is forfeited, and a valuable right accrues to the landlord to re-enter upon the premises: that right, it has been suggested, ought not to be taken away for the benefit of the Defendant who has failed to carry out the order of the Court and has not been diligent enough to make an application for extension before expiry of the prescribed time. But we are of opinion that a narrow construction ought not to be placed upon the terms of sub-sec. (3) of sec. 178. It may be observed that the sub-section does not specifically prescribe the limit of time within which an application for extension of time may be made: in fact, the sub-section authorises the Deputy Commissioner to extend the time even without an application. As was explained by Mr. Justice Banerjee in the case of *Bodh Narain* v. *Mahomed Mossa* (9), where a question arose as to the interpretation of sec. 66 of the Bengal Tenancy Act, which corresponds to sec. 178 of the Chota Nagpur Tenancy Act, 1908, as ejectment for non-payment of rent, is in the nature of a penalty of forfeiture, the provision for extension of time for payment to avoid the penalty of forfeiture is a remedial provision and should be construed liberally so as not to restrict the remedy and make it inapplicable to cases to which it ought obviously to extend. It was further pointed out by the same learned Judge that the section authorises the Court for special reasons to extend the period and there is no reason why we should interpolate words so as to limit the power of the Court to make an order for enlargement of time. It is, indeed, conceivable that needless hardship may be caused to litigants if the contention of the Appellant were to prevail. For instance, if the Defendant, by reason of accidental circumstances over which he has no control, finds it impossible in spite of his diligence to deposit the decretal amount on the last day of the prescribed period, he may be driven to make an application for extension of time on the day following by reason of adverse events which he had not foreseen and which made it impossible for him to carry out the direction of the Court. There is no good reason why the section should be narrowly interpreted so as to exclude relief in such a case. We are not prepared to accept the contention of the Appellants, and in the view we take we are supported by the principle which underlies the decisions of their Lordships of the Judicial Committee in *Rajab Ali* v. *Amir Hossein* (10) and *Badri Narain* v. *Sheo Koer* (11), which were applied by this Court in the case of *Golab Chand* v. *Bahuria Rammurat Koer* (12). We hold, therefore, that it was competent to the Court to entertain an application for enlargement of time under sub-sec. (3) of sec. 178 after the expiry of the period prescribed in the decree in conformity with sub-sec. (2) and even after the decree-holder had applied for execution. The second contention of the Appellants must consequently be overruled.

With regard to the third contention, we are unable to hold that the Court of first instance exercised its judicial discretion improperly. The Court pointed out that the Defendant was a permanent tenure-holder and had offered to the pleader for

(9) I. L. R. 26 Cal. 689 (1899).

(10) I. L. R. 17 Cal. 1 (1889).
(11) I. L. R. 17 Cal. 512 (1889).
(12) 13 C. L. J. 432 (1911).

the decree-holder to pay the money on the 23rd June 1909, some days before the application for execution was made. In view of this circumstance, the Court held that an order for extension might properly be made under sub-sec. (3) and that view has been affirmed by the Judicial Commissioner on appeal. It is impossible for us to hold that there has been such a flagrant abuse of judicial discretion as to justify the interference of this Court, as a Court of Appeal.

The result is that the order of the Court below is affirmed and this Appeal dismissed.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE NO. 173 OF 1909.

BRETT, J.
N. R. CHATTERJEA, J.
1912,
Heard, 8, May.
Judgment, 17, May.

SASI BHUSAN LAHIRI, Defendant, Appellant,
v.
RAJENDRA NATH JOARDAR and ors., Plaintiffs, Respondents.

Hindu Law—Stridhan, *succession to—Step-sister's son as heir.*

A step-sister's son is a preferential heir to a woman's stridhan *to the daughter's son of the great-grandson of the great-grandfather of the woman's husband.*

This was an Appeal preferred on the 22nd of April 1909 against the decree of Mr. H. E. Ransom, District Judge of Zillah Nuddea, dated the 6th of February 1909.

The facts of the case will appear from the judgment.

Mr. B. K. Lahiri and *Babus Narendra Kumar Bose*, *Upendra Nath Bagchi* and *Hira Lal Sanyal* for the Appellant.

Babus Golap Chandra Sarkar and *Sachindra Prosad Ghosh* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

N. R. CHATTERJEA, J.—This Appeal arises out of an application for probate of the Will of one Adya Sundari Debi who bequeathed her properties to the three Respondents who were her paternal relations and appointed them executors, one of them Charu Chandra being related to her as her half-sister's son. The Appellant, Sasi Bhusan Lahiri, was the daughter's son of the great-grandson of the great-grandfather of Adya Sundari's husband, Ram Kanai Moitra. The Appellant had applied for letters of administration to the estate left by Adya Sundari before the application for probate of her Will was made by the Respondents.

Therefore in the proceedings on the application for probate citation was issued upon the Appellant and he put in a petition of objections contesting the genuineness and validity of the will and also alleging that the estate belonged to Adya Sundari's husband which she had no power to dispose of by will. The learned District Judge held that he was not entitled to oppose the grant of probate and after taking formal evidence of the execution of the will, granted probate to the Respondents. Sasi Bhusan has appealed to this Court.

Before Sasi Bhusan can contest the will he must show that he has an interest in the estate of Adya Sundari. If the estate dealt with by the will belonged to her husband, the grant of probate of the will executed by her, cannot affect the rights of the heir of her husband, and the Court of probate of course has no power to go

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into the question whether the estate belonged to Adya Sundari or her husband.

It has accordingly been contended on behalf of the Appellant, Sasi Bhusan, in this appeal, *first*, that assuming that the estate belonged to Adya Sundari over which she had a disposing power, the Respondent Charu Chandra, as the half-sister's son of the deceased, was not her heir in preference to him and, *secondly*, that citation having been issued upon him, the Court below is wrong in holding that he had no *locus standi* to oppose the grant of probate.

The question, therefore, arises whether Charu Chandra, as the half-sister's son of the testator, is the heir to the *stridhan* of Adya Sundari. If he is, then the Appellant Sasi Bhusan has no *locus standi* to contest the will.

The parties are governed by the Dayabhaga School of Hindu Law. The Dayabhaga, in dealing with the succession to the separate property of a childless woman after enumerating certain heirs down to the husband, says as follows :—" On failure of heirs down to the husband, this rule is again provided which Vrihaspati thus delivers, " The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law and the wife of an elder brother are pronounced similar to mothers. If they leave no issue of their bodies nor son [of a rival wife] nor daughter's son, nor son of those persons, the sister's son and the rest shall take their property." (See Dayabhaga, Chap. IV, sec. III, verse 31).

The sister's son is expressly named as an heir in the above text of Vrihaspati and the only question is whether a half-sister's son is included in the expression " sister's son." This question was raised in the case of *Dasarathi Kundu* v. *Bepin Behary Kundu* (1), and it was held in that case that " sister's son " includes a half-sister's son and that under the Dayabhaga a step-sister's son is entitled to succeed to a woman's *stridhan* in preference to her husband's elder brother. That is a direct authority against the Appellant's contention. In that case the learned Judges, with reference to the translation of the expression 'sister's son' in Vyavastha Darpana as own sister's son pointed out that the author probably used the words 'own sister's son' as contradistinguished from the woman's husband's sister's son, who is the next in order in the table of succession. In the case of *Bhola Nath Roy* v. *Rakhal Das Mukerjee* (2), it was held that under the Bengal School of Hindu Law sons of sisters of the half-blood are entitled to succeed equally with sons of sisters of the whole blood to the property of a deceased brother. That case, no doubt, related to the question of succession to a male owner but it is an authority for the proposition that the expression 'sister's son' includes a half-sister's son, and that there is no difference between the son of a sister of the whole blood and the son of a sister of half-blood.

It is pointed out, however, on behalf of the Appellant that the rival wife's son is expressly mentioned as a son in the Dayabhaga (Chap. IV, sec. III, verse 32), and that if it had been meant to include the son of a sister of the half-blood in the expression 'sister's son,' it would have been expressly so stated. But no argument can be based upon this ground. The word 'brother' in the well-known text of Yajnavalkya relating to the succession of a male owner dying without

(1) I. L. R. 32 Cal. 261 (1904).
(2) I. L. R. 11 Cal. 69 (1884).

male issue is applicable to a brother of the whole blood as well as to a brother of the half-blood. The fact of being a male offspring of one common parent makes one a brother, (see Srikrishna's Commentary on the Dayabhaga, Chap. XI, sec. V, paras. 7—12.) There is, no doubt, a distinction between brothers of the whole blood and those of the half-blood, but the former confers a greater amount of spiritual benefit.

In the case of a sister's son, according to some authorities (see Colebrook's Digest, Book V, Chap. 8, sec. 1), there is no difference in the amount of spiritual benefit conferred by a full sister and a half-sister respectively and therefore they inherit together and although a different view is taken by some other authorities, the above view is "respected and followed." (See Shyama Charan Sarkar's Vyavastha Darpana, 2nd Edition, p. 265). In the Dayakrama Sangraha, Chap. I, sec. X, verse 1, in dealing with the question of succession to a male owner, Srikrishna Tarkalankar says: "According to Acharja Chudamani, the son of the proprietor's own sister and the son of his half-sister have an equal right of inheritance." Srikrishna's recapitulation of the line of inheritance in which a different view is alleged to have been taken and the difference in the copies of the recapitulation were discussed in the case of *Bhola Nath Roy* (2) cited above and it was there held that Srikrishna's opinion was the same as that of Acharja Chudamani.

As already pointed out, it was held in the case of *Dasarathi Kundu* v. *Bepin Behary Kundu* (1), that the half-sister's son is entitled to succeed in preference to the husband's elder brother. Even if the half-sister's son does not stand in the same position as the full sister's son, he is entitled to succeed in preference to the Appellant who is the daughter's son of the great-grandson of the great-great-grandfather of the deceased. The latter, accordingly, is not the heir of Adya Sundari and has no *locus standi* to oppose the grant of probate. This disposes of the first contention.

The second contention also has no force. The mere fact that it was stated in the application for probate that the Appellant had applied for letters of administration to the estate of the testatrix, and that the Court had issued a citation upon him would not entitle him to come in and oppose the grant of probate if it is found that he has no interest in the estate of the deceased. The case of *Chutoo Kurmi* v. *Rajaram Tewari* (3) relied on by the Appellant has no application to the facts of the present case. There the relationship of the caveator with the testatrix was admitted, and the caveator would have succeeded if it had been proved that the testatrix was not a degraded woman. He wanted to cross-examine the witnesses for the Petitioner for probate to show that the deceased was not degraded; his title to succeed depended upon the question whether the woman was degraded or not, he was a party to the proceeding and he had certainly a right to cross-examine the witnesses. In the present case Charu Chander being the heir of Adya Sundari had she died intestate, the Appellant had no interest in her estate and had no *locus standi* to contest the Will.

The Appeal accordingly fails and is dismissed with costs, three gold mohurs.

BRETT, J.—I agree.

Appeal dismissed.

(1) I. L. R. 32 Cal. 261 (1904).
(2) I. L. R. 11 Cal 69 (1884).
(3) 11 C. L. J. 124 (1909).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER NO. 299 OF 1911.

BRETT, J.
SHARFUDDIN, J.
1912,
11, April.

GANESH CHANDRA ADAK,
Judgment-debtor,
Appellant,
v.
BANWARI LAL RAY,
Decree-holder,
Respondent.

Civil Procedure Code (Act V of 1908), Or. 38, r. 6; Or. 21, r. 57—Attachment before judgment—Application for execution dismissed—Attachment if ceases—Second application for execution—Attachment if must be asked for.

An order for attachment before judgment obtained at the instance of the decree-holder subsists after the decree for the purpose not merely of the original application for execution but for purposes of subsequent applications for execution as well.

Where in such a case the original application for execution was dismissed,

Held—*That the decree-holder might apply for sale of the properties without taking out fresh attachment.*

The attachment referred to in the concluding portion of Or. XXI, r. 57 is an attachment made under the provisions of Or. XXI and not an attachment under the provisions of Or. XXXVIII.

This was an Appeal preferred on the 20th of June 1911 against an order of Mr. T. S. Macpherson, District Judge of Zillah Hughly, dated the 30th of May 1911, affirming that of Babu S. Chuckerbutty, Munsif at Howrah, dated the 8th of November 1910.

The facts of the case will appear from the judgment.

Babus Provas Chunder Mitter and *Monmotha Nath Roy* for the Appellant.

Babus Asitaranjan Chatterjee and *Jogesh Chandra Ghosh* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The point which has been raised for our determination in this appeal is whether a decree-holder, who has prior to the decree obtained an order for attachment before judgment and after decree has made one application for execution which has been dismissed, can afterwards in execution of the decree sell the property of the judgment-debtor in respect of which the order of attachment had issued without obtaining a fresh order for attachment under Or. XXI, r. 57 of the Code of Civil Procedure. In this case, the decree-holder had applied under the provisions of r. 5 of Or. XXXVIII, C. P. C., and had obtained an order of attachment before judgment. Afterwards, he was granted a decree and put in an application for execution. Subsequently, in consequence of his default, that application was dismissed and another application was made for execution of the decree by sale of the property and this is now the subject of the present appeal.

Both the lower Courts held that the order of attachment before judgment subsisted after judgment had been given and that the order of attachment relieved the decree-holder from the necessity of attaching the property in execution under Or. XXI, r. 57 of the Code not only in the case of the fresh application but also in the case of any subsequent application for execution. The learned pleader who appears on behalf of the Appellant in this appeal has contended that the view taken by the lower Courts is wrong. He has urged that the attachment before judgment can only be taken to enure to the benefit of the decree-holder for the purposes of the fresh application for execution and that, when such an application for execution has been made and has been dismissed for default,

the decree-holder is bound to proceed under the provisions of Or. XXI of the Code. He contends that, in such circum stances, r. 57 of that Order would apply and that, after the dismissal of the application, it would be necessary for the decree-holder to take out a fresh attachment as the original attachment would have been brought to an end by the order of dismissal. In support of his contention, the learned pleader has relied on the decision of this Court in the case of *Sewdut Roy* v. *Sree Canta Maity* (1) and the decision of the Bombay High Court in the case of *Pallonji Shapurji Mistry* v. *Jordan* (2). The learned pleader contends that because the learned Judges in both those cases held that the attachment before judgment enured and became an attachment in execution, they meant that such attachment enured only for the purposes of the fresh application for execution and for no other. There is, however, no such finding in either of the judgments and we are unable to agree with the learned pleader that that conclusion necessarily follows from the expressions used by the learned Judges who decided those two cases. The learned pleader has also referred us to the decision of this Court in the case of *Namuna Bibi* v. *Roshan Mia* (3), and has used as part of his argument, the remarks made by one of the learned Judges who decided that case (at p. 432) with reference to the necessity of closely adhering to the provisions of r. 57 of Or. XXI. We fully agree with the remarks made by the learned Judge in that case, but we do not think that they can be taken to have any application to the present case. The real point is whether an order for attachment before judgment subsists only for the purposes of the fresh application for execution or whether it should be taken to subsist for the benefit of subsequent applications as well. In our opinion, such an order for attachment before judgment must be taken to subsist for the benefit not only of the fresh application for execution, but also for subsequent applications; for otherwise, the whole object for which Or. XXXVIII, r. 5, C. P. C., has been passed would be defeated. If the attachment were to cease after the dismissal of the fresh application for execution, the judgment-debtor would be at liberty to adopt any of the measures to obstruct or delay the execution of the decree which r. 5 of Or. XXXVIII was framed to defeat. In our opinion, the provisions of r. 57 of Or. XXI have no application to a case in which an order for attachment before judgment has been obtained. The attachment referred to in the concluding passage in that Rule is, in our opinion, an attachment made under the provisions of Or. XXI and not an attachment under the provisions of Or. XXXVIII.

The result, therefore, is that the judgment and order of the lower Appellate Court are confirmed and the Appeal is dismissed with costs. We assess the hearing-fee at 2 gold mohurs.

Appeal dismissed.

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(1) I. L. R. 33 Cal 639 (1906).
(2) I. L. R. 12 Bom 400 (1888).
(3) 15 C. W. N. 429 (1911).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES NOS. 3, 14, 15 AND 16 OF 1910.

CHITTY, J.
TEUNON, J.
1912,
Heard, 17, June.
Judgment, 21, June.

LAKHI NARAIN SHAW, Opposit Party, Appellant,
v.
MULTAN CHAND DAGA, Applicant, Respondent.

Probate and Administration Act (V of 1881), secs. 50, 86—Grant, revocation of—Creditor's right to contest Will propounded in fraud of creditors—Order holding applicant has right if appealable—Interlocutary order.

Where 8 years after the death of B. one of his sons L. obtained letters of administration with a copy annexed of an alleged Will left by B. which if genuine would deprive another son S, who had meanwhile become heavily involved in debt, of a very large share of his inheritance:

Held—That the creditors of S. were entitled to apply for revocation of the Will, their application being based on the ground that the probate had been obtained in fraud of creditors.

SHIEKH AZIM *v.* CHANDRA NATH NAMDAS (1), NILMONI SINGH DEO *v.* UMANATH MOOKERJEE (3), KISHEN DAI *v.* SATYENDRA NATH DUTT (4) *referred to.*

Semble :—*No appeal lay from an order of the Trial Judge holding that the creditors had* locus standi *to contest the Will, the same being merely interlocutary.*

SHIEKH AZIM *v.* CHANDRA NATH NAMDAS (1), ABHIRAM DAS *v.* GOPAL DAS (2) *referred to.*

These Appeals were preferred against the judgment and decree of G. Gordon, Esq., District Judge of Zillah 24-Pergunnahs, dated the 14th of December 1909.

The Appeals arose out of applications under sec. 50 of Act V of 1881 made by the several Respondents for the revocation of a grant of letters of administration with a copy annexed of an alleged Will of one Behari Lall Shaha, granted on 22nd June 1909, to his son, the Appellant, Lakshmi Narain Shaha. Behari Lal Shaha had died on 4th Chaitra 1307 leaving him surviving a widow, two daughters and three sons of whom the eldest Sakhi Lal continued to carry on his father's *arathdari* business in the course of which he became heavily involved in debt. The Respondent Multan in his petition for revocation alleged that he had lent money to Sakhi Lal for the *arathdari karbar*, that the Will was a forgery and had been propounded by Sakhi Lal in the name of his minor brother, Lakhi Narayan, with the object of saving most of the properties left by Behary from his creditors. The applications for revocation by the other creditors were of a similar nature. The Will in terms purported to give Sakhi considerably less than what he would have inherited if there was intestacy.

The Appellant, Lakhi Narain, objected in each case *inter alia* that the Petitioner had no *locus standi* to apply for revocation. The District Judge upon this objection held that although the creditors would not be entitled to special citation, they "undoubtedly came under the head of persons claiming an interest in the estate of the deceased." They would therefore be entitled to oppose a grant and consequently also to apply for revocation upon proper grounds.

Against this order the present Appeals were preferred.

(1) 8 C. W. N. 748 (1904).
(2) I. L. R. 17 Cal. 48 (1889).
(3) I. L. R. 10 Cal. 19 (1883).
(4) I. L. R. 28 Cal. 441 (1901).

LAKHI NARAIN SHAW *v.* MULTAN CHAND DAGA.

Mr. B. Chakrabutty, *Babus Baidya Nath Dutt*, *Bepin Behari Ghosh* II. and *Jadu Nath Mandul* for the Appellant in No. 3.

No one for the Respondent.

Babu Bepin Behari Ghosh II. for the Appellant in No. 14.

No one for the Respondent.

Babu Bepin Behari Ghosh II. for the Appellant in No. 15.

No one for the Respondents.

Babu Bepin Behari Ghosh II. for the Appellant in No. 16.

Babus Sarat Chandra Roy Chaudhuri and *Charu Chandra Bhattacharjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This Appeal (No. 16 of 1910) arises out of an application by the Respondents for the revocation of the grant of letters of administration, with a copy of the Will annexed, to the estate of Behari Lal Shaha. Behari Lal Shaha died on 17th March 1901, leaving three sons Sakhi Lal, Lakshmi Narain and Hari Narain, a widow and two daughters. Sakhi Lal had attained majority at the date of his fathers's death, while the other two sons were minors. Hari Narain died a minor and unmarried. Sakhi Lal carried on his father's business and became very heavily involved in debts. The Respondents, whose firm name is Multan Chand Doga, obtained a decree against him on the Original Side of this Court for Rs. 5,270 and costs, and applied for execution. It does not appear that any property has been actually attached. On 27th March 1909, the Appellant, Lakshmi Narain, alleging that he had recently come of age, applied for letters of administration to the estate of his deceased father, and propounded a Will said to have been executed by Behari Lal Shaha on 15th March 1901, two days before he died. That Will if genuine would have the effect of depriving Sakhi Lal of a very large share of his inheritance. A grant of letters of administration with a copy of the Will annexed was made to the Appellant on 26th June 1909, and on 20th September 1909 the Respondents applied for a revocation of that grant on the ground that the Appellant was still a minor when it was made, and that the Will was a forgery, put forward solely to defraud the creditors of Sakhi Lal. On 14th December 1909, the District Judge held that the Respondents had a *locus standi* to contest the Will, and against that order this appeal is preferred. A preliminary objection was taken that no appeal lies against such an order, which is merely interlocutory. We are inclined to think that that objection is well-founded. Sec. 86 of the Probate and Administration Act V of 1881 provides that "every order made by a District Judge or District Delegate by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court under the Rules contained in the Code of Civil Procedure applicable to appeals." Had the decision been the other way, it would have amounted to a dismissal of the Respondents' petition and would have been equivalent to a decree, in which case an appeal would lie. [See *Shiekh Azim* v. *Chandra Nath Namdas* (1)]. In *Abhiram Das* v. *Gopal Das* (2), it was held that an appeal would lie under sec. 588 (2) of the Civil Procedure Code, 1882, against an order admitting a person as caveator under sec. 69 of the Probate and Administration Act. But sec. 588 (2) has not been reproduced in the Civil Procedure Code of 1908, and

(1) 8 C. W. N. 748 (1904).

(2) I. L. R. 17 Cal. 48 (1889).

LAKHI NARAIN SHAW *v.* MULTAN CHAND DAGA.

we cannot find any provision for an appeal which would meet this case. It is however unnecessary to discuss the question further as we are of opinion that the appeal must fail on other grounds. In *Nilmoni Singh Deo* v. *Umanath Mookherjee* (3), their Lordships of the Judicial Committee after commenting on the earlier cases remarked, at p. 27, "Assuming that a purchaser (from the heir) can oppose the grant of probate or apply to have it revoked (which their Lordships do not decide) they entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors." That is precisely the ground on which the Respondents base their present application, as it was in the cases of *Shiekh Azim* v. *Chandra Nath Namdas* (1) above cited, and *Kishen Dai* v. *Satyendra Nath Dutt* (4). This last case was very similar in its facts to the one before us, but here we have the additional circumstance that the alleged Will was not put forward until 8 years after the death of the Appellant's father. It is only right that the creditors of Sakhi Lal should be heard in the matter of this grant, as their interests are so largely affected by it. We accordingly dismiss this appeal. The Respondents must have their costs. We assess the hearing-fee at 5 gold mohurs. The record should be sent down at once, in order that the proceedings before the District Judge should be continued without further delay.

This Judgment will govern appeals 3, 14 and 15 of 1910, which are also dismissed but as the Respondents in these appeals have not appeared it is unnecessary to make any order as to costs.

Appeal dismissed.

(1) 8 C. W. N. 748 (1904).
(3) I. L. R. 10 Cal. 19 (1883).
(4) I. L. R. 28 Cal. 441 (1901)

CIVIL REVISIONAL JURISDICTION.

RULE NO. 3212 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.
1912,
7, June.

PRIYA NATH PAL, Plaintiff, Petitioner,
v.
KAMINI DASI, Defendant No. 2 and ors., Defendants, Opposite Party.

Crop grown on another person's land, title if in owner of land—Suit by owner to recover value of crop cut and taken away—Fixtures, English law of, if applies in this country.

When after purchasing a holding at an execution sale and taking delivery of possession thereof through Court, the Plaintiff suffered the tenant to grow crop on the land:

Held—*That the Plaintiff could not sue for recovery of the value of the crop cut and taken by another.*

The crop did not become the Plaintiff's as soon as it was grown merely because the Plaintiff had acquired ownership of the land.

MOFIZ SHEIKH *v.* RASIK LAL (1) *distinguished.*

LEP SINGH *v.* NIMAR KHASIA (2) *referred to.*

This was a Rule granted on the 20th of May 1912 against the judgment and decree of Babu Jogendra Nath Bose, the Small Cause Court Judge of Midnapur, dated the 30th of March 1912.

The material facts will appear from the judgment.

(1) I. L. R. 37 Cal. 815 (1910).
(2) I. L. R. 21 Cal. 244 (1893).

PRIYA NATH PAL *v.* KAMINI DASI.

Babus Sarat Chunder Roy Chaudhury and *Satya Churn Sinha* for the Petitioner.

Babus Bepin Behary Ghosh II. and *Ramesh Chunder Sen* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule is directed against a decree by which the suit of the Petitioner for value of crops grown on his land by the second Defendant has been dismissed. The Petitioner alleges that in execution of a decree for rent against the second Defendant, he purchased the holding on the 19th May 1911, that he obtained delivery of possession through Court on the 19th August, and that the crops grown thereon by the second Defendant were unlawfully cut and taken away by the first Defendant on the 25th December. His contention is that as the crops were grown after his purchase by the second Defendant on land the title whereto had vested in him, the crops became his property, and he is consequently entitled to the value thereof. The learned Small Cause Court Judge has negatived this claim and dismissed the suit ; in our opinion, the view taken by him is correct and his decree must be affirmed.

It was pointed out by this Court in the case of *Mofiz Sheikh* v. *Rasik Lal* (1), that the English law of fixtures cannot be applied in this country as based on equitable grounds. No doubt, under the mediæval English law as laid down in Bracton, whatever is planted, sown or built on belongs to the soil if root has struck ; or as Britton and Fleta put it, if trees are planted or seeds sown in the land of another, the owner of the soil becomes owner, also of the tree, the plant or the seed, as soon as it has taken root. But that has never been the law in this country. On behalf of the Petitioner, however, reliance was placed upon the text of Narada quoted in the case of *Mofiz Sheikh* v. *Rasik Lal* (1), where it is stated that if a man has been residing on the ground of a stranger without paying rent and against that man's wish, he shall by no means take with him, on leaving it, the thatch and timber. It will be observed at the outset, that this does not specifically apply to growing crops. It must further be remembered that, in the case before us, the second Defendant must have continued in occupation of the land with the acquiescence of the Plaintiff after his purchase. As already stated, the sale took place on the 19th May : possession was delivered to the Plaintiff on the 19th August ; the crops were then grown by the second Defendant and remained on the land till the 25th December. During this period extending over many weeks, the second Defendant must have been in actual occupation of the land, although, in the eye of law, possession might have been with the Plaintiff. Neither authority nor principle can be invoked in support of the proposition that merely because the Plaintiff became the owner of the land on the 19th May, and the crops were grown thereon by the second Defendant after that date, the crops as soon as they were grown became the property of the Plaintiff. The view we take is supported by the case of *Lep Singh* v. *Nimar Khasia* (2), where, in a suit for recovery of damages for value of the fruit crops taken away by the Defendant from a garden alleged to be in

(1) I. L. R. 37 Cal. 815 (1910).

(2) I. L. R. 21 Cal. 244 (1893).

PRIYA NATH PAL *v.* KAMINI DASI.

the possession of the Plaintiff, it was held that the fact that the Plaintiff was in possession sufficient to support his title to the damages claimed. In other words, if in the present case, the second Defendant had brought a suit against the Plaintiff, assuming that the latter had by force removed the crops, his claim would have been successful. Consequently, a suit by the Plaintiff against the second Defendant for the value of the crops grown by the latter cannot be sustained. The Plaintiff may possibly be entitled to mesne profits against the second Defendant if she continues in occupation of the land after her title had been extinguished by the execution sale. But there was no claim for mesne profits made in the Court below and nothing in this judgment will affect the title of the Plaintiff to recover mesne profits from any person who may be found hereafter to have kept him out of possession of the land.

The result is that this Rule is discharged with costs. We assess the hearing-fee at four gold mohurs.

Rule discharged.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 368 OF 1912.

COXE, J.	RASIK LAL MANDAL,
IMAM, J.	Defendant, Petitioner,
1912,	*v.*
8, March.	SINGHESHWAR RAY, Plaintiff, Opposite Party.

*Hindu Law—Debts, sons' liability for—Suretyship—*Dana-pratibhu, *meaning of.*

Where A promised to pay to B a certain sum in consideration of B allowing A to take a property over which B had a mortgage and C promised to pay the amount to A if B failed to pay :

Held—*That C was a surety for* "dana" *within the meaning of Yajnavalkya's text and his debt as such was payable by his sons.*

Held—*Further, that in order to constitute a surety for gift or payment* (Dana-pratibhu) *it was not necessary that the money covenanted to be paid should have been advanced as a loan.*

TUKARAM BHAT *v.* GUNGARAM (1), THE MAHARAJAH OF BENARES *v.* RAM KUMAR (2) *referred to.*

This was a Rule granted on the 22nd of January 1912, against the judgment and decree of Babu Ram Lal Das, Subordinate Judge of Zillah Purneah, exercising the powers of a Small Cause Court Judge, dated the 22nd of December 1911.

The facts of the case will appear from the judgment.

Babus Provas Chunder Mitter and *Susil Madhub Mullick* for the Petitioner.

Babus Satish Chandra Ghosh and *Anilendra Nath Ray Chowdhury* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The facts of the case, as laid before us, are as follows :—One Majlis Sahay brought a suit for recovery of certain land over which the Plaintiff had a mortgage. In the end it was agreed that Rs. 300 should be paid by Majlis to the Plaintiff apparently by way of redemption of this mortgage and the Defendant's father agreed to pay that sum in the event of Majlis's default. The Plaintiff, thereupon, gave up the land. The Defendant's father died and the Plaintiff then brought this suit against the Defendant for the recovery of the money. It was decreed by the Court below and the Defendant obtained from

(1) I. L. R. 23 Bom. 454 (1898).
(2) I. L. R. 26 All. 611 (1904).

this Court a Rule on the Opposite Party to show cause why the decision should not be set aside on the grounds, *firstly*, that the debt was incurred by the Defendant's father in respect of a suretyship and, *secondly*, on the ground that the Court had no jurisdiction to award more than six per cent. interest.

As regards the first point, we see no reason why the Plaintiff should not be entitled to the relief that he has obtained. We have been referred to Yajnavalkya Sanhita translated by Babu Monmotha Nath Dutt, Chap. II, p. 71. It is there stated that "surety is sanctioned in *darsana* (presentation), *pratyaya* (creating confidence) and *dana* (giving). The first two sureties, if their statements be false, must be compelled to repay the money. As regards the other, that is one who undertakes to repay the money himself, if it is not realised from the party, even his sons are to repay the money after his demise." We can see no reason why the suretyship of the Defendant's father should not be regarded as coming within the term "dana." In the foot-note to this section, the word "dana" is thus defined :—"The third form of surety is when a person undertakes to repay the money himself if the party for whom he stands surety fails to do so." It has been argued that the obligation created by this form of surety is not binding on the sons unless the money covenanted to be repaid, was a loan. It is difficult for us to see why the obligation of the Defendant's father in the circumstances we have described above, should be any less than the obligation would have been if the money had actually been lent to Majlis. In *Tukaram Bhat* v. *Gungaram* (1), it is stated that Brihaspati recognised four different classes of sureties (1) sureties for appearance, (2) sureties for honesty, (3) sureties for payment of money-lent, and (4) sureties for delivery of goods : and stress is laid on the description of the third class as being sureties only for payment of money lent. Further on however the Judges say : "The texts of Narada and Yajnavalkya recognise three classes of surety obligation only—those for appearance, those for honesty and those for payment," and it is not said that the money to be repaid should be a loan. As we have said, we see no reason why this class of surety should be restricted only to cases in which money has actually been advanced and no case has been shown where this distinction is clearly laid down. The case of *The Maharajah of Benares* v. *Ram Kumar* (2) is clear authority for holding that a surety obligation of this nature is binding on the son even when no money has been advanced. We think, therefore, that the decision of the learned Subordinate Judge in this respect is right.

As regards the question of interest, it is conceded that six per cent. interest is sufficient.

The Rule will accordingly be made absolute to this extent that the interest is reduced to the rate of six per cent.

We make no order for costs in this Court. Costs of the Court below will stand.

(1) I. L. R. 23 Bom. 454 (1898).

(2) I. L. R. 26 All. 611 (1904).

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Contents.

NOTES.

A MISCHIEVOUS AGITATION IS BEING ENGINEERED by some designing people both in this country and in England against the Calcutta High Court. The object of it is not certainly to strengthen the judiciary and to secure equal justice between man and man but on the contrary to deprive it of its independence and to make it in spirit though not in outward form subservient to the executive. This suicidal attack on the High Court is being made for no other reason than that some of the judges of the Calcutta High Court happened to find that certain executive officers had rendered themselves liable in damages because they were of the opinion that the officers had improperly exercised their right of house-search and arrest of private individuals. Their findings have been set aside by the superior Courts and the officers in question have been exculpated. The result of these decisions has made little difference to them but it has put the personal liberty of the Indian subjects and the sanctity of their homes at stake.

THERE IS CONSIDERABLE DIFFERENCE OF OPINION yet, both in legal circles and amongst the general public, as to whether the opinion of the Court of first instance or that of the Court of Appeal is the correct one. But, be that as it may, even blind partisans will have to admit that the judgments of the first Court in both cases were more judicial and temperate in their tone and language than the pronouncements of the superior Courts. Judges, like doctors, often differ and because they do so it would be just as sensible to agitate for all lawyer judges being removed from the law Courts as to cry out for the replacement of qualified physicians and surgeons by quacks in the hospitals. Yet this is the sort of remedy that is being suggested by some designing men and their dupes for the so-called reform of the High Court. It is remarkable that the general public in this country who have very serious grievances in respect of these judgments, though they have criticised the opinions of the Judges concerned, have not said one unkind word about the High Court itself. But the champions of executive irresponsibility have been levelling most malevolent attacks on the High Court because there are to be found on its Benches Judges who are not swayed by racial, political or executive bias in dispensing justice.

WHEN REUTER PURPORTING TO WIRE OUT TO India the substance of Sir Henry Prinsep's recent article on the High Court gave undue prominence to his rather inconsequential remarks regarding the *Vakil Raj*, it gave rise to a general impression in this country that even this veteran ex-judge had joined the group of reactionaries who would, if they could, put an end to the rule of law in India and restore absolutism of the primitive type. Having regard to Sir Henry Prinsep's long and meritorious connection with the Calcutta High Court during which he seldom failed as a judge to do justice or to put right the younger members of the Indian Civil Service of which he was himself a member, we could never persuade ourselves to believe that a judge of such sound common sense and wide experience, and a thorough English gentleman of the good old type, would make any unfair attack on the most popular English institution in India with which he had been intimately connected for the best part of his life.

WE ARE SINCERELY GLAD THEREFORE TO FIND that Sir Henry Prinsep's article is altogether free from the sinister suggestions that have been made from some Anglo-Indian quarters for the reconstitution of the High Court on such lines that the people of this country may never expect to obtain from it any relief against any breakers of the law of that community, be he an official or a non-official. It costs these busy-bodies nothing to give the Government such gratuitous advice, but it would surely cost the Government no end of trouble if this advice were acted upon. The Government is, however, well aware that in the impartial administration of justice lies the greatest security of British rule in India. While the object of these enemies of peace and order, law and justice is to set up racial antipathy in our law Courts, that

of Sir Henry is genuine reform and the strengthening of the High Court in its truest sense.

SIR HENRY PRINSEP TRULY POINTS OUT IN THE first place that the quality of the barrister judges has considerably gone down in recent years. We seldom get in these days men of the type of Sir William Markby, Sir John Budd Phear, Sir Arthur Wilson, Mr. Justice Pigot and many others we can name amongst the barrister judges of the Calcutta High Court. Sir Henry attributes this to the depreciation of the value of the rupee. Formerly 10 rupees were equivalent to £1 sterling, but now 15 rupees go to make £1. No doubt we admit that an Indian judgeship was more attractive to the members of the English Bar in those days than it is now. But all the same we fully believe that the present deterioration in the quality of barrister judges is greatly due to the careless selections that are made for Indian judgeships both by the Government of India and the Secretary of State. We know of instances where much better qualified men of the English Bar have accepted judgeships in the Colonies which carry less pay, prestige and prospects. We are therefore of opinion that if the Government both in this country and in England would discontinue patronage and be in right earnest to give these judicial appointments always to trained lawyers and the best equipped men available, the body of barrister judges on the Benches of the High Courts would before long be as strong and efficient as it once used to be.

SIR HENRY IS, HOWEVER, ON SURER GROUNDS when he says that the pension rules relating to Judges which were introduced about 15 years ago form the most serious impediment to any one of position or standing at the Bar accepting an Indian judgeship. We fully endorse the following remarks of Sir Henry Prinsep in this connection :—

> By their short-sighted policy the governing bodies have added another serious impediment to the acceptance of such an office by a barrister in England. They have declared that he shall be superannuated on attaining the age of sixty years, and thus vacate his appointment. This makes it impossible for anyone to accept a Judgeship in India who may be forty-eight years of age unless he deliberately foregoes all prospect of obtaining a retiring pension, for under the existing rules a full pension can be earned only after twelve years of service, of which six months may be on leave. To produce the present situation in its complete aspect the Government has allowed the value of a Judge's salary to be diminished by the shrinkage of its silver currency in which that salary is payable, thus making that office less attractive, and at the same time it has diminished the area of selection from the Bar in England by declaring that sixty years of age shall be the limit of retention of office. Neglect to remedy the first condition may be due to apathy; the second is a deliberate act.

WE HOPE THAT GOVERNMENT WILL TAKE AN early opportunity of removing this serious impediment against men of standing either in India or England accepting judgeships on the Benches of the Indian High Courts. Sir Henry, though himself a veteran member of the Indian Civil Service, with his characteristic frankness, admits that neither the depreciation of the rupee nor the superannuation rules affect very materially the members of the Civil Service who may attain the position of High Court Judges. It is only in special cases where in consequence of compulsory superannuation at the age of 60, service on the High Court Bench falls short of 12 years by a few months, that the hardship is felt since it deprives a Civilian Judge of the special judicial pension of £1,200 a year. But Civilian Judges in any event are entitled to the ordinary service pension of £1,000. Thus it is not any question of pay or pension but one of judicial and legal training that most seriously affects their competency as judges.

THE GREAT PROBLEM OF STRENGTHENING THE HIGH Courts as the final Courts of Appeal in India is most intimately connected with the question of efficiency amongst the Civilian Judges. Sir Henry Prinsep candidly admits that this is the most difficult problem that has awaited solution for many years now and that no reform in this direction is still in sight. The question of securing efficiency amongst barrister Judges is much simpler as it might be attained by more careful selection and by the relaxation of pay and pension rules. Sir Henry very justly describes the disadvantages under which the Civilian Judges have to labour in the High Court in the following terms :—

> But it is notorious that the judicial branch of the Civil Service, which supplies not less than one-third of the Judges to the High Courts, labours under great disadvantages from deficient legal education and knowledge of the law of the land in its letter and in its interpretation expressed through the Law Reports, and that on his first appointment to a District Judgeship a member of the Civil Service finds himself now-a-days in this respect embarrassed in his relations with a local Bar which has had advantages beyond his reach During his previous service as a Magistrate he may have acquired the necessary knowledge and experience of criminal law and practice, and as a subordinate revenue officer he may not be without some experience and knowledge of the complicated revenue system; but in regard to civil law and the practice of his Court he has everything to learn. This has long attracted the attention of the Government of India.

THE LEARNED EX-JUDGE NEXT ALLUDES TO Sir James Fitz James Stephen's minute on this question and regrets that nothing has been done by the Government of India, since 1872, to improve matters in any way. The only change made, namely, that of giving the members of the Indian Civil Service a choice in the early part of their career of selecting either the Executive or

the Judicial branch of the Service has, in the opinion of Sir Henry, made matters drift from bad to worse. With considerable justice he remarks :—

His (Sir James Stephen's) recommendations were not accepted, and the only result was the separation of the Civil Service into two separate departments—judicial and executive—under which the prospects of official advancement were so clearly in favour of the latter that candidates for judicial service were few, and as a rule represented the least capable in the Civil Service. And in Bengal at least a long series of local rulers did not hesitate to show their contempt for judicial office, some going so far as to attempt to foist into it men who had been declared incapable as executive officers and who had no other recommendation for entering on a new profession.

WE BEG, HOWEVER, TO DIFFER FROM THE LEARNED writer that the fact that a Judge of the Calcutta High Court may not look forward to any future preferments at the hands of the executive should in any sense be regarded as a grievance. Public opinion in Bengal is strongly opposed to the idea of High Court Judgeships being regarded as a stepping-stone to any executive preferments. The Judges of the Calcutta High Court, true to their Bengal traditions, have been credited to be more independent of the executive than the Judges of other High Courts in India. This certainly accounts for the fact which Sir Henry notices in his article that while Judges from the Madras, Bombay or the Allahabad High Court have from time to time been appointed members of the Council of the Secretary of State for India, it is seldom that a Judge of the Calcutta High Court has been similarly favoured. We consider it a matter of congratulation rather than one of regret that this has been so and we sincerely hope that the practice which obtains in Bengal would before long be adopted in the other Provinces as well.

BY WAY OF CONTRAST TO THE LEGAL ATTAINMENTS of the members of the Civil Service, Sir Henry pays a very just tribute to the Vakil and the District Bar in India. We must however say in justice to the Indian Barristers practising in the Calcutta High Court that they too now claim amongst them a very large number of men of high education and culture acquired not only at the local Universities, but also at some of the leading Universities in England. With but this qualification we fully endorse the following observations of Sir Henry Prinsep :—

All this time there has been a gradually increasing improvement of the capacity of the indigenous local Bar throughout India, attributable generally to the system of education in law in the Indian Universities. As a rule the Indian pleader holding the University degree of Bachelor of Law who has never been out of India has, in the opinion of those competent to judge, higher professional attainments than his fellow-countryman who has become a barrister of one of the Inns of Court in England, and he is certainly a man of better general education and knowledge. Those amongst them who have succeeded to seats in the High Courts have earned reputations which will endure, and men of promise in the future are abundant. Such improvement in the local Bar necessarily demands a corresponding improvement in the attainments of those destined to preside over the superior local Courts—to fill the office of District Judge—and to form the body from which a large proportion of the Judges of the High Courts is drawn.

A VERY SIMPLE REMEDY FOR THIS STATE OF things is obviously to recruit from the Bar a good number of the District Judges. The only means that suggests to us for improving the legal training of the members of the Indian Civil Service is the complete separation of the executive and judicial administration of the country. If this be done, members of the Civil Service may also be usefully employed to try civil cases transferred to them, according to their standing in the Service, either from the file of the Munsifs or from that of Subordinate Judges, whose files are always very heavy and who are a great deal sweated. If an Assistant District Judge is required to do such duties in addition to his Sessions work, when later on he attains the position of District Judge, he is sure to prove an efficient Civil Judge. And a District Judge of such training, when he comes to the High Court, will surely not feel out of his element there. But should District Judges be partly recruited from the legal profession, selections for judgeships of the High Court should also be made from amongst them. Unless such prospect is held out to them it would be difficult to get desirable men from the Bar to take up District Judgeships.

Reviews.

HIGH COURT DECISIONS OF INDIAN RAILWAY CASES. *By Mr. M. Tern-venkatachariar, 2nd Edition. Lawrence Asylum Press, Madras.*

We welcome a new and up-to-date edition of this already well-known and useful work. It gives not only the High Court decisions but also an appendix giving select decisions of some subordinate Courts. The inclusion of the various Railway Acts and other Acts connected therewith such as the Carriers Act, the Fatal Accidents Act, the Provident Funds Act with the latest amendments greatly enhances the usefulness of the work. A work of this kind will not only be found useful by the Railway Administration and by the Railway people but also by the much larger circle of the mercantile public. The cases are well-selected and very appropriately classified. We would however point out to the author that he might have omitted from the title the expression "High Court Decisions" for decisions of the Judicial Committee of the Privy Council as well have very appropriately been incorporated in it

For instance *E. I. R.* v. *Kalidas Mukerjee.* We would also suggest that references to this and other cases which are more fully reported in our reports might with advantage have been given. The binding and get-up of the book are also worthy of praise.

THE DURRUL MUKHTAR OF MUHAMMAD ALA-UDDIN HASKAFI. Being a commentary of the Tanwirul Absar of Muhammad Bin Abdullah Tamartashi, with an English Translation. *By Brij Mohan Dayal, B. A, Pleader, Lucknow. Part I. Book of Nikah. Lucknow: Printed by R. R. Bajpai at the Lucknow Steam Printing Press. 1912.*

With a few notable exceptions, Indian lawyers contributed very little during the last century towards the elucidation of Hindu and Mahomedan legal texts. The task had been left as a rule to English *savants*, who from their imperfect acquaintance with Sanskrit and Arabic cannot naturally be always taken to be faithful interpreters of those texts. It is satisfactory to note, however, that Indian lawyers are coming forward in increasing numbers to participate in this task. It is also characteristic of the times that Indian readers now-a-days are not content to take any translation on trust, and translators are finding themselves under the necessity of vouching the correctness of their work by publishing the texts along with the translations. The present work is such a combination of original texts and translations. The texts translated deal with the following subjects, *viz.*, Nikah, Guardianship in Marraige, Equality in Marriage, Dower, Marriage of Infidels and Fosterage. A second part is, we are assured, in preparation, and judging from the inscription on the title page, the present publication is the first of a series which is to bear the title "The Mahomedan Law Translation Series." We sincerely hope that the plan contemplated will meet with success, the present need and utility of such publications being beyond question.

SANJIVA ROW'S INDIAN REGISTRATION ACT (XVI of 1908). *By P. Hari Rao, B. A., B. L., First grade Pleader, Trichinopoly. Published by T. A. Venkasawmy Row and T. S. Krishnasawmy Row. Lawyer's Companion Office, Trichinopoly and Madras. 1912.*

This is a fairly complete and up-to-date commentary on the Indian Registration Act. There are besides an instructive historical introduction summarising the progress of the law of Registration in India, and appendices embodying provisions relating to registration contained in other enactments including the Bengal Tenancy Act, but without notes. The portions of the Act as applied to Burma are reproduced in another appendix. The Statements of Objects and Reasons of the Registration Bill of 1908, reproduced in another appendix, a subject-index and tables of cases arranged both according to names and the volumes and pages of the reports add to its utility as a book of reference. The book is handy and handsomely got up.

CIVIL COURT MANUAL. Local Acts. Bengal. *By the Lawyer's Companion Office. Published by T. V. Venkasawmy Row and T. S. Krishnasawmy Row. The Lawyer's Companion Office, Trichinopoly and Madras. 1912.*

The publishers of the two volumes of the Acts of the Governor-General in Council issued under the title "All India Civil Court Manual" which were noticed in these columns have followed them up by the present volume in which are collected the Acts and Regulations dealing with civil matters applying to Bengal. Brief notes embodying legal changes effected by amending legislation and giving references to leading cases add to the value of a compilation which from the point of view of mechanical execution is as nearly perfect as a compilation of this kind, intended for general use, can well be. It should be noticed, however, that the Eastern Bengal Council amendments of the Bengal Tenancy Act have not been incorporated in the present volume and indeed none of the very few Acts of the short-lived E. B. & Assam Legislature has been so included. In the absence of an explanatory preface we assume that the volume under notice is intended for Bengal only and that a supplementary collection of Eastern Bengal Council Acts and Amendments would have to be issued to complete it.

[END OF VOL. XVI.]